

# The right to respect for private and family life

*A guide  
to the implementation  
of Article 8  
of the European Convention  
on Human Rights*

Ursula Kilkelly



Human rights handbooks, No. 1



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## Preface

Judges of Council of Europe member states will know that the incorporation of the Convention into domestic law means that they, as judges, will be faced regularly with individuals who invoke before them rights guaranteed by the articles of the Convention. Now, there are two obvious questions judges will put to themselves in that situation.

The first question: which law must I apply as the superior law when the right in question is governed by conflicting domestic and Convention provisions? The answer to that is clear and it is that, in general, the rights guaranteed by the Convention are superior to domestic law. Accordingly, if the domestic and Convention provisions conflict, the Convention provisions must be applied. In certain states the position in the domestic law of Convention rights is below that of the Constitution. Any conflict between the Constitution and the European Convention must therefore be resolved in favour of the Constitution.

The second question: how do I apply the articles of the Convention invoked before me (and the rights guaranteed by those articles) given the very brief and summary nature of those provisions? The answer is that judges must assess the Convention complaint before them by applying the principles which are found in the jurisprudence of the European Court of Human Rights and, in the absence of any relevant principles there, of the former European Commission and Court of Human Rights. (These two were dissolved with the coming into force in November 1998 of Protocol No. 11 to the Convention).

How is that jurisprudence useful? It has established precise tests to be applied by a judge in determining whether a complaint before him or her under an article of the Convention is a valid one. Those tests vary, depending on the article of the Convention in question. For present purposes, this paper outlines the tests which are applied by the European Court of Human Rights to an individual's complaint under Article 8, tests which must therefore be applied by a judge when faced with a complaint under Article 8 of the Convention.

# Part I: an introduction to Article 8 and the test used in its application

## 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 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.*

## Introduction

It is immediately obvious that Article 8 is divided into two parts. The first part, Article 8 para. 1, sets out the precise rights which are to be guaranteed to an individual by the State – the right to respect for private life, family life, home and correspondence. The second part, Article 8 para. 2, makes it clear that those rights are not absolute in that it may be acceptable for public authorities to interfere with the Article 8 rights in certain circumstances. Article 8 para. 2 also indicates the circumstances in which public authorities can validly interfere with the rights set out in Article 8 para. 1; only interferences which are in accordance with law and necessary in a democratic society in pursuit of one or more of the legitimate aims listed in Article 8 para. 2 will be considered to be an acceptable limitation by the State of an individual's Article 8 rights.

## The margin of appreciation

In determining whether measures taken by the State are compatible with Article 8 the State is afforded a certain degree of discretion, known as a margin of appreciation. This principle was first established in the *Handyside* case<sup>1</sup> which concerned an

<sup>1</sup> *Handyside v. the United Kingdom*, judgment of 7 Dec. 1976, paras. 48-49.

Article 10 dispute, but its ruling applies equally to Article 8 cases. It held that:

*[b]y reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the ... "necessity" of a "restriction" or "penalty" ... it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.*

*Consequently, Article 10 (2) leaves to the contracting states a margin of appreciation. This margin is given both to the domestic legislator ... and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.*

However, the Court went on to state that **the doctrine does not give the contracting states an unlimited power of appreciation** and to reiterate that it, the Court, is responsible for ensuring the state's observance of Convention obligations. For the purposes of Article 8, therefore, it is the role of the Court to give the **final ruling** on whether an interference with a Convention right can be justified under Article 8 para. 2 and the **domestic margin of appreciation thus goes "hand in hand" with a European supervision**. The margin of appreciation has thus been relied upon by the Court in two main sets of circumstances:

1. when determining **whether an interference with an Article 8 right is justifiable** on the

public interest grounds permitted by paragraph 2.

2. when assessing whether a state has done enough to comply with any **positive obligations** that it has under this provision.

The margin of appreciation afforded to competent national authorities will vary **according to the circumstances, the subject matter and its background**. Factors to be taken into account in determining the scope of the margin of appreciation under Article 8 include the following:

- Whether there exists **common ground between the laws of the Convention States**:<sup>2</sup> Where common practice is apparent, then the margin of appreciation will be narrow and deviation from it will be difficult to justify. On the other hand, where a common approach is not widespread, then the discretion which the Court offers respondent States will be generous.<sup>3</sup>
- The scope of the margin of appreciation will differ according to the context and it has been held, for example, to be **particularly wide in areas such as child protection**. Here, the Court has recognised that there is diversity in approaches to child care and state intervention into the family among contracting states, and it takes this into account when examining such cases under the Convention by allowing States a measure of discretion when acting in this

2 *Rasmussen v. Denmark*, judgment of 28 Nov. 1984, para. 40.

3 See section 1.2 on *Positive obligations*.

area. Moreover, the Court has also recognised that **due to their proximity to the sensitive and complex issues being determined at national level, the domestic authorities are better placed to make an assessment of the circumstances of each case and to determine the most appropriate course of action.** In care cases, for example, the national authorities benefit from direct contact with the persons concerned, at the very stage when care measures are being envisaged or immediately after their implementation.<sup>4</sup> As a result, the State enjoys a degree of discretion with regard to the manner in which private and family life is respected under Article 8 and this is reflected in the way in which the balance between the interference and its aim is assessed.

- ▶ The fact that customs, policies and practices vary considerably between contracting states will sometimes be used to support the existence of a margin of appreciation.
- ▶ The Court held in the *Handyside* case that it was not possible to find a uniform **European conception of morals** among the domestic laws of the various Contracting States. It continued to say that:

*[t]he view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject.*

However, in the *Dudgeon*<sup>5</sup> and the *Norris*<sup>6</sup> cases the Court rejected that the margin of appreciation was wide enough to allow the United Kingdom and Ireland, respectively, to retain the criminalisation of homosexuality. As regards the area of the protection of morals, therefore, the Court has not accepted that the margin is wide as a general proposition.

## Article 8 – the tests applied

The determination of a complaint by an individual under Article 8 of the Convention necessarily involves a two-stage test. The first stage concerns the applicability of Article 8; in other words, is the right which an individual complains has been interfered with, a right actually guaranteed by Article 8 para. 1 of the Convention. This will often involve discussion of, for example, what constitutes private life or home within the meaning of Article 8 para. 1. If the judge considers, based on the jurisprudence of the European Court, that the right invoked by an individual (for example, the right to be provided with free housing) is not in fact a right covered by the guarantees in Article 8 para. 1, then Article 8 is inapplicable and the complaint will end there.

If, however, Article 8 is found to be applicable, the Court will go on to the second stage of the assessment. The most common situation is where the appli-

4 *Olsson (No. 2) v. Sweden*, judgment of 30 Oct. 1992.

5 *Dudgeon v. the United Kingdom*, judgment of 22 October 1981.

6 *Norris v. Ireland*, judgment of 26 Oct 1988.

cant has claimed that the State took action which he or she considers was in violation of his or her Article 8 rights; in that situation, the Court will consider whether the interference with the Article 8 right can be justified with reference to the requirements of Article 8 para. 2. It is also true that applicants also complain, although much less often, that the State or public authorities *should have but failed* to take action which action the applicant argues would have been necessary in order to provide the necessary "respect" for his or her Article 8 rights. In that case, the Court should consider whether the State had, in the circumstances, a positive obligation to so act in order to in compliance with the "respect" element of Article 8. Both of these approaches to the second stage of the Article 8 analysis are set out in detail below.

### Stage 1: Article 8 para. 1

1.1 Does the complaint fall **within the scope** of one of the rights protected by Article 8 para. 1?

1.2 If so, is there a **positive obligation** on the State to respect an individual's right and has it been fulfilled?

### Stage 2: Article 8 para. 2

2.1 Has there been an **interference** with the Article 8 right?

2.2 If so,

2.2.1 is it **in accordance with law**?

2.2.2 does it pursue a **legitimate aim**?

2.2.3 is it **necessary in a democratic society**?

This test is followed by the Court each time it applies Article 8. In many cases, of course, it will not be necessary for it to discuss each point in detail but it will nevertheless apply each stage of the test before reaching its conclusion. The next two sections of the handbook will cover the issues relevant to the two stages of this test. The final section will deal with substantive issues of compliance with Article 8.

## Stage I of the Article 8 test

### 1.1 Does the complaint fall within the scope of one of the rights protected by Article 8 para. 1?

In order to attract the protection of Article 8 the complaint raised must fall within the scope of the provision, meaning that it must be found to concern one or more of the personal interests protected by that provision, namely private life, family life, home or correspondence.

#### Whose task is it to identify the relevant interest under Article 8 para. 1?

**It is up to the applicant to characterise the interest which s/he seeks to protect and to advance it before the Court in the terms of its understanding of Article 8 para. 1.** For example in *Gaskin v. the United Kingdom*, the applicant successfully convinced a majority in the Court that his interest in obtaining access to information in the hands of a local authority about his upbringing in public foster-care concerned his private and family life, and not some general interest in access to information, which is outside the scope of Article 8.<sup>7</sup> Moreover, when an individual invokes more than one Article 8

right in his/her application and both are feasible, the Court may avoid spelling out precisely which individual right is implicated. For example, in *Klass v. Germany*<sup>8</sup> it held that a complaint regarding the interception of communications (mail and telephone) constituted an interference with private life, family life and correspondence.

#### The Court's approach to the applicability of Article 8 para. 1?

The meaning of the four concepts protected by Article 8 para. 1 is not self-explanatory and the Court has avoided laying down specific rules as to their interpretation. In particular, its approach is to determine the applicability of Article 8 – and thus whether an individual complaint falls within the scope of one of the rights it protects – on a case-by-case basis while giving the concepts an autonomous Convention meaning. While the flexibility of the Court's approach allows it to take into account social, legal and technological developments across the Council of Europe, this approach makes it difficult to define categorically what constitutes private life, family life, home or correspondence. General guidance as to the content of these four interests is set out below. It is important to bear in mind, however, that the concepts are dynamic insofar as their meaning is capable of evolving and also, that they have the potential to embrace a wide variety of mat-

<sup>7</sup> *Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A no. 160.

<sup>8</sup> *Klass v. Germany*, judgment of 22 September 1993, Series A no. 269, para. 41.

ters, some of which are connected with one another and some of which overlap.

### 1.1.1 Private life

## The meaning of private life

According to the Court, private life is a broad concept which is **incapable of exhaustive definition**.<sup>9</sup> The concept is clearly wider than the right to privacy, however, and it concerns a sphere within which everyone can freely pursue the development and fulfilment of his personality. In 1992, the Court said that

*... it would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.*<sup>10</sup>

Thus, private life necessarily includes the right **to develop relationships with other persons and the outside world**.

- 9 *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, para. 36.
- 10 *Niemietz v. Germany*, judgment of 16 December 1992.
- 11 Appl. No. 8257/78, 10 July 1978, 13 DR 248.
- 12 Appl. No. 15817/89, 1 October 1990, 66 DR 251.
- 13 Appl. No. 15666/89 *Kerkhoven v. the Netherlands*, 19 May 1992, unpublished.
- 14 Appl. No. 6825/75, 4 March 1976, 5 DR 86.
- 15 *Dudgeon v. the United Kingdom*, judgment of 22 October 1981.

## What relationships constitute private life?

*Relationships which fall outside the scope of family life*

Relationships which fall outside the scope of family life under Article 8 may nonetheless deserve the provision's protection where they constitute private life. This category includes:

- Relationships **between foster parents and children** they have looked after;<sup>11</sup>
- Relationships between parties who are not yet married;<sup>12</sup>
- Relationships **between homosexuals and their partners** with or without children;<sup>13</sup>

Private life does not extend to the relationship between an owner and his pet.<sup>14</sup>

*To what extent do sexual activities fall within the scope of private life?*

A person's sexual life is part of his private life, of which it constitutes an important aspect. Private life thus guarantees **a sphere within which a person can establish relations of different kinds, including sexual ones** and thus the choice of affirming and assuming one's sexual identity comes within the protection of Article 8. In *Dudgeon v. the United Kingdom*,<sup>15</sup> the Court held that given the personal circumstances

of the applicant, the very existence of legislation which outlawed homosexual conduct continuously and directly affected his private life. It has confirmed several times since that sexual orientation and activity concern an intimate aspect of private life. However, **not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8**. In *Laskey, Jaggard & Brown v. the United Kingdom*,<sup>16</sup> the applicants were involved in consensual sado-masochistic activities for the purposes of sexual gratification. While the Court did not formally have to determine the issue of whether the applicants' behaviour fell within the scope of private life, it expressed some reservations about allowing the protection of Article 8 to extend to activities which involved a considerable number of people; the provision of specially equipped chambers; the recruitment of new members and the shooting of videotapes which were distributed among the members.

*To what extent do social activities fall within the scope of private life?*

There is some evidence in the case-law that there is a sphere of personal relationships beyond the "inner circle" that is protected by the concept of private life.

- ▶ In *McFeeley v. the United Kingdom*,<sup>17</sup> the Commission suggested that the importance of relationships with others also applied to prisoners and

respect for private life thus required a degree of **association for persons imprisoned**. Freedom to associate with others is thus a further, social feature of private life.

- ▶ Some judges of the Court have expressed a view of private life which encompasses the possibility of the **effective enjoyment of a social life** being an aspect of private life. This involves the capacity by reason of cultural and linguistic familiarity to enter into social relationships with others and is particularly relevant in immigration cases.<sup>18</sup>

*Do business relationships concern private life?*

In *Niemietz v. Germany*<sup>19</sup> the Court was prepared to consider that some personal relationships **in business contexts** might fall within the scope of private life.

## What activities or measures concern private life?

*Does telephone tapping always concern private life?*

The **use of covert technological devices to intercept private communications has been found to fall within the scope of private life**. Moreover, the provision applies regardless of the content of the telephone conversation.

16 *Laskey, Jaggard & Brown v. the United Kingdom*, judgment of 19 February 1997.

17 Appl. No. 8317/78, *McFeeley & Ors v. the United Kingdom*, 15 May 1980, 20 DR 44.

18 See further the section below on immigration.

19 *Niemietz v. Germany*, judgment of 16 December 1992.

- In *A v. France*<sup>20</sup> the Government argued that conversations taped relating to the commission of murder did not relate to private life. The Commission held that the mere fact that a **conversation concerned the public interest did not deprive it of its private character**. The Court also accepted this argument.
- In *Halford v. the United Kingdom*,<sup>21</sup> conversations by telephone were covered **whether business or private**, as was the use of an office telephone.
- In contrast, where an applicant used a **radio channel** for civil aircraft, the interception did not constitute interference with private life since the conversation was on a wavelength accessible to other users and **could not be classified as private communication**.<sup>22</sup>

*Will the collection of personal data by the State concern private life?*

The collection **of information by officials of the State about an individual without his consent will always** concern his/her private life and will thus fall within the scope of Article 8 para. 1. Examples include:

- An official **census**,<sup>23</sup> which includes compulsory questions relating to the sex, marital status, place of birth and other personal details;
- The recording of **fingerprinting, photogra-**

**phy** and other personal information by the police<sup>24</sup> even if the police register is secret;<sup>25</sup>

- The collection of **medical data** and the maintenance of medical records;<sup>26</sup>
- The compulsion by tax authorities to reveal **details of personal expenditure** (and thus intimate details of private life);<sup>27</sup>
- A **system of personal identification**, such as those covering administrative and civil matters including health, social services and tax.

*Accessing personal data*

The **inability to access the State's records** may concern private life depending on the type of information held. In *Gaskin v. the United Kingdom*,<sup>28</sup> the Court held that because the files held on the applicant concerned highly personal aspects of his childhood, development and history and thus constituted his "principal source of information about his past and formative years", lack of access thereto raised issues under Article 8.

*Does the regulation of names concern private life?*

Even though Article 8 does not contain any explicit reference to names, an individual's name does concern his/her private and family life because it constitutes a means of personal identifi-

20 *A v. France*, judgment of 23 Nov. 1993.

21 *Halford v. the United Kingdom*, judgment of 25 June 1997.

22 Appl. No. 21353/93, 27 Feb. 1985.

23 Appl. No. 9072/82, *X v. the United Kingdom*, 6 Oct. 1982, 30 DR 229.

24 *Murray v. the United Kingdom*, judgment of 28 Oct. 1994, Series A no. 300-A.

25 *Leander v. Sweden*, judgment of 26 March 1987, Series A no. 116.

26 Appl. No. 14661/81, 9 July 1991, 71 DR 141.

27 Appl. No. 9804/82, 7 Dec. 1982, 31 DR 231.

28 *Gaskin v. the United Kingdom*, judgment of 7 July 1989, para. 89.

cation. The fact that there may exist a public interest in regulating the use of names is not sufficient to remove the question of a person's name from the scope of private and family life.<sup>29</sup> The same principles applies to forenames, which also concern private and family life since they constitute a means of identifying persons within their families and the community.<sup>30</sup>

### *Does invasion of the press concern private life?*

The absence of protection against press intrusions or the disclosure in the media of highly intimate, non-defamatory details of private life has not yet been subject to significant challenge in Strasbourg. Some complaints, such as the Irish case where the applicant complained that an insurance company taking photographs of her outside her house infringed her private life<sup>31</sup> and the case introduced by Earl and Countess Spencer concerning press coverage of their private lives,<sup>32</sup> have been declared inadmissible for failing to exhaust domestic remedies. Determination of whether issues might arise under private life in relation to press intrusion might be influenced by the extent to which the person concerned courted attention, the nature and degree of the intrusion into the private sphere and the ability of diverse domestic remedies to provide effective and adequate redress.

## The determination of legal ties

### *Paternity proceedings*

The determination of a father's legal ties with his daughter was found to concern his private life, notwithstanding that the paternity proceedings which he wished to institute were aimed at the dissolution in law of existing family ties.<sup>33</sup> In most cases, however, such legal ties will constitute family life.

### *Transsexuals*

Matters relating to the refusal to allow a transsexual to obtain a change of name and official papers to reflect gender re-assignment have been found to concern the right to respect for private life under Article 8 para. 1.<sup>34</sup>

## Physical and moral integrity

In *X & Y v. the Netherlands*<sup>35</sup> the Court held that private life is a concept which covers the physical and moral integrity of the person, including his or her sexual life. In that case, the inability of a 16-year-old girl with a mental disability to institute criminal proceedings against the perpetrator of a sexual assault against her was found to raise an issue under Article 8 para. 1. An unwelcome attack by one individual on another is thus capable of infringing the private life of the latter.

- 29 *Stjerna v. Finland*, judgment of 25 Nov. 1994, Series A no. 299-B.
- 30 *Guillot v. France*, judgment of 24 Oct. 1996, RJD 1996-V., No. 19.
- 31 Appl. No. 18760/91 v. *Ireland*, 1 Dec. 1993.
- 32 Appl. Nos. 28851/95 and 28852/95, *Spencer v. the United Kingdom*, 16 Jan. 1998.
- 33 *Rasmussen v. Denmark*, judgment of 25 Nov. 1984, Series A no. 87.
- 34 *B v. France*, judgment of 25 March 1992, Series A no. 232-C.
- 35 *X & Y v. the Netherlands*, judgment of 26 March 1985, para. 22.

## *Will all interferences with physical integrity concern private life?*

While some interferences with the physical integrity of an individual may impinge on the private life of that person, not all such actions will do so. *Costello-Roberts v. the United Kingdom*<sup>36</sup> concerned the compatibility with Article 8 of the **corporal punishment** of a little boy. Here, the Court noted that

*measures taken in the field of education may, in certain circumstances, affect the right to respect for private life but not every act or measure which may be said to affect adversely the physical or moral integrity of a person necessarily gives rise to such an interference.*<sup>37</sup>

However, in this case, it went on to conclude that

*having regard ... to the purpose and aim of the Convention taken as a whole, and bearing in mind that the sending of a child to school necessarily involves some degree of interference with his or her private life, the Court considers that the treatment complained of by the applicant did not entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8.*<sup>38</sup>

Both the slight nature of the punishment and the fact that it had been imposed in the formal school environment were central to the Court's decision in this case.

## *Does compulsory medical treatment concern private life?*

Compulsory medical treatment, regardless how minor, will fall within the scope of private life under Article 8 para. 1. Examples include:

- Blood and urine tests imposed on prisoners to check for drugs, drivers to check for alcohol in the system or those involved in paternity proceedings;<sup>39</sup>
- Compulsory vaccination, dental treatment, TB tests or X-rays for children;<sup>40</sup>
- Compulsory administering of food.<sup>41</sup>

## *Do safety measures imposed by the State concern private life?*

The numerous measures which the State takes to protect the public against various dangers, such as making the **wearing of seatbelts or use of safety appliances in industry** compulsory, will also fall to be examined under Article 8 para. 1 although they will almost certainly be justifiable under the second paragraph.

### 1.1.2 Family life

The concept of family life has evolved steadily in the lifetime of the Convention and it continues to develop so as to take account of social and legal

36 *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993.

37 *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, at para. 36.

38 *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, at para. 36.

39 Appl. No. 8278/78, 13 Dec. 1979 18 DR 154 (bloodtest); Appl. No. 21132/93, *Peters v. the Netherlands*, 6 April 1994, 77-A DR 75 (urine test).

40 Appl. No. 10435/83, 12 July 1978, 14 DR 31.

41 *Herczegfalvy v. Austria*, judgment of 24 Sept 1992.

change. Similar to the concept of private life, therefore, the Court maintains a flexible approach to the interpretation of family life, bearing in mind the diversity of modern family arrangements, the implications of divorce and medical advance. According to the wording of the provision, family life is located squarely within the private sphere, where it is entitled to function free from arbitrary state interference. However, Article 8 does not contain a right to establish family life, for example by marrying or having the opportunity to have children.<sup>42</sup>

### *What constitutes family life?*

As a rule, the Court decides on the existence of family life on the facts of each case and the general principle to be applied is whether there are **close personal ties** between the parties. Although the Court's case-by-case approach means that it is not always possible to enumerate those relationships which constitute family life and those which do not, an increasing number of relationships now enjoy the automatic protection of Article 8.

### *The family based on marriage*

► The protection of Article 8 always extends to marriages, which can be shown to be **lawful and genuine**. Those lacking substance or existing in form only, such as a sham marriage en-

tered into for the purposes of avoiding immigration rules or acquiring nationality, may thus fall outside the scope of Article 8.

► **A child born to parents who are lawfully and genuinely married will be *ipso iure* part of that relationship from the moment and by the fact of the child's birth.**<sup>43</sup> Thus, the relationship between married parents and their children will always fall within the scope of Article 8 para. 1.

### *Is marriage necessary to enjoy family life?*

► Article 8 applies automatically to the **relationship between a mother and her child**, regardless of her marital status.<sup>44</sup> Such relationships will always require the protection of Article 8 therefore.

► **Unmarried couples who live together with their children** will normally be said to enjoy family. This was established in the *Johnston* case,<sup>45</sup> where in reaching its conclusion the Court was persuaded by the stable nature of their relationship and the fact that it was otherwise indistinguishable from the family based on marriage.

### *Is cohabitation necessary to enjoy family life?*

Cohabitation is not a *sine qua non* of family life, irrespective of the parents' marital status.<sup>46</sup> Thus,

42 Article 12 ECHR guarantees the right to marry and found a family.

43 *Berrehab v. the Netherlands*, judgment of 21 June 1988.

44 *Marckx v. Belgium*, judgment of 13 June 1979.

45 *Johnston v. Ireland*, judgment of 18 Dec 1986.

46 For example, see *Berrehab v. the Netherlands*, judgment of 21 June 1988 (divorced father) and *Kroon and Ors*, judgment of 27 Oct. 1994 (unmarried).

family members who do not live together, due to divorce or separation or by arrangement, may nonetheless enjoy the protection of Article 8.

### *Can family life exist without cohabitation or marriage?*

In *Boughanemi v. France*<sup>47</sup> the Court held that

*[t]he concept of family life on which Article 8 is based embraces, even when there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate. Although that tie may be broken by subsequent events, this can only happen in exceptional circumstances.*<sup>48</sup>

Applying this principle, the applicant's relationship with his son born outside marriage, and with whom he had had little contact, was found to amount to family life within the meaning of that provision.

Neither a father's delay in recognising his child, his failure to support the child financially, nor his decision to leave the child in the care of relatives when emigrating to a Convention State have been found to constitute exceptional circumstances in this regard.<sup>49</sup> The presumption that Article 8 applies automatically to the relationship between parent and child, regardless of its nature, has also been applied in the *Söderbäck* case concerning adoption.<sup>50</sup> Here, an unmarried father and his daughter were found to enjoy family life despite the fact that they had never cohabited nor enjoyed regular contact.

### *Does Article 8 apply if the establishment of family life is frustrated?*

In circumstances where one parent has prevented the development of family ties with a child the **potential for family life may be sufficient** to attract the protection of Article 8. This arose in *Keegan v. Ireland*,<sup>51</sup> where the applicant's daughter had been placed for adoption by the child's mother without his consent or knowledge, thereby depriving him of the opportunity to establish close personal ties with her. However, due to the nature of the relationship between the child's parents – they cohabited, planned the pregnancy and intended to marry – the Court found that the potential family life between father and child meant that their relationship fell within the scope of Article 8, notwithstanding that they had met on only one occasion.

### *Can family life exist without a blood tie?*

While the Court places clear emphasis on the social rather than the biological reality of a situation in determining whether family life exists, it has only once found **that family life existed between those without a blood link**. In *X, Y & Z v. the United Kingdom*<sup>52</sup> it held that the relationship between a female-to-male transsexual and his child born by artificial insemination by donor (AID) amounted to family life. In reaching this conclusion, the Court

47 *Boughanemi v. France*, judgment of 24 April 1996.

48 *Boughanemi v. France*, judgment of 24 April 1996, para. 35.

49 See *C v. Belgium*, judgment of 7 Aug. 1996 and *Ahmut v. the Netherlands*, judgment of 28 Nov. 1996.

50 See *Söderbäck v. Sweden*, judgment of 28 Oct. 1998.

51 *Keegan v. Ireland*, judgment of 26 May 1994.

52 *X, Y & Z v. the United Kingdom*, judgment of 22 April 1997.

found it significant, firstly, that their relationship was otherwise indistinguishable from that enjoyed by the traditional family and secondly, that the transsexual participated in the AID process as the child's father.

The Court has not yet considered whether **same sex relationships** constitute family life. In *Kerkhoven v. the Netherlands*, the Commission failed to find that a stable relationship between two women and the child born to one of them by AID amounted to family life<sup>53</sup> Notwithstanding that they lived together as a family and shared parental tasks in relation to the child, their claim for legal recognition was deemed to relate only to private life. Were the Court to consider the matter it may indeed choose to follow its own precedent in *X, Y & Z*, meaning that family life would include same-sex relationships, notwithstanding the absence of a blood tie.

### *Is a blood tie in itself sufficient?*

While the absence of a biological link will not preclude a relationship from constituting family life, a mere **blood or genetic link** appears to be insufficient for this purpose. Thus, the relationship between a sperm donor and the child born as a result will not normally amount to family life under Article 8 unless there is sufficient evidence that they enjoy close personal ties in addition to the blood link.<sup>54</sup>

### *What other relationships constitute family life?*

Where other relationships are concerned, the Court determines the existence of family life on the facts of each case. In relation to extended family and other arrangements, the case-law is as follows:

- Family life may exist **between children and their grandparents** since they play a "significant part in family life".<sup>55</sup>
- **Siblings**, both as children<sup>56</sup> and as adults,<sup>57</sup> also fall within the meaning of family life.
- The relationship between an **uncle or aunt and his/her nephew or niece** may fall within the meaning of family life where there is particular evidence of close personal ties. Thus, in *Boyle v. the United Kingdom*,<sup>58</sup> family life was found to exist between an uncle and his nephew, in the light of the fact that the boy stayed for weekends with his uncle, who was deemed by the domestic authorities to be a "good father figure" to him.
- Family life may exist between **parents and children born into second relationships**, or those children born as a result of an extra-marital or adulterous affair, particularly where the paternity of the children has been recognised and the parties enjoy close personal ties.<sup>59</sup>
- The relationship between **adoptive parents and children** will, in principle, attract the protection of Article 8.<sup>60</sup>

53 Appl. No. 15666/89, *Kerkhoven, Hinke & Hinke v. the Netherlands*, 19 May 1992, unreported.

54 Appl. No. 16944/90, *G v. the Netherlands*, 8 Feb. 1993, 16 EHRR 38.

55 *Marckx v. Belgium*, judgment of 13 June 1979, para. 45.

56 *Olsson v. Sweden*, judgment of 24 March 1988.

57 *Boughanemi v. France*, judgment of 24 April 1996.

58 Appl. No. 16580/90, *Boyle v. the United Kingdom*, Comm. Rep., 9 Feb. 1993.

59 Appl. No. 11418/85, *Jolie & Lebrun v. Belgium*, 14 May 1986, DR 47, p. 243.

60 Appl. No. 9993/82, *X v. France*, 5 Oct. 1982, DR 31, p 241, 5 EHRR 302; *Söderbäck v. Sweden*, judgment of 28 Oct 1998.

- Whether ties between a **child and his/her foster parents** will amount to family life will depend on the facts of the case, in particular, whether the child has close personal ties with his/her natural parents and the length of time s/he has been in the care of the foster family.<sup>61</sup> The longer the foster-care arrangement, the greater the likelihood that family ties will be found to exist.

- 61 Appl. No. 8257/78, *X v. Switzerland*, 10 July 1978, DR 13, p 248.
- 62 Appl. No. 8427/78, *Hendriks v. the Netherlands*, Comm. Rep. 8 March 1982, DR 29, p. 5; 5 EHRR 223.
- 63 *Berrehab v. the Netherlands*, judgment of 21 June 1988.
- 64 *Andersson v. Sweden*, judgment of 25 Feb. 1992, para. 72.
- 65 Appl. No. 7626/76, *X v. the United Kingdom*, 11 July 1977, DR 11 p. 160.
- 66 Appl. No. 14830/89, *Yousef v. the United Kingdom*, Comm. Rep., 30 June 1992, para. 43.
- 67 *Boughanemi v. France*, judgment of 24 April 1996.
- 68 *Gillow v. the United Kingdom*, judgment of 24 Nov. 1986, para. 46.
- 69 *Niemietz v. Germany*, judgment of 16 Dec. 1992.

### *Can family life ever come to an end?*

Once established, family life **does not come to an end** upon divorce,<sup>62</sup> or when the parties no longer live together.<sup>63</sup> Nor is it terminated by a decision to place a child in care.<sup>64</sup> Although subsequent events, such as adoption<sup>65</sup> or expulsion<sup>66</sup> may break the tie of family life, the Court has established that this can only happen in exceptional circumstances.<sup>67</sup>

## 1.1.3 Home

### **The meaning of home**

In general, home, within the meaning of Article 8, is where one lives on a settled basis and it may be the case, therefore, that **all living places constitute a home** within the meaning of Article 8 para. 1. Holiday homes and work hostels or other temporary long-term accommodation might be exceptions.

### *Is ownership sufficient to constitute a home?*

In *Gillow v. the United Kingdom*<sup>68</sup> the Court held that the applicants, who had owned but not lived in their house for 19 years, could indeed call it a home within the meaning of Article 8. This was because, despite the length of their absence, they had always intended to return and they had retained **sufficient continuing links with the property** for it to be considered their home.

### *Do business premises constitute a home?*

In 1992 the Court extended the notion of *home* to cover some business premises in the context of justifying a search of such premises under Article 8. In *Niemietz v. Germany*,<sup>69</sup> the Court decided that home may extend, for example, to a professional person's office. Given that activities relating to a profession or business may be conducted from a person's private residence and activities which are not so related may be carried on in an office or commercial premises it may not always be possible to draw precise distinctions. In such circumstances, business premises were entitled to the protection of Article 8.

## 1.1.4 Correspondence

The right to respect for one's correspondence is a right to **uninterrupted and uncensored communications with others**.

## What constitutes correspondence?

While the meaning of correspondence clearly includes materials which cross by post, the Court has also found the concept to include telephone communications<sup>70</sup> and telexes.<sup>71</sup> As the literal meaning of home has been expanded in this way, it is anticipated that the **concept will continue to be interpreted so as to keep pace with developments in technology** which may bring other methods of communication, such as e-mail, within its sphere of protection. The appropriate level of protection may vary with the type of communication method used however.

*Does the content of the communication matter?*

The protection Article 8 offers relates to the means or method of communication, rather than its content and so the State cannot argue, for example, that telephone **conversations about criminal activities** fall outside the scope of Article 8 para. 1.<sup>72</sup> In *Halford v. the United Kingdom*<sup>73</sup> **conversations by telephone, whether business or private**, were found to be covered, as was the use of an office telephone.

*Is the identity of the sender or the recipient relevant?*

The identity of either the sender or the recipient of the correspondence will play a part in determining

what is required by Article 8. For example, the Court has made it clear that the protection afforded to letters and other correspondence between lawyers and their clients, particularly detained persons, is great.

## 1.2 Is there a positive obligation on the State to respect the Article 8 right and has it been fulfilled?

While the essential object of Article 8 is to “protect the individual against arbitrary action by the public authorities”, the Court has held that there may in addition be positive obligations inherent in effective respect for the values it contains.<sup>74</sup> Thus, as well as the negative obligation not to interfere arbitrarily with a person’s family and private life, home and correspondence, **the State may also have to act affirmatively to respect the wide range of personal interests set out in the provision**. The basis for this interpretation of Article 8 is its reference to the individual’s right to *respect* for private and family life etc., and this has allowed the Court to expand its obligations beyond the right to be left alone. In *X & Y v. the Netherlands*<sup>75</sup> the Court held that

[Article 8] *does not merely compel the state to abstain from ... interference: in addition to this primarily*

- 70 *Klass v. Germany*, judgment of 6 Sep. 1978, para. 41.
- 71 Appl. No. 21482/93, *Campbell Christie v. the United Kingdom*, 27 June 1994, DR 78A, p. 119.
- 72 *A v. France*, judgment of 23 Nov. 1993.
- 73 *Halford v. the United Kingdom*, judgment of 25 June 1997.
- 74 *Kroon v. the Netherlands*, judgment of 27 October 1994, para. 31.
- 75 *X & Y v. the Netherlands*, judgment of 26 March 1985.

*negative undertaking, there may be positive obligations inherent in an effective respect for private and family life ... These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.*

In certain circumstances, therefore, the Convention will require the State to take steps to provide individuals with their Article 8 rights and it may also require them to protect persons from the activities of other private individuals which prevent the effective enjoyment of their rights.

#### *When will positive obligations apply?*

It is difficult to identify the circumstances in which compliance with Article 8 will require positive action. The Court has held that the notion of “respect” is not clear-cut and because conditions and circumstances in Contracting States vary, what is required to ensure respect for family life will vary considerably from case to case. A wide margin of appreciation is thus conceded to States in deciding what “respect” requires in the circumstances of a particular application. According to the Court, the State, in order to determine whether or not a positive obligation exists, must have regard to whether **a fair balance has been struck between the general interest of the community and the interests of the individual.** In determining the con-

tent of the protected right, the Court has held that the aims mentioned in the second paragraph of Article 8 may be relevant and so the test differs from that under Article 8 para. 2 where it is necessary to strike a balance between a right already established and the countervailing interests which the State seeks to protect. In many occasions, the difference between adopting a positive obligations approach and considering the case under Article 8 para. 2 in the normal way will be apparent from the Court’s reasoning but not its conclusion.<sup>76</sup> On a practical level, the interests of the general community perhaps start out heavier in the balance, with a certain burden on the individual to establish that his interests clearly predominate. For example, the case-law indicates that where an important individual right is at stake and the applicant has endured great disadvantage, a positive obligation may arise. On the other hand, where this disadvantage is not so great or where instead an important state interest is at stake, then this is less likely.

For example, in *Marckx v. Belgium*, the Court found that respect for family life between an unmarried mother and her child placed a positive obligation on the State to adopt measures designed to ensure the child’s integration into his/her family from the moment of birth.<sup>77</sup> Here, the disadvantage endured by the unmarried mother and her daughter was great in comparison to the lesser interest of the State in protecting the family based on marriage.

76 See, for example, *Gaskin v. the United Kingdom*, judgment of 7 July 1989, para. 42.

77 *Marckx v. Belgium*, judgment of 13 June 1979.

Moreover, the margin of appreciation afforded to the State was narrow due to the fact that the legal and social conditions among Contracting States reflected the trend towards eliminating the unequal treatment of unmarried mothers and their children. This was reflected by the adoption of the European Convention on the Legal Status of Children born outside Wedlock.<sup>78</sup> The positive obligation to respect family life was thus found to necessitate the adoption of measures ensuring the child's integration into his/her family.

The Court reached a different conclusion in the case of *X, Y & Z v. the United Kingdom*, however. To begin with, it found that the lack of a common approach among Convention States in the area meant

that the State was entitled to a wide margin of appreciation as to how it showed respect for family life for the parties concerned – a child born by AID and her transsexual father. As a result, the content of the positive obligation to respect family life was different than in the *Marckx* case and less action was required to fulfil it to satisfy Article 8. More specifically, the Court rejected that respect for their family life required the State to permit the transsexual's name to be entered on the child's birth certificate as her father.<sup>79</sup> While it had not been shown that the recognition of the filiation of a child born by AID was contrary to the interests of the community, nor had it been established as necessary to the welfare of the child.

78 ETS No 85.

79 *X, Y & Z judgment*, judgment of 26 March 1985.

## Stage 2 of the Article 8 test

### 2.1 Has there been an interference with the Article 8 right?

Once it is established that the dispute concerns private or family life, home or correspondence then the Court goes on to examine the substance of the complaint under Article 8 para. 2. Article 8 para. 2 provides that

*[t]here 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.*

#### What constitutes an interference?

Once it is established that the dispute concerns an Article 8 right, the next stage of the test is to determine whether the measure complained of interferes with that right. Examples include

- removing children from their parents and taking them into public care;<sup>80</sup>
- stopping prisoners' correspondence;<sup>81</sup>
- searching a person's home;<sup>82</sup>

- gathering and storing information on a secret police file.<sup>83</sup>

*What does the applicant have to establish?*

It is for the applicant **to establish the fact of interference**. For example, in *Campbell v. the United Kingdom*<sup>84</sup> the government maintained that the applicant prisoner had not substantiated his claim that his right to respect for his correspondence had been interfered with because he could not show that any particular letter had been opened. However, the Court was satisfied that there had been an interference for the purpose of the Convention because the prevailing prison regime allowed for letters to be opened and read, a condition which had been specifically brought to the attention of the applicant and his lawyer. In such circumstances, the applicant could claim to be a victim of an interference with his right to respect for his correspondence under Article 8. Thus, where the applicant cannot establish the certainty of the material damage which would constitute the interference, **it will be sufficient if he can demonstrate a likelihood** that the interference has occurred.

*Is the existence of legislation sufficient?*

In *Dudgeon v. the United Kingdom*<sup>85</sup> the applicant complained that legislation criminalising homo-

80 *Olsson v. Sweden*, judgment of 24 March 1988.

81 *Campbell & Fell v. the United Kingdom*, judgment of 28 June 1984.

82 *Chappell v. the United Kingdom*, judgment of 30 March 1989.

83 *Leander v. Sweden*, judgment of 26 March 1987.

84 *Campbell v. the United Kingdom*, judgment of 25 March 1992.

85 *Dudgeon v. the United Kingdom*, judgment of 22 October 1981.

sexual conduct interfered unjustifiably with his right to respect for private life under Article 8. As the prosecution of consenting adult males under the legislation had not occurred for some time and the applicant himself had not been convicted or prosecuted of an offence, the government contested that the applicant's right to respect for his private life had been interfered with by the mere existence of legislation. However, the Court held that the threat that such an action might be started was neither illusory nor theoretical and therefore in the personal circumstances of the applicant, **the very existence of this legislation continuously and directly affected his private life.**

*When will the existence of secret surveillance legislation be sufficient to interfere with private life?*

As the authorities intend, many of the subjects of secret surveillance are oblivious to the interference. Others may suspect it, but lack sufficient proof. The applicant's difficulty in proving that his communications have been intercepted may lead him/her to claim that the mere existence of the legislation interferes with his private life and correspondence under Article 8. This claim will only succeed in certain circumstances.

► In *Klass v. Germany*<sup>86</sup> the Court held that an individual may claim to be the victim of a **violation**

**occasioned by the mere existence of secret measures** or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. However, it made it clear that this will occur **under certain conditions only**. The relevant conditions are to be determined in each case according to the Convention right alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures.

► In the case of *Malone v. the United Kingdom*,<sup>87</sup> there was a dispute before the Court as to whether the applicant's telephone had in fact been bugged. Apart from the agreement that one telephone conversation had been intercepted by the police, the Government declined to disclose consistently to what extent, if at all, his telephone calls and mail had been otherwise intercepted. However, it was conceded that

*as a suspected receiver of stolen goods, he was a member of a class of persons against whom measures of postal and telephone interception were liable to be employed.*<sup>88</sup>

As a result, the Court concluded that the existence of laws and practices which permit and establish a system for effecting secret surveillance of communications alone amounted to an interference with the exercise of the applicant's rights under Arti-

86 *Klass v. Germany*, judgment of 6 Sep. 1978, para. 34.

87 *Malone v. the United Kingdom*, judgment of 2 Aug. 1984.

88 *Malone v. the United Kingdom*, judgment of 2 Aug. 1984, para. 64.

cle 8 "apart from any measures actually taken against him".

## 2.2 If there has been an interference with an Article 8 right:

- 2.2.1 is it *in accordance with law*?
- 2.2.2 does it *pursue a legitimate aim*?
- 2.2.3 is it *necessary in a democratic society*?

In order to be consistent with the Convention any interference with the rights protected by Article 8 para. 1 must fulfil all of the criteria listed in para. 2 of the provision. In particular, the interference must be in accordance with law, it must pursue one of the legitimate aims listed in the second paragraph and it must be necessary in a democratic society or proportionate to the pursuit of that aim.

### 2.2.1 Is the interference in accordance with law?

A measure which constitutes an interference with an Article 8 right will only be compatible with that provision where it is in accordance with law. If the measure complained of does not fulfil this legality requirement it will violate Article 8 and the case will end there. Certain areas of law appear to be particularly vulnerable in this regard, including secret

surveillance law, child protection and the interception of prisoners' correspondence.

## What is the meaning of "in accordance with law"?

In order to be "in accordance with law" the interference complained of must have a **legal basis** and the law in question must be **sufficiently precise and contain a measure of protection against arbitrariness** by public authorities.

## The interference must have a legal basis

Measures will be problematic in this regard where they are **not specifically authorised by statute** and are regulated instead by administrative practice, or other non binding guidelines. An administrative practice, however well adhered to, thus does not provide the guarantee required by "law".

- ▶ In *Malone v. the United Kingdom*<sup>89</sup> the Court considered whether the power to intercept telephone conversations had a legal basis. At the time, telephone-tapping was regulated by administrative practice, the details of which were not published, and without specific statutory authorisation. The Court said that there was **not sufficient clarity about the scope or the manner in which the discretion of the**

89 *Malone v. the United Kingdom*, judgment of 2 Aug. 1984.

**authorities to listen secretly to telephone conversations was exercised:** because this was an administrative practice, it could be changed at any time and this constituted a violation of Article 8.

- More recently, in *Khan v. the United Kingdom*<sup>90</sup> the Court held that the use of a covert listening device by the United Kingdom authorities was not in accordance with law within the meaning of Article 8 because there was **no statutory system to regulate the use of such devices**, which was governed by Home Office Guidelines which were neither legally binding nor directly publicly accessible.

## The foreseeability requirement

In order to satisfy Article 8's legality requirement, the quality of the law in question must be such that it is **accessible to the persons concerned**, and **formulated with sufficient precision to enable them, if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.**<sup>91</sup> This is known as the **foreseeability requirement** and it means that a law which confers a discretion is not in itself inconsistent with Article 8 as long as the scope of discretion and the manner of its exercise are indicated with sufficient clarity to give the individual adequate

protection against arbitrary interference.<sup>92</sup> Moreover, the exercise of discretion by administrative authorities may well satisfy the requirements of Article 8 where it is subjected to review by the courts.

It is inevitable that some areas of law require greater discretion to be afforded to public authorities than others and the compatibility of these laws with Article 8 has been considered by the European Court.

### *Child protection law*

In *Olsson v. Sweden*<sup>93</sup> the applicants argued that the relevant legislation set no limits on the discretion which it conferred on the social authorities in the area of public childcare, and was drafted in terms so vague that its results were unforeseeable. While the Court acknowledged that the Swedish law was written in general terms, it found, nevertheless, that it satisfied the legal requirements of Article 8 para. 2. In particular, the Court held that **the circumstances in which it may be necessary to take a child into public care and in which a care decision may fall to be implemented are so variable that it would scarcely be possible to formulate a law to cover every eventuality.** Moreover, to confine the authorities' entitlement to act to cases where actual harm to the child has already occurred might well unduly reduce the effectiveness of the protection which the child requires.

90 *Khan v. the United Kingdom*, judgment of 12 May 2000.

91 *Andersson v. Sweden*, judgment of 25 Feb. 1992, para. 75.

92 *Olsson v. Sweden*, judgment of 24 March 1988, para. 62.

93 *Olsson v. Sweden*, judgment of 24 March 1988. See also *Andersson v. Sweden*, judgment of 25 Feb. 1992, para. 62.

Importantly, in relation to the discretion exercised under the legislation, the Court noted that **the legislation provided safeguards against arbitrary interference** to the extent that the exercise of nearly all the statutory powers was either entrusted to or was subject to **review by the administrative courts at several levels.**

### *Secret surveillance*

Secret surveillance law has, for obvious reasons, been seen to be problematic with regard to the foreseeability requirement. The question arises, therefore, as to how the requirement applies in such an area.

In *Malone v. the United Kingdom* the Court acknowledged that the requirements of the Convention, with regard to foreseeability,

*cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly.*

Similarly, in *Leander v. Sweden*<sup>94</sup> the Court held that an individual could not claim to be able to foresee precisely what checks would be made by the special police service. Nevertheless, the Court said

that in a system applicable to citizens generally, *the law must be sufficiently clear in its terms to give ... an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.*

### *Telephone tapping*

In two cases against France – the *Kruslin* case<sup>95</sup> and the *Huvig* case<sup>96</sup> – it fell to the Court to consider whether French law regulating telephone-tapping by the police was in conformity with the foreseeability requirement of Article 8 para. 2. It held that

*[t]apping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence and must accordingly be based on a "law" that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.*

In that respect the Court was of the opinion that French law (written and unwritten) did not *[i]ndicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. This was truer still at the material time, so that Mr Kruslin did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society.*

94 *Leander v. Sweden*, judgment of 26 March 1987.

95 *Kruslin v. France*, judgment of 24 April 1990.

96 *Huvig v. France*, judgment of 24 April 1990.

In *Rotaru v. Romania*<sup>97</sup> the applicant complained that the Romanian Intelligence Service (RIS) held and used a file containing personal information on him, some of which he claimed was false and defamatory. The core issue was whether the law which permitted this interference was accessible to the applicant and foreseeable as to its results. The Court first noted that **the risks of arbitrariness are particularly great where a power of the executive is exercised in secret**. It then went on to say that

*since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.*<sup>98</sup>

The question was, therefore, whether domestic law laid down with sufficient precision the circumstances in which the RIS could store and make use of information relating to the applicant's private life. Noting that the relevant law provides that information affecting national security may be gathered, recorded and archived in secret files, the Court

observed that no provision of domestic law lays down any limits on the exercise of those powers. For instance, it observed that the relevant domestic law did not set out any of the following:

- the kind of information that may be recorded;
- the categories of people against whom surveillance measures such as gathering and keeping information may be taken;
- the circumstances in which such measures may be taken, or
- the procedure to be followed.

Nor did it place any limits on the age of information held or the length of time for which it may be kept.<sup>99</sup> Moreover, in relation to the safeguards which were necessary to protect against arbitrary use of the power to gather and archive information, the Court noted that Romanian law did not provide any supervision procedure, either while the measure ordered was in force or afterwards. Overall, then, it was found not to indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities and the holding and use by the RIS of information on the applicant's private life was thus not "in accordance with the law", and in violation of Article 8.

### *Rights of detained persons*

In *Herczegfalvy v. Austria*<sup>100</sup> the requirement of foreseeability was held not to be satisfied by deci-

97 *Rotaru v. Romania*, judgment of 4 May 2000.

98 *Malone v. the United Kingdom*, judgment of 2 Aug. 1984, para. 67 and *Rotaru v. Romania*, judgment of 4 May 2000, para. 55.

99 *Rotaru v. Romania*, judgment of 4 May 2000, par 57.

100 *Herczegfalvy v. Austria*, judgment of 24 Sep. 1992.

sions under an Austrian law which allowed a mental patient's curator to decide whether his correspondence should be sent on to him. A curator's powers were set out in the most general terms and, according to the Court

*in the absence of any detail at all as to the kind of restrictions permitted or their purpose, duration and extent or arrangements for their review, [these] provisions do not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society.*<sup>101</sup>

Thus, while it may be acceptable to use **statutory instruments**, rather than legislation, to fill in the details of the necessarily wide legal authority to intercept personal and private communications, this is permissible only to the extent that the relevant instruments are **accessible to those in detention**. Thus, in *Silver v. the United Kingdom*<sup>102</sup>, where the stopping of the applicant's letters was carried out pursuant to directions to prison governors which did not have the force of law and which were not accessible to him, the interference with his right to respect for his correspondence was deemed not to be in accordance with law and violated Article 8 para. 2.

The Court reached a similar conclusion in the more recent case of *Niedbala v. Poland*<sup>103</sup> where the applicant prisoner complained that his letter to the Ombudsman had been intercepted and delayed in contravention of Article 8. With regard to whether

the interference with the prisoner's correspondence was in accordance with law, as required by Article 8 para. 2, the Court noted the following problems with the relevant Polish law:

- ▶ There was an absence of legal provisions, which could serve as a legal basis for effectively lodging a complaint against censorship of correspondence of persons detained on remand.
- ▶ Polish law allowed for automatic censorship of prisoners' correspondence by the authorities conducting criminal proceedings.
- ▶ As a result, the law did not draw any distinction between the different categories of persons with whom the prisoner could correspond and consequently, correspondence with the Ombudsman was also subject to censorship.
- ▶ The relevant provisions had not laid down any principles governing the exercise of this censorship and in particular, they failed to specify the manner and the time-frame within which it should be effected.
- ▶ As the censorship was automatic, the authorities were not obliged to give a reasoned decision specifying grounds on which it had been effected.<sup>104</sup>

Taking the above into account, therefore, the Court concluded that Polish law failed to indicate with reasonable clarity the scope and manner of exercise of discretion conferred on the public authorities in respect of control of prisoners' correspondence

101 *Herczegfalvy v. Austria*, judgment of 24 Sep. 1992, para. 91.

102 *Silver v. the United Kingdom*, judgment of 25 March 1983.

103 *Niedbala v. Poland*, judgment of 12 July 2000.

104 *Niedbala v. Poland*, judgment of 12 July 2000, para. 81.

amounting to a violation of Article 8 para. 2.

### 2.2.2 Does the interference pursue a legitimate aim?

Once an interference is found to be in accordance with law, the Court will proceed to question whether it pursues a legitimate aim under Article 8 para. 2. Article 8 para. 2 contains a list of the aims upon which the state can seek to rely in this regard. For example, the State may argue that:

- ▶ the collection and storage of information about individuals is “in the interests of national security”;
- ▶ intercepting prisoners’ correspondence seeks to prevent “disorder and crime”;
- ▶ removing children from an abusive home or denying one party custody or contact aims to protect “health or morals” or the “rights and freedoms of others” or that
- ▶ ordering an expulsion or deportation serves the interests of the “economic well-being of the country”.

It **falls on the respondent State to identify the objective** or objectives of the interference, and the fact that the grounds for permissible interference are so wide – in the interests of national security for example – means that the State can usually make a plausible case in support of the interference. The applicant claims frequently that the reason

given by the State is not the “real” reason motivating the interference, although the Court has not willingly accepted such a claim. In fact, the Court could be said to pay little attention to the aims invoked by the State as a basis for its actions and often condenses the aims invoked – such as the protection of health and morals and the protection of the rights and freedoms of others – into one.<sup>105</sup> Thus, in most cases, the Court will accept that States were **acting for a proper purpose** and it has rarely if ever rejected the legitimate aim or aims identified, even where this may be disputed by the applicant.

### 2.2.3 Is the interference necessary in a democratic society?

The final stage of the Article 8 test is the determination of whether the interference is “necessary in a democratic society”.

*What is the meaning of “necessary”?*

It is clearly not sufficient that the State had “some” reason for taking the measures that created the interference as the interference must be “necessary”. In terms of the meaning of “necessary”, the Court explained in *Handyside v. the United Kingdom*<sup>106</sup> that while

*... it is not synonymous with “indispensable” ... neither has it the flexibility of such expressions as “ad-*

105 See *Open Door Counseling v. Ireland*, judgment of 29 Oct 1992.

106 *Handyside v. the United Kingdom*, judgment of 7 Dec. 1976.

*missible*", "ordinary", "useful", "reasonable" or "desirable".

The Court elaborated further in *Olsson v. Sweden*,<sup>107</sup> where it held that

*... the notion of necessity implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.*

Excessively strict or generous interpretations of the term "necessary" have thus been rejected by the Court, which instead pursues a policy of proportionality.

### *The character of a democratic society?*

Surprisingly, perhaps, the Court has not described in great detail what it deems to be the characteristics of a democratic society. In *Dudgeon v. the United Kingdom*,<sup>108</sup> however, the Court spoke of tolerance and broadmindedness as two of the hallmarks of a democratic society. In the context of Article 8, it has stressed the importance of the rule of law in a democratic society and the need to prevent arbitrary interferences with Convention rights. Moreover, according to the Court, the Convention is designed to maintain and promote the ideals and values of a democratic society.<sup>109</sup> Overall, however, what is necessary in a democratic society for the purposes of Article 8 is determined by reference to the balance achieved between the rights of the individual and the public interest, through the applica-

tion of the principle of proportionality.

### *What is the principle of proportionality?*

Overall, the principle of proportionality recognises that human rights are not absolute and that the **exercise of an individual's rights must always be checked by the broader public interest**. This principle is one way in which this balance is achieved and its use throughout the Court's application of the Convention is now widespread. The Court has frequently reminded that:

*inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.*<sup>110</sup>

### *How is the principle of proportionality applied to Article 8?*

In carrying out its review of whether domestic decisions are compatible with Article 8, the Court applies the proportionality test, which, at its simplest, involves **balancing the rights of the individual and the interests of the State**. The Court does not offer an appeal from the decisions of domestic courts, however, and it thus refrains from substituting its opinion on the merits of any individual case. **Instead, its role is to consider whether, in the light of the case as a whole, the**

107 *Olsson v. Sweden*, judgment of 24 March 1988.

108 *Dudgeon v. the United Kingdom*, judgment of 22 Oct. 1981, para. 53.

109 *Soering v. the United Kingdom*, judgment of 7 July 1989, para. 87.

110 *Soering v. the United Kingdom*, judgment of 7 July 1989.

authorities had “relevant and sufficient reasons” for taking the contentious measures.<sup>111</sup>

Deciding whether the interference is proportionate to the aim which it pursues is frequently a **complex process**, which involves consideration of a number of factors. These include the interest to be protected from interference, the severity of the interference and the pressing social need which the State is aiming to fulfil.

- In relation to **the interest to be protected from interference**, for example, the Court noted in *Dudgeon v. the United Kingdom*<sup>112</sup> that the right to private enjoyment of sexual relations required “particularly serious reasons” to justify interference with it. Some rights will thus inevitably be afforded more importance than others, making interferences with them very difficult to justify.
- With regard to **the nature of the interference**, it is clear that the more far reaching and severe the interference, the stronger the reasons required to justify it. Weightier reasons are needed to justify a prohibition on contact between a parent and a child in care, than for example, a restriction on such contact.
- The **pressing social need** served by the interference will also require serious consideration and measures used to protect national security may be easier to justify than those seeking to protect morals, for example. It is noteworthy,

also, that the character of the democratic society is relevant to the exercise, as is evident from the Court’s consistent emphasis on providing safeguards in order to protect the individual from arbitrary use of state power.

## The margin of appreciation

It is clear that the Court affords to the State a margin of appreciation when deciding whether an interference with an Article 8 right is justified under paragraph 2 of that provision. The margin of appreciation afforded to competent national authorities will vary **according to the circumstances, the subject matter and its background**. It has already been identified that factors to be taken into account in determining the scope of the margin of appreciation in this area include the existence of common ground among the laws of Contracting States; the sensitivity of the area being considered and the variety in customs, policies and practices across Contracting States.<sup>113</sup>

As a rule, then, the scope of the margin of appreciation will differ according to the context. For example, it has been held to be **particularly wide in areas such as child protection**. Here, the Court has recognised that there is diversity in approaches to child care and state intervention into the family among Contracting States, and it takes this into account when examining such cases under the Conven-

111 *Olsson v. Sweden*, judgment of 24 March 1988.

112 *Dudgeon v. the United Kingdom*, judgment of 22 Oct. 1981.

113 See above.

tion by allowing States a measure of discretion when acting in this area. Moreover, the Court has also recognised that **due to their proximity to the sensitive and complex issues being determined at national level, the domestic authorities are better placed to make an assessment of the circumstances of each case and to determine the most appropriate course of action.** In care cases, for example, the national authorities benefit from di-

rect contact with the persons concerned, at the very stage when care measures are being envisaged or immediately after their implementation.<sup>114</sup> As a result the State enjoys a degree of discretion with regard to the manner in which private and family life is respected under Article 8 and this is reflected in the way in which the balance between the interference and its aim is assessed.

114 *Olsson (No. 2)*  
v. *Sweden*, judgment of  
30 Oct. 1992.

## Part II: The substantive law

The second part of this handbook details the substantive case-law of the Commission and Court of Human Rights on the four rights protected by Article 8 – the right to respect for private and family life, home and correspondence. While the objective is to describe whether certain measures and activities are compatible with Article 8, as not every scenario has been dealt with by Convention bodies this analysis cannot be exhaustive. The general rules established by the Court in its case-law and set out in the discussion that follows should be applied as appropriate.

### Private life

The case-law on the right to respect for private life covers a wide variety of areas including the collection and storage of information, accessing personal information, the regulation of names and issues of physical and moral integrity. Issues relating to correspondence, which overlap with private life, are dealt with in a separate section at the end.

### Collection and storage of personal information

The extent to which the State can collect, store and use personal information about an individual without his consent will depend on its compatibility with Article 8. Such measures usually fall into two categories: the information collected and stored by the police in the prevention and detection of crime and the files maintained by the security services in the protection of national security.

#### What information can be collected and stored by the police?

##### *Photographs*

Whether the taking of photographs by the police amounts to an intrusion into an individual's private life will depend on whether it related to private matters or public incidents, and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public.<sup>115</sup> The case of *Friedl v. Austria*<sup>116</sup> concerned the fact that the Vienna police authorities took photographs in the course and during the conclusion of a demonstration in which the applicant participated. Afterwards, the police established the identity of the applicant, recorded these personal data and stored them in an administrative file relating to these events. However,

115 Appl. No. 5877/72,  
12 Oct. 1972.

116 *Friedl v. Austria*, Comm.  
Rep., 19 May 1994,  
p. 20.

the Commission failed to find that this constituted an interference with his right to respect for private life and put forward three reasons for its decision:

- ▶ there was **no intrusion into the "inner circle"** of the applicant's private life in the sense that the authorities had not entered his home and taken the photographs there;
- ▶ the photographs related to a **public incident**, namely a manifestation of several persons in a public place, in which the applicant was voluntarily taking part;
- ▶ they were solely taken for the purposes of recording the character of the manifestation and the conduct of the participants in it **in view of ensuing investigation proceedings for related offences**.

However, in reaching its final conclusion, the Commission also attached weight to the fact that the Government had given assurances that

*the individual persons on the photographs taken remained anonymous in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system, and no action was taken to identify the persons photographed on that occasion by means of data processing.*

### Records relating to past criminal cases

The Commission has found that **the interference with an individual's private life caused by**

**the keeping of records relating to criminal cases of the past is relatively slight** and may thus be regarded as necessary in a modern democratic society for the prevention of crime.<sup>117</sup> In *Friedl v. Austria*, the authorities established the applicant's identity for the purposes of prosecuting him for road traffic offences, although the prosecution was not pursued in view of the trivial nature of the offences. According to the Commission, it was relevant that the information obtained was only **kept in a general administrative file** recording the events in question, and that it was **not entered into the data processing system**. Where the opposite is true, then the compatibility of the interference with Article 8 would have to be revisited.

### Information relating to terrorist activity

The information which the police can legitimately keep on its records includes both records of past offences as well as information obtained in investigations where no prosecution is brought and there is no reasonable suspicion against the individual concerned in relation to any specific offence. The latter is specifically permitted where **special considerations, such as combating organised terrorism, can justify the retention of the material concerned**.

- ▶ In *McVeigh v. the United Kingdom*<sup>118</sup> the applicants were questioned, searched, fingerprinted and

117 Appl. No. 1307/61,  
4 Oct. 1962, Collection 9  
p. 53.

118 *McVeigh, O'Neill and  
Evans v. the United King-  
dom*, 18 March 1981, DR  
24 p. 15.

photographed under anti-terrorism legislation, and they argued that the subsequent retention of relevant records constituted an interference with their private life. However, the Commission accepted that **the information was relevant for intelligence purposes**, and that there was a pressing social need to fight terrorism which outweighed what it considered as minor infringements of the applicants' rights.

- In *Murray v. the United Kingdom*<sup>119</sup> the recording of the applicant's personal details and photograph on arrest was considered to be within the legitimate bounds of the process of investigating terrorist crime. According to the Court, none of the personal details recorded appeared irrelevant to the arrest and interrogation procedures. This case suggests that the Court will scrutinise **the nature and extent of the information which the police and security forces record**, subject to the wide margin of appreciation normally applied in such cases.

### **Collecting personal information in order to protect national security**

The Court has accepted that in order to protect national security, States need to have laws granting the authorities the power to collect and store information in registers that are not accessible to the public.<sup>120</sup> Moreover, it is also acceptable that the au-

thorities should be able to use this information when assessing the suitability of candidates for employment in posts that are important for national security. It is the State's responsibility to identify those exceptional conditions and special jobs. However, in such cases, the Court has said that it must be satisfied that there exist **adequate and effective guarantees against abuse**. These are necessary, it said, in view of the risk that "a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it".<sup>121</sup> States must thus have in place an adequate framework of safeguards offering **minimum standards of protection in order to prevent the abuse of power by the State** and the violation of Article 8 rights.

### **What procedural safeguards are required?**

In *Leander v. Sweden*<sup>122</sup> the Court discussed in detail the character of procedural safeguards necessary to protect an individual's Article 8 rights. The applicant had been prevented from obtaining permanent employment and dismissed from provisional employment on account of certain secret information which, the authorities believed, made him a security risk. He complained that both the storage and the release of this information, coupled with a refusal to allow him an opportunity to refute it, violated his right to respect for private life as

119 *Murray v. the United Kingdom*, judgment of 28 Oct. 1994.

120 *Leander v. Sweden*, judgment of 26 March 1987, para. 59.

121 *Leander v. Sweden*, judgment of 26 March 1987, para. 60.

122 *Leander v. Sweden*, judgment of 26 March 1987.

guaranteed by Article 8 para. 1. While the Court agreed that the personnel control system constituted an interference with the applicant's private life, it went on to find that it was necessary in a democratic society with reference to the safeguards available to protect the applicant's rights from abuse.

From the list of twelve safeguards which the Swedish Government believed provided adequate protection against abuse, the Court attached importance to a number of provisions which were designed to reduce the effects of the personnel control procedure to an unavoidable minimum. They were as follows:

- although the National Police Board enjoyed discretion as to what information may be entered in the register this was regulated by law and circumscribed by instructions issued by Government;
- the entering of information on the secret police register was subject to the requirements that the information be necessary for the special police service and be intended to serve the purpose of preventing or detecting "offences against national security";
- the relevant law was found to contain explicit and detailed provisions as to what information may be handed out, the authorities to which information may be communicated, the circumstances in which such communication may

take place and the procedure to be followed by the National Police Board when taking decisions to release information.

- finally, the use of the information on the secret police-register in areas outside personnel control was limited, as a matter of practice, to cases of public prosecution and cases concerning the obtaining of Swedish citizenship.<sup>123</sup>

In *Leander v. Sweden* the Court attached much importance to the fact that the **supervision of the proper implementation of the system was entrusted both to Parliament and independent institutions** such as the Chancellor of Justice, the Parliamentary Ombudsman and the Parliamentary Committee on Justice.<sup>124</sup>

Moreover, in terms of the operation of the National Police Board, the Court found it important that the parliamentary members of the Board

*participate in all decisions regarding whether or not information should be released to the requesting authority. In particular, each of them is vested with a right of veto, the exercise of which automatically prevents the Board from releasing the information. In such a case, a decision to release can be taken only by the Government themselves and then only if the matter has been referred to them by the National Police Commissioner or at the request of one of the parliamentarians. This direct and regular control over the most important aspect of the register – the release of information – provides a major safeguard against abuse.*<sup>125</sup>

123 *Leander v. Sweden*, judgment of 26 March 1987, para. 62.

124 *Leander v. Sweden*, judgment of 26 March 1987, para. 65.

125 *Leander v. Sweden*, judgment of 26 March 1987, para. 65.

Taken together, then, the safeguards contained in the Swedish personnel control system were sufficient to fulfil the requirements Article 8, para. 2 in that case. Overall, the Court will consider the merits of each case individually and will refrain from making references to the systems in place in other jurisdictions. Its role is thus to determine if the system under scrutiny in the current case passes the threshold imposed by Convention guarantees and achieves a compromise between the requirements of defending democratic society and the rights of the individual.

### Accessing personal data held by the State

Frequently, it is an individual's inability to access the information which the State holds about him/her that is the subject of complaint rather than the fact that such data is being held on state records. In *Gaskin v. the United Kingdom*<sup>126</sup> the applicant, who was taken into care at a very young age and remained in care until he attained majority, wished to have access to the whole file relating to the time he had spent in the care of the State. In contrast to the *Leander* case, the applicant in *Gaskin* did not complain about the fact that information was compiled and stored about him. Instead, he challenged the failure to grant him unimpeded access to that information as a failure to respect his private life under Article 8. The Court had no diffi-

culty deciding that the information contained in the file concerned the applicant's private and family life, lack of access to which raised issues under Article 8. It then went on to consider whether a fair balance had been struck between the general interests of the community – in maintaining a confidential system of social services records – and the interests of the individual – in having access to information concerning his private life. In relation to the latter, the Court noted that **persons like the applicant have a "vital interest" in receiving information necessary to know and understand their own childhood and early development.** With respect to the general interest, however, the Court noted the **important link between receiving objective and reliable information and maintaining a confidential system of public records.** As a result, it found that a system, which makes access to records dependent on the consent of the contributor is compatible, at least in principle, with Article 8. However, difficulties arise, however, with regard to securing the interests of the individual seeking access to records relating to his private and family life **when a contributor to the records either is not available or improperly refuses consent.** According to the Court, such a system will only be compatible with the principle of proportionality if *it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent.*<sup>127</sup>

126 *Gaskin v. the United Kingdom*, judgment of 7 July 1989.

127 *Gaskin v. the United Kingdom*, judgment of 7 July 1989, para. 49.

Where no such procedure exists, there will thus be a violation of Article 8.

## Disclosing personal data to third parties or the public

The protection of personal data is of fundamental importance to a person's enjoyment of his private and family life and as a result, its disclosure to the public or third parties will constitute an interference with private life that is less difficult to justify than its mere storage. In general, **the public interest in disclosure must outweigh the individual's right to privacy**, having regard to the aim pursued and the safeguards surrounding its use.

## Disclosure in the course of the investigation and prosecution of crime

In *Doorson v. the Netherlands*<sup>128</sup> the Commission had to consider whether the interference with private life caused by showing the applicant's photograph from police files to third persons was justified under Article 8 para. 2. It held that the interference, which aimed to prevent crime, was proportionate to that aim for the following reasons:

- the photograph was used solely for investigation;
- it was not generally available to the public; and
- it had been taken lawfully by police during an

earlier arrest and thus not in a way which intruded on his privacy.

## Disclosure by police to the press

Disclosure of details of arrest by the police to the press may be problematic depending on the circumstances of the case. In 1995 an applicant complained that details, which appeared in the press following his arrest on suspicion of indecent assault on a boy, referring to police confiscation at his home of large quantities of child pornography, violated his right to respect for private life. He complained that the police had given incorrect details to the press together with details which would enable persons in his neighbourhood to recognise him. The Commission held that, presuming this was an interference, it was justified as being **a factual summary of events**, which pursued the legitimate aim of informing the public on matters of general interest.

## Disclosure of medical data and confidentiality

According to the Court, it is **a vital principle in the legal systems of the Contracting Parties to the Convention that the confidentiality of health data be respected**.<sup>129</sup> Its importance relates not only to the individual's right of privacy but also his/her confidence in the medical profession and the health services in general. Consequently,

128 *Doorson v. the Netherlands*, 29 Nov. 1993, DR 75, p. 231.

129 *Z v. Finland*, judgment of 25 Feb. 1997.

failing to protect this confidentiality may lead to those in need of medical assistance being deterred from revealing personal information necessary to receive the appropriate treatment or even from seeking such assistance in the first place. This, the Court has said, would not only endanger their own health but where transmittable diseases are concerned it would endanger the health of the community.

### *In what circumstances can medical data be disclosed?*

In *Z v. Finland*<sup>130</sup> the applicant complained that her medical details, including her HIV status, were revealed, for the purposes of a criminal trial, violating her right to respect for her private life under Article 8. The Court's response was to find that

*[i]n view of the highly intimate and sensitive nature of information concerning a person's HIV status, any State measures compelling communication or disclosure of such information without the consent of the patient call for the most careful scrutiny on the part of the Court, as do the safeguards designed to secure an effective protection.*<sup>131</sup>

The Court also accepted, however, that **the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest in investigation and prosecution of crime** and in the publicity of court proceedings. Each case must

thus be taken on its merits and must take into account the margin of appreciation that the State enjoys in such an area.

The Court's conclusion in *Z v. Finland* was that the disclosure of the witness's medical records was "necessary", within the meaning of Article 8 para. 2, for the purposes of a trial. However, the Court went on to find that **the publication of the witness's name and HIV status in the appeal court judgment was not justified** as necessary for any legitimate aim. A violation of Article 8 of the Convention was also disclosed from the fact that the criminal files containing details of the applicant's medical records (HIV status) would be made public within 10 years, while she might still be alive.

### *Disclosing medical data to an insurance company*

In *MS v. Sweden*<sup>132</sup> the Court found that it was legitimate for State medical institutions to pass onto social insurance authorities details of the medical history of the claimant for benefit. The measure was proportionate since the details disclosed were relevant to the claim, there was a duty of confidentiality and staff incurred civil and/or criminal liability for abuse.

130 *Z v. Finland*, judgment of 25 Feb 1997.

131 *Z v. Finland*, judgment of 25 Feb 1997, para. 96.

132 *MS v. Sweden*, judgment of 27 Aug. 1997.

# Names

## The Court's approach

Although issues concerning the regulation of personal names falls within the scope of private and family life under Article 8, the fact that the Court has never found a violation of that provision in the area suggests that it is not an aspect to which great importance is attached. In the first instance, as there is little common ground between Contracting States as to the restrictions on permissible name changes and choices, the Court affords a wide margin of appreciation in this area. Moreover, the Court has stated that there are **accepted public interest considerations which can be used to justify regulating restrictions on name changes and choice**. These include:

- the importance given to the stability of family names;
- accurate population registration;
- safeguards as to the means of personal identification; and
- linking the bearers of a particular name to a given family.

However, although such restrictions have been found to be compatible with respect for private life, the application of different rules to men and women

on marriage has been held to amount to discrimination in violation of Article 14 in conjunction with Article 8.<sup>133</sup>

## Changing surnames

In *Sterjna v. Finland*, the Finnish applicant complained that his inability, under Finnish law, to change his surname violated Article 8. In particular, he claimed that his surname caused problems since it was Swedish and was liable to be mispronounced by Finnish speakers, causing delays in mail and giving rise to a nickname. However, the Court was not persuaded that there was any particular inconvenience or singularity in his name, noting that many names give rise to nicknames and distortions.

## Registration of first names

In *Guillot v. France*, the Court found that it was compatible with Article 8 to prohibit the registration of a baby with the name "Fleur de Marie". It was influenced in its decision by the fact that the child could use the name in daily life, if not for official documents, and it also found that the "complications" that might arise were she to use one name for official purposes and another name socially were insufficient to raise issues of interference with either private or family life.

133 *Burghartz v. Switzerland*, judgment of 22 Feb 1994.

# Physical and moral integrity

## When will positive obligations be necessary to satisfy Article 8?

It is well established that the State may be under a positive obligation to protect persons from infringements on their physical and moral integrity. *X & Y v. the Netherlands*<sup>134</sup> concerned the lack of legal capacity of a 16-year-old mentally disabled girl to appeal against the decision of the public prosecutor not to pursue criminal charges against her alleged rapist. She claimed that this violated her rights under Article 8 and in response, the Court held that positive obligations could arise requiring a State to adopt measures even in the sphere of the relations of individuals between themselves. On the facts of *X & Y* **civil law remedies were found to offer insufficient protection given the severe and violent nature of the wrongdoing alleged.** Moreover, a loophole in the criminal law meant that it provided her with no protection and as a result, the State was found to have failed to fulfil its positive obligation to protect her right to physical integrity, giving rise to a violation of Article 8.<sup>135</sup>

## When will medical treatment violate Article 8?

Most medical interventions which constitute an interference with physical integrity as part of private life will be justified with regard to the need to protect the health and rights of the community at large, or the individual being treated. For example, considering whether the **compulsory administration of food** in *Herczegfalvy v. Austria*<sup>136</sup> was held to be compatible with respect for the applicant's private life because, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment.

## Are body searches compatible with respect for private life?

Strip searches, including rectal examinations, carried out for security reasons have not been found to be incompatible with Article 8 although such measures will normally constitute an interference with respect for private life. However, interferences of this kind will usually be justified **bearing in mind the reasonable and ordinary requirements of imprisonment** in which wider measures of interference might be justified than for persons at liberty in pursuance of the aims of preventing crime and disorder. In *McFeeley v. the United Kingdom*,<sup>137</sup> for example, **frequent strip searches were found to**

134 *X & Y v. the Netherlands*, judgment of 26 March 1985.

135 See further above.

136 *Herczegfalvy v. Austria*, judgment of 24 Sep. 1992.

137 Appl. No. 8317/78, *McFeeley v. the United Kingdom*, 15 May 1980.

be required by the exceptional security requirements of the Maze prison in Northern Ireland, where experience showed dangerous objects had been smuggled in. The Commission found that while the circumstances were personally humiliating they were **not deliberately degrading** particularly given the lack of physical contact and the presence of a third officer to avoid abuse.

### Is the criminalisation of homosexuality consistent with Article 8?

*Dudgeon v. the United Kingdom*<sup>138</sup> established the important principle that private sexual conduct, which is a vital element of an individual's personal sphere, cannot be prohibited merely because it may shock or offend others. In such an intimate aspect of private life, there must exist **particularly serious reasons before interferences can be justified**. The Court underlined in this context two of the hallmarks of a democratic society: tolerance and broadmindedness. In *Dudgeon*, therefore, it held that the criminalisation of homosexual conduct between consenting males constituted an unjustifiable interference with the applicant's private life.

In *Norris v. Ireland*<sup>139</sup> the Court reached the same conclusion with respect to Irish law which criminalised homosexual conduct and rejected the claim that States should enjoy extensive discretion with regard to the protection of morals in a particu-

lar society. However, it has held that **a margin of appreciation is left to Contracting States as to appropriate safeguards**, including the age of consent, **required for the protection of the young**.

### Can private sexual conduct ever be regulated?

The extent to which private sexual conduct can be regulated has been examined recently by the Court. The applicants in *Laskey, Jaggard & Brown v. the United Kingdom*<sup>140</sup> were prosecuted for engaging in group sado-masochistic activities, which they argued violated their right to private life under Article 8. Although the Court questioned whether such actions could be considered as an aspect of private life under that provision, it was not necessary for it to decide the matter as, in any event, the **prosecution of acts such as assault and wounding, notwithstanding the consent of the adult victims, was justified for the aim of the protection of health**, having regard to the extreme nature of the acts concerned.

However, in *ADT v. the United Kingdom*<sup>141</sup> the Court considered whether the prosecution of the applicant for recording his sexual activities on video tape constituted an unjustifiable interference with the right to respect for his private life. While the Court agreed with the Government that, at some point, sexual activities can be carried out in such a manner that state inter-

138 *Dudgeon v. the United Kingdom*, judgment of 22 Oct. 1981.

139 *Norris v. Ireland*, judgment of 26 Oct. 1988.

140 *Laskey, Jaggard & Brown v. the United Kingdom*, judgment of 19 Feb. 1997.

141 *ADT v. the United Kingdom*, judgment of 31 July 2000.

ference can be justified, it went on to find that this was not such a case. In particular, it was relevant that the applicant was involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. Notwithstanding that the activities were recorded on video tape, the Court found it relevant that the applicant was prosecuted for the activities themselves and not for the recording or for any risk of it entering the public domain. The **activities were thus genuinely “private”**, which means that a narrow margin of appreciation applies as in other cases concerning intimate aspects of private life. As a result of these factors, the Court concluded that both maintaining the legislation in force and prosecuting and convicting applicant were disproportionate to the aim of protecting morals and the rights and freedoms of others under Article 8 para. 2.

## Failure to recognise transsexuals’ change of gender

According to the Court, transsexuals seeking to obtain recognition of their change of gender and to enjoy other Convention rights raises legal, social, medical and ethical issues. In the absence of clear consensus in Contracting States, therefore, it has afforded a wide margin of appreciation in this area and it has consistently **failed to find that respect for private life requires the amendment of birth**

**certificates to record a transsexual’s gender re-assignment.**<sup>142</sup> In doing so, it has accepted the argument that, since the birth register system is based on recording facts at the time they occurred, any subsequent changes would amount to a falsification of the record. It has also accepted that measures protecting transsexuals from disclosure of the gender re-assignment would have adverse effects, including an alleged risk of confusion and complication in family and succession matters. The Court’s conclusion has been, therefore, that **in balancing the general interest in the community with the interests of the individual, the scales tipped in favour of the general interest.** This is particularly the case where the transsexuals are able to change first names and official documents. Despite its case-law, however, the Court has admitted that it is conscious of the seriousness of the problems which transsexuals face in this area and has thus stated that the position should be kept under review.

## Private life and correspondence

The interception of communications, in the form of telephone tapping or interrupting written correspondence, has generally been found to constitute an interference with more than one of the in-

<sup>142</sup> *Rees v. the United Kingdom*, judgment of 17 Oct. 1986; *Cossey v. the United Kingdom*, judgment of 27 Sep. 1990; *Sheffield and Horsham v. the United Kingdom*, judgment of 30 July 1998.

terests protected by Article 8 para. 1, usually the right to respect for private life and correspondence. The contentious issues in such cases, which have already been examined above, will invariably be whether the applicant can prove that the alleged interference occurred and/or whether the measure complained of was in accordance with law in compliance with Article 8 para. 2. The extent to which the interception of communications is a justifiable interference with private life and correspondence is set out below.

## Intercepting correspondence by post

*Are prisoners entitled to have their correspondence respected under Article 8?*

While it was originally argued that there were implied restrictions on the exercise of Convention rights by prisoners, the Court rejected this proposition in *Golder v. the United Kingdom*.<sup>143</sup> However, it did recognise that **the "necessity" for interfering with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment**. Nevertheless, on the facts, it held that the decision to prevent the prisoner from corresponding with his legal advisor violated Article 8.

143 *Golder v. the United Kingdom*, judgment of 17 June 1971.

144 *Campbell v. the United Kingdom*, judgment of 25 March 1992.

145 *Campbell v. the United Kingdom*, judgment of 25 March 1992, para. 48.

*When and how are authorities allowed to intercept prisoners' correspondence?*

In *Campbell v. the United Kingdom*<sup>144</sup> the applicant complained that correspondence to and from his solicitor and the Commission was opened and read by the prison authorities giving the Court an opportunity to set down precise indications as to when and how the authorities are allowed to open prisoners' correspondence. It began by affirming that correspondence with lawyers is privileged under Article 8 and especially important in a prison context, where it may be more difficult for a legal adviser to visit his client in person, for example because of the distant location of the prison. It then went on to note that the objective of confidential communication with a lawyer could not be achieved if this means of communication were the subject of automatic control. As a result, **any such interference requires solid justification**.

According to the Court, **the special protection which correspondence between a prisoner and his lawyer** enjoys under the Convention means that the authorities may open a letter from a lawyer to a prisoner only

*when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose.*<sup>145</sup>

Even then, the letter should be opened and not read and suitable guarantees preventing the

reading of the letter should be provided, such as opening the letter in the presence of the prisoner.

In relation to the reading of a prisoner's mail to and from a lawyer, the Court held in Campbell that this should be **permitted only in exceptional circumstances**, in particular only

*when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature.*<sup>146</sup>

According to the Court, what may be regarded as "reasonable" cause will depend on all the circumstances, but

*it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused.*<sup>147</sup>

While the Government argued that affording a special status to mail between a prisoner and his solicitor would create a risk that such a system would be abused, the Court held that the **mere possibility of abuse was outweighed by the need to respect the confidentiality attached to the lawyer-client relationship**. Clearly, therefore, intercepting correspondence between a prisoner and his lawyer is an interference with Article 8 rights which will be justified only in exceptional circumstances.

### *Do the same rules apply to remand prisoner's correspondence?*

According to the Court in *Schönenberger & Durmaz v. Switzerland*,<sup>148</sup> the same principles apply to correspondence between a lawyer and a prisoner on remand. In this case, the applicants' complaint was not that the authorities had apprised themselves of the content of the letter, but that they had failed to forward it to its addressee in violation of Article 8. The Government's justification for refusing to forward the letter was that it gave the remand prisoner legal advice which was of a nature that would jeopardise the proper conduct of pending criminal proceedings. In effect, the letter advised Mr Durmaz of his right to remain silent, something which the Court agreed was a lawful tactic provided for under Swiss Federal Court's case-law, whose equivalent could be found in other Contracting States. The interception of the correspondence was thus incompatible with Article 8.

### *Can prisoners' private correspondence be intercepted?*

Whether the interception of prisoners' private correspondence will be justified will depend largely on its content. As the objective of preventing disorder and crime under Article 8 para. 2 may "justify wider measures of interference in the case of a ... prisoner than in that of a person at liberty"<sup>149</sup> some

146 *Campbell v. the United Kingdom*, judgment of 25 March 1992, para. 48.

147 *Campbell v. the United Kingdom*, judgment of 25 March 1992, para. 48.

148 *Schönenberger & Durmaz v. Switzerland*, judgment of 20 June 1998.

149 *Golder v. the United Kingdom*, judgment of 17 June 1971, para. 45.

measure of control over prisoners' correspondence is not of itself incompatible with the Convention. *Silver v. the United Kingdom*,<sup>150</sup> for example, illustrates how the interception of letters containing threats of violence or discussions about particular criminal activities may be found to be necessary in a democratic society Article 8 para. 2. On the other hand, it is not compatible with Article 8 to stop private letters "calculated to hold the authorities up to contempt" or containing "material deliberately calculated to hold the prison authorities up to contempt". According to the Court, measures which do not pursue those aims or any other aim set out in the provision will not be permissible and **the interception of purely personal or private correspondence will thus be incompatible with the Convention**.<sup>151</sup>

## Secret surveillance operations

Although the Court recognises that intelligence services may legitimately exist in a democratic society it has made it clear that powers of secret surveillance of citizens are tolerable under the Convention **only in so far as they are strictly necessary for safeguarding the democratic institutions**. In this regard, the Court has been influenced by the fact that democratic societies find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must

be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has had to accept, therefore, that

*the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.*<sup>152</sup>

## What safeguards are required?

While it is within the discretion of the State how such a system of surveillance should operate, this discretion is not unfettered. Similar to the State's covert activities in other areas, therefore, **the Court must be satisfied that there are adequate and effective guarantees against abuse whatever system is adopted**. According to the Court, however, this assessment has a relative character

*it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.*<sup>153</sup>

In *Klass v. Germany*<sup>154</sup> the Court had to address whether German legislation, which authorised letter-opening and wire-tapping in order to safeguard national security and prevent disorder and crime,

150 *Silver v. the United Kingdom*, judgment of 25 March 1983.

151 *Boyle & Rice v. the United Kingdom*, judgment of 27 April 1988.

152 *Klass v. Germany*, judgment of 6 Sept 1978, para. 48

153 *Klass v. Germany*, judgment of 6 Sept 1978, para. 50.

154 *Ibid.*

violated the applicant's rights under Article 8 para. 1 insofar as it lacked adequate safeguards against possible abuse. In relation to what protection is necessary, the Court emphasised that, **in principle, judicial control of surveillance is desirable.** However, it went on to approve the German system even though the supervisory control was vested not in the courts but in a Parliamentary Board and a body called the G10 Commission, which the Board appointed. This was because it was satisfied that **both bodies were independent** of the authorities carrying out the surveillance and have been given **sufficient powers to exercise an effective and continuous control.** The Court concluded, therefore, that taking notice of technical advances in the means of espionage and surveillance and of the development of terrorism in Europe, the German system for controlling covert surveillance met the requirements of Article 8 of the Convention.

## Family life

Once family life within the meaning of Article 8 is found to exist protection flows from the provision in a number of areas.

## The legal recognition of family ties

### *Unmarried mother and her child*

The Court established in *Marckx v. Belgium*<sup>155</sup> that family life between an unmarried mother and her child is created by the fact of birth and the biological bond which it creates. This means that the **automatic and immediate transformation of this biological bond into a legal tie is essential in order to guarantee respect for family life under Article 8.** The fact that facilities for recognition may vary across Contracting States means that domestic authorities enjoy a margin of appreciation with regard to the practicalities of how recognition takes place. Importantly, however, **"respect for family life implies the existence in law of safeguards that render possible, from the moment of birth, the child's integration in the family".**<sup>156</sup> The Court has also found that domestic laws relating to family ties must enable all concerned to lead "a normal family life".

### *The position of the child born to unmarried parents*

In *Johnston v. Ireland*<sup>157</sup> the Court went on to find that **the normal development of natural family ties between unmarried parents and their children required that the latter be placed, legally**

155 *Marckx v. Belgium*, judgment of 13 June 1979.

156 *Ibid.*, para. 31.

157 *Johnston v. Ireland*, judgment of 18 Dec. 1986.

**and socially in a position akin to that of a child whose parents were married.** Treating children differently by virtue of their parents' marital status is thus prohibited under the Convention reading Article 8 together with the non-discrimination provision, Article 14.

### *The child born by AID*

Not all parents and their children are entitled to have their natural family ties recognised under Article 8, although any **exceptions must be justified with reference to the best interests of the child** under paragraph 2. In *X, Y & Z v. the United Kingdom*<sup>158</sup> the Court failed to find that respect for the family life enjoyed by a female to male transsexual, his partner and their daughter born by artificial insemination by donor required the recognition of the transsexual as the child's father on her birth certificate. The basis of its decision was the absence of common European standards with respect to granting parental rights to transsexuals and reflecting in law the relationship between a child conceived by AID and the person performing the social role of father.<sup>159</sup> This lack of consensus meant that the State enjoyed a wide margin of appreciation when balancing the rights of the individuals concerned with those of the community. The community or **public interest was served by the maintenance of a coherent system of family law which prioritises**

**the best interests of the child** and with regard to the rights of the individuals, the Court concluded that **the social and legal disadvantages experienced by the child and her social father were unlikely to cause undue hardship** in the circumstances. Overall, the Court was unconvinced that the registration of the applicant as her father would benefit the child concerned or indeed children conceived by AID in general. As a result, it refused to find implicit in Article 8 an obligation to recognise as the father of a child a person who is not the biological father.<sup>160</sup>

### *The rights of unmarried fathers*

Some States permit mothers to control whether the unmarried father of their child is entered onto the child's birth certificate. Whether this practice will violate Article 8 will depend on whether it can be justified in the child's best interests. Such justification will usually exist only where there is conflict between the parents and the mother objects to the entry on the child's birth certificate on the grounds that it will afford him automatic rights of custody and access.

### *Is shared parental responsibility necessary to respect family life?*

The Commission has found that the inability of unmarried parents to enjoy joint legal custody of their

158 *X, Y & Z v. the United Kingdom*, judgment of 22 April 1997.

159 *Ibid.*, para. 44.

160 *Ibid.*, para. 52.

child responds to the circumstances which prevail where a child is born outside marriage and such treatment is thus consistent with the Convention, even where both parents wish to have their factual situation of shared parental responsibility recognised in law.<sup>161</sup> The Court has not yet considered this issue.

*Does the presumption that the husband is the father violate Article 8?*

The Convention approach to the issue of paternity reflects **the prevalence of the social and biological, over the legal reality in the recognition of family ties**. In 1993 a mother complained that her inability to rebut the presumption that her husband was the father of her child, despite the fact that he had disappeared years before the birth, violated her right to respect for family life.<sup>162</sup> The Court believed that the irrebuttable presumption violated Article 8. In particular, it held that

*respect for family life requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone.*<sup>163</sup>

## Custody, contact and care issues

*Can an award of custody violate Article 8?*

Family life does not cease with divorce and so

the right to respect for family life under Article 8 is to be enjoyed by married, as well as separated, spouses together with their children.<sup>164</sup> When, following separation, the right of custody and care of the child is awarded to one parent, then the other parent can claim that this decision violates his right to respect for family life. The Court's review of whether domestic decisions of this kind are consistent with Article 8 is influenced heavily by the **wide margin of appreciation** which the State enjoys in this area and it is unlikely to find that a decision awarding custody to one parent violates Article 8 unless the procedure followed was arbitrary or otherwise failed to take the parties' rights and interests into account.

*When is the award of custody discriminatory?*

The Convention prohibits the domestic authorities from awarding, or refusing to award the custody and care of children to a particular parent on religious grounds. This was established in the case of *Hoffmann v. Austria*.<sup>165</sup> The applicant in this case was a Roman Catholic, who married a man of the same religion and together, they had their children baptised and brought up in that faith. However, she later became a Jehovah's Witness and divorced her husband, taking her children with her. The couple contested custody in the Austrian courts and the lower courts awarded custody to the

161 Appl. No. 9519/81 v. Germany, March 1984, 6 EHRR 599. See also Appl. Nos. 7658/76 & 7659/76, X v. Denmark, 5 Dec. 1978, DR 15, p. 128.

162 Appl. No. 18535/91, K, Z & S v. the Netherlands, Comm Rep, 7.4.93, Series A no 297-C, p 66.

163 *Kroon and Others v. the Netherlands*, judgment of 27 Oct. 1994, para. 40.

164 Appl. No. 8427/78, *Hendriks v. the Netherlands*, Comm. Rep., 8 March 1982.

165 *Hoffmann v. Austria*, judgment of 23 June 1993.

mother. The Supreme Court reversed this decision, however, being persuaded, in part, by the negative effects of the mother's religion on the children, including its opposition to blood transfusions and public holidays and its position as a social minority.

The European Court found that the decision of the Austrian Supreme Court was incompatible with the Convention insofar as it amounted to discrimination on the basis of religion. While it did not deny that certain social factors concerning membership of the Jehovah's Witnesses might tip the scales in favour of one parent when awarding custody – the possible effect on the children's social life of being associated with a religious minority and the hazards attached to the mother's total rejection of blood transfusions in the absence of a court order – the Court held that **any distinction between parents based essentially on a difference in religion alone was unacceptable.**

*Does the failure to enforce parents' rights violate Article 8?*

The Court established in *Hokkanen v. Finland*<sup>166</sup> that Article 8 may oblige the State to take active measures with a view to enforcing court orders on matters of custody and contact. However, **the obligation to ensure that family life is respected is not absolute.** In particular, with regard to enforcing custody orders, the Court has noted that prepara-

tory measures may be required where a child has lived with others for some time. Moreover, the nature and extent of such preparation should depend on the circumstances of the case. Thus, while domestic authorities

*must do their utmost to facilitate such co-operation, any obligation to apply coercion must be limited as all interests and rights (particularly of the child) must be taken into account.*<sup>167</sup>

Overall, **the State must take all measures reasonably necessary in the circumstances to enforce a parents' rights to custody or access.** Where such efforts are inadequate or unsuccessful, and responsibility cannot be attributed to the parent seeking enforcement, then a violation of Article 8 will result. On the other hand, where the national authorities have taken all the necessary steps with a view to enforcing the right to contact as could reasonably be demanded in a difficult situation of conflict, then no violation will occur.<sup>168</sup>

*Is there a greater obligation to enforce contact than custody rights?*

In *Hokkanen v. Finland*, the Court held that the authorities had failed to take adequate and appropriate measures to enforce the applicant's right to contact with his daughter.<sup>169</sup> However, it did not reach the same conclusion in relation to enforcement of the applicant's custody rights and the even-

166 *Hokkanen v. Finland*, judgment of 23 Sep. 1994.

167 *Ibid.*, para. 58.

168 *Nuutinen v. Finland*, judgment of 27 June 2000.

169 *Hokkanen v. Finland*, judgment of 23 Sep. 1994.

tual transfer of custody to the child's grandparents, which were both found to be compatible with Article 8. In particular, the Court found it important that the child in question had been in the custody of her grandparents for nearly six years when her legal custody was eventually transferred to her carers during which time she had little contact with her father. This decision, said the Court, was clearly in the child's best interests, a factor which served to justify the serious interference with the father's Article 8 rights, which it caused. Similarly, the authorities' failure to enforce the custody order when it was being challenged in the courts was also consistent with the Convention.

Clearly, therefore, it appears that there is a greater obligation on the State to enforce orders in relation to contact, than custody matters. This is consistent with the Court's view that **without measures to prepare for the child's return to his/her parents the implementation of a custody order may be damaging to the child**, whose interests it is supposed to serve.

### *The positive obligation to reunite parents with their children*

Respect for family life under Article 8 clearly involves a positive obligation to reunite parents with their children. This obligation is usually invoked where a temporary order placing the child into the

care of the State is found to be no longer necessary. As to what is required to fulfil this obligation, the Court has established that a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child. In particular, it has held that

*... [i]n carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, as suggested by the Government, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's.*<sup>170</sup>

In *Johansen v. Norway*<sup>171</sup> the applicant's daughter had been placed in a foster home with a view to adoption by the foster parents, a decision which she sought to challenge under Article 8. According to the Court, **measures such as those aimed at permanently depriving a parent of contact or custody, should only be applied in exceptional circumstances and could be justified only where they are motivated by an overriding requirement pertaining to the child's best interests.** On the facts of the case, the Court noted that the mother's access to her daughter in care was going well and that there were signs of improvement in her life. The authorities' view that the applicant was unlikely to cooperate and that there was a risk of her disturbing the daughter's care if given access to the foster home was based, instead, on the difficulties experienced in

170 *Johansen v. Norway*, judgment of 7 Aug. 1996, para. 78.

171 *Johansen v. Norway*, judgment of 7 Aug. 1996

the implementation of the care decision concerning her son. The Court concluded, therefore, that these difficulties and risks were not of such a nature and degree as to dispense the authorities altogether from their normal obligation under Article 8 to take measures with a view to reuniting them. This was particularly the case if the mother were to become able to provide the daughter with a satisfactory upbringing. The decision to deprive her of her parental rights thus violated Article 8.

### *The Court's approach in care cases*

The Court does not offer an appeal from the decisions of domestic courts and it thus refrains from substituting its opinion on the merits of individual decisions. In this area, therefore, its role is to assess whether a decision to place a child into care is compatible with the Convention. In this regard, **its supervisory role is not limited to determining whether the State had exercised its discretion reasonably, carefully and in good faith. Instead, it falls to the Court to consider whether the reasons used to justify an interference were "relevant and sufficient"**. In *Olsson v. Sweden*,<sup>172</sup> for example, three children were taken into care because the social authorities considered that their development was in danger for a variety of reasons, including the parents' inability to satisfy their emotional and intellectual needs. Such rea-

sons were found to be "relevant" and "sufficient", as there was evidence, for example, that the children were retarded in their development and other measures had been tried without success. This satisfied the Court that the care order was compatible with Article 8. However, this will not always be the case despite the State's wide margin of appreciation. In *K & T v. Finland*<sup>173</sup> the Court found, on the facts, that the care order was not the only option for securing a child's protection. In particular, **the reasons used to justify the care order were insufficient and the methods used in implementing those decisions were excessive leading to a violation of Article 8**. Thus, where the authorities fail to use a care order as a measure of last resort and base such a decision on reasons that are arbitrary and unjustified in the circumstances, then this may give rise to a violation of Article 8.

### *The ultimate aim of family reunion*

The Court has established that given the **fundamental relationship of family life** between parents and their children, a care order is intended to be temporary in nature and **its implementation guided always by the ultimate aim of family reunion**.<sup>174</sup> Only in exceptional cases, therefore, can it be justified to act as if a care order should never be lifted and even if it is necessary for the child to spend a long period of time in care, **the aim of lift-**

172 *Olsson v. Sweden*, judgment of 24 March 1988.

173 *K & T v. Finland*, judgment of 27 April 2000.

174 *Olsson v. Sweden*, judgment of 24 March 1988, para. 81.

**ing the order must inform all arrangements made during that time.** In the *Olsson* case, the three children had been placed with separate foster families, hundreds of kilometres from each other and their parents, making it very difficult for them to maintain contact. Considering whether this situation was compatible with respect for their family life, the Court noted that although the authorities had acted in good faith in implementing the care decision in this manner, it was **unacceptable that administrative difficulties, such as a lack of appropriate foster families or placements, should determine where the children would be placed.**<sup>175</sup> According to the Court, such problems could play no more than a secondary role in the implementation of a care order and its conclusion, therefore, was that, despite the parents' uncooperative behaviour, the measures taken by the authorities were not supported by sufficient reasons for them to be proportionate to the aim pursued giving rise to a violation of Article 8.

### *The importance of contact with children in care*

The Court clearly attaches much importance to the maintenance of contact between parents and children, during a child's placement in care. Frequently, therefore, it will find that the making of a care order is compatible with Article 8, while the restriction or refusal of contact with a parent while the

order is in force is not.

Any limit placed on the communication permitted between parent and child must be based on relevant and sufficient reasons designed to protect the interests of the child and to further reunification of the family. In particular, **there must be proportionality between the restrictions imposed on contact and the need served by those restrictions.** In *Andersson v. Sweden*<sup>176</sup> a mother and her son complained that their right to visits was severely curtailed and they were also prohibited from having any contact by mail or telephone during a period which lasted eighteen months. While the reasons advanced by the authorities in support of these measures were relevant – the child was likely to abscond from care where he needed treatment – the Court failed to find that they were sufficient to justify the severe measures imposed giving rise to a violation of Article 8.

## Procedural rights

The Court has established that there are procedural rights implicit in respect for family life under Article 8. In *W v. the United Kingdom*<sup>177</sup> the local authority passed a parental rights resolution in respect of the applicant's child and then proceeded to take a number of decisions – including placing the child in long-term foster care with a view to adoption, restricting and eventually terminating the

175 *Olsson v. Sweden*, judgment of 24 March 1988, para. 82.

176 *Andersson v. Sweden*, judgment of 25 Feb 1992.

177 *W v. the United Kingdom*, judgment of 8 July 1987.

father's access – without advance consultation or discussion with the applicant. Considering whether this was compatible with Article 8, the Court noted **that it was crucial in an area where decisions may prove irreversible (such as where a child may form new bonds with his alternative carers) that there is adequate protection from parents against arbitrary interferences.** In the circumstances of the case, the Court found that the applicant was not informed or consulted in advance in respect of a number of decisions which affected his relationship with his daughter and that as a result, he was insufficiently involved in critical stages of the decision making. Accordingly, the Court held that the applicant had not been afforded the requisite consideration of his views or protection of his interests, giving rise to a violation of Article 8.

The precedent set therefore is that under Article 8, parents, and where relevant, other family members, **must be involved in any decision-making process concerning their children to a degree sufficient to provide them with a requisite protection of their interests.** Thus, particular attention must be paid to the procedural fairness of the decision-making process concerning their children, whether administrative or judicial in nature, in which parents and other family members participate although the level of consultation or involvement required may differ in respect of non-parental relatives.<sup>178</sup>

178 Appl. No. 12402/86, *Price v. the United Kingdom*, 14 July 1988.

179 *W v. the United Kingdom*, judgment of 8 July 1987, para. 65.

180 *H v. the United Kingdom*, judgment of 8 July 1987, para. 85.

181 *Johansen v. Norway*, judgment of 7 Aug. 1996.

## **Is the length of family proceedings relevant to Article 8?**

The impact of the length of family law proceedings on their outcome has implications for Article 8 due to the fact that **effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time.**<sup>179</sup> Any procedural delay may thus lead to a *de facto* determination of the issue before the court and as a result, the relevant authorities are under a duty to exercise exceptional diligence where there is a danger that a procedural delay will have an irreversible effect on the parties' family life.<sup>180</sup>

## **Will the adoption of a child without parental consent violate Article 8?**

Parents whose children are placed for adoption may claim that this violates their right to respect for family life under Article 8 of the Convention. While it is apparent that an adoption order interferes with family life, **the circumstances of the case will determine whether that interference can be justified by relevant and sufficient reasons with reference to the rights and interests of the child concerned.** In *Johansen v. Norway*<sup>181</sup> the decision to free the applicant's daughter for adoption was found

to violate Article 8 because it was not based on reasons that were relevant and sufficient. However, the opposite conclusion was reached in *Söderback v. Sweden*,<sup>182</sup> where the issue was the same but the context different. The applicant in *Söderback* also complained about the decision to free his child for adoption, but in contrast to *Johansen* which concerned the severance of links between a mother and her child who was taken into care, this case involved the severance of links between a natural father and his child who was in the mother's care since her birth. According to the Court, there were a number of important factors here:

- First, the case did not concern a parent who had either custody of the child or who had assumed care of the child in any capacity.
- Second, at the relevant time, the contacts between the applicant and the child were infrequent and limited in character and when the adoption was granted he had not seen her for quite some time.
- Finally, the person adopting the child had shared the care of the child with the child's mother almost since birth and she regarded him as her father. The adoption would thus consolidate and formalise those ties.

Against this background, and having regard to the assessment of the child's best interests made by the domestic courts, the Court was satisfied that the case disclosed no violation of Article 8.

## **Will the adoption of a child without a parent's knowledge violate Article 8?**

Once family life is found to exist between a parent and a child, the placement of that child for adoption without the parent's consent or knowledge will constitute an interference with family life which is very difficult to justify. In *Keegan v. Ireland*<sup>183</sup> the Court held that certain aspects of the Irish system of adoption violated Article 8. In particular, the fact that **the natural father had no standing in the adoption process** meant that the child was placed immediately with prospective adopters with whom she began to form bonds and by the time his application to challenge the adoption came before the courts, the child was found to be secure and established in the adoptive home. Thus, the legal situation not only

*jeopardised proper development of the applicant's ties with his child, but also set in motion a process likely to prove irreversible, thereby putting the applicant at a distinct disadvantage in the contest for custody.*<sup>184</sup>

According to the Court, therefore, **the procedural impropriety caused by the failure to consult or inform the unmarried father about his child's placement amounted to a failure to respect his family life under Article 8, regardless of the merits of placing the child for adoption.**

182 *Soderback v. Sweden*, judgment of 28 Oct. 1998.

183 *Keegan v. Ireland*, judgment of 26 May 1994.

184 *Keegan v. Ireland*, judgment of 26 May 1994, para. 55.

## Immigration

An order deporting someone from a Convention State where their children or other people with whom they enjoy family life reside, or refusing to allow a parent or other family member to join others in that State will interfere with their family life under Article 8. Such a measure will only be compatible with the Convention where it fulfils the requirements of Article 8 para. 2.

*Do non-national spouses have a right to live together in a Convention State?*

The principles governing the extent of the State's obligation to admit spouses were laid down by the Court in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*.<sup>185</sup> They are as follows:

- ▶ There is no general obligation on a State to respect the choice by married couples of the country of matrimonial residence.
- ▶ States enjoy a wide margin of appreciation in this area.
- ▶ It is relevant whether there are obstacles to establishing the marital home elsewhere, in the country of the spouse or applicant's own origin or whether there are any special reasons why they should not be expected to do so.
- ▶ It is relevant whether when married they were aware of the problems of entry and the limited leave available.

185 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985.

186 *Ahmut v. the Netherlands*, judgment of 28 Nov. 1996.

187 *Gul v. Switzerland*, judgment of 19 Feb. 1996.

*Does a child have a right to join a parent in a Convention State?*

**Article 8 does not guarantee a right to choose the most suitable place to develop family life.** Thus in *Ahmut v. the Netherlands*<sup>186</sup> the Court held that the refusal of the Dutch authorities to permit the Mr Ahmut's 15-year-old son to enter the country where he himself had resided for some time did not violate Article 8. In particular, the Court noted that the boy had lived most of his life in Morocco, with which he had **strong linguistic and cultural links** and where he had been brought up by other family members. The Court saw no reason why the family life between the parties could not continue the way it had before.

**The fact that the family is able to return to join the child may also be a decisive consideration.** In *Gul v. Switzerland*,<sup>187</sup> where the Turkish father lived in Switzerland and had applied unsuccessfully for the 12-year-old son to join him, the Court observed that the parents had caused the separation by moving to Switzerland in the first instance, and that while it was admittedly difficult, given their health problems, living in Turkey, there were no obstacles preventing them from living there.

*When will expulsion violate Article 8?*

In order to determine whether a decision to de-

port a person from a Contracting State will be compatible with respect for their private and family life, the Court will look at **the extent of the links which the individual enjoys with both the host state and the receiving state which will be the individual's state of origin**. Among the factors taking into account are:

- the length of time spent and knowledge of the language and culture in either State;
- the existence of family ties and a social circle in the respective countries;
- the impact on their relationship with those family members who remain behind, and
- any other personal circumstances, such as health or psychological factors, which may mean that the deportation has a particularly drastic effect on the individual.

These factors then have to be balanced against the reasons for the removal – either the prevention of crime or disorder where there has been a breach of the criminal law, or the economic well-being of the country, where the country has a strict immigration policy – in order to determine whether the interference with family life is proportionate to the need thereby fulfilled.

### *When is deportation contrary to Article 8?*

The Court has found on a number of occasions that the effect on the individual's Article 8 rights

would be disproportionate to the aim sought to be achieved by his/her deportation. In such cases the applicant has lived most of his/her life in the expelling state, s/he has considerable social and family ties with the that State while having little contact or familiarity with the receiving state. For example, in *Moustaquim v. Belgium*<sup>188</sup> the applicant had arrived in Belgium aged 2, all his close relatives were there and had acquired Belgian nationality; he had received all his schooling in French and visited Morocco only twice on holiday. More recently, in *Mehmi v. France*,<sup>189</sup> the applicant had been born in France and schooled there, and most of his family, including his wife and three children, lived there, had acquired French nationality and could not be expected reasonably to live elsewhere.

### *When is deportation compatible with Article 8?*

In contrast, where the applicants had retained some links with their country of origin their claims under Article 8 are less successful. For example, in *Boughanemi v. France*<sup>190</sup> the Court found it probable that the applicant had retained links with Tunisia, did not claim that he could not speak Arabic or that he had cut off all ties with that country. It also gave particular weight to the offences that he had committed and the fact that he had cohabited with a French woman and had a child with her only subsequent to the making of the deportation order.

188 *Moustaquim v. Belgium*, judgment of 18 Feb 1991.

189 *Mehmi v. France*, judgment of 26 Sep. 1997.

190 *Boughanemi v. France*, judgment of 24 April 1996.

## *The importance of parental links with their children*

In *Berrehab v. the Netherlands*<sup>191</sup> the Court attached particular importance to the effect that the applicant's deportation would have on his relationship with his daughter in finding that the measure was disproportionate to the aim of preserving the economic well-being of the country. Although it was relevant that the applicant's expulsion resulted from his divorce, rather than any illegal or criminal conduct, **the girl's young age and her need to remain in contact with her father were significant factors** in the Court's conclusion that the deportation would amount to a violation of Article 8.

Moreover, in *Ciliz v. the Netherlands*<sup>192</sup> the Court held that by **failing to co-ordinate the various proceedings touching on the applicants' family rights** the authorities had not acted in a manner which enabled his ties with his son to be developed following the divorce. As a result, the decision-making process concerning both the question of his expulsion and the question of his access to his son had not afforded him the requisite protection of his interests, giving rise to a violation of Article 8.

## Home

Where it is established that a premises constitutes home within the meaning of Article 8 then the

protection that flows is various and is outlined below. However, where a person enjoys a property right in relation to the house, any interference with that right will raise issues, instead, under Article 1 of the first Protocol, which guarantees the right to peaceful enjoyment of possessions.

## Protection from wilful damage

At its most basic, Article 8 includes a right to have one's home protected from attacks by the State and its agents. Thus, in *Akdivar and Others v. Turkey*<sup>193</sup> the Court found it established that the security forces were responsible for the burning of the applicants' houses and the loss of their homes which caused them to abandon the village and move elsewhere. As there was no doubt that the deliberate burning of their homes and contents constituted a serious interference with the right to respect for their family lives and homes under Article 8 and no justification for these interferences was offered by the Government, the Court concluded that there had been a violation of Article 8.

## Protection from nuisance

According to the Court, **the concept of home includes the peaceful enjoyment of residence there** and Article 8 thus offers protection from infringements upon private life and home by noise and

191 *Berrehab v. the Netherlands*, judgment of 21 June 1988.

192 *Ciliz v. the Netherlands*, judgment of 11 July 2000.

193 *Akdivar and Ors v. Turkey*, judgment of 16 Sep. 1996.

disturbances. In the *Powell & Rayner* case,<sup>194</sup> which concerned complaints about excessive noise generated by air traffic in and out of Heathrow airport, the question was whether a fair balance had been struck between the competing interest of the individual and the community, taking into account the measures adopted by the authorities to control, abate and compensate for aircraft noise. The Court concluded that it had and in particular found that there was

*no serious ground for maintaining that either the policy approach to the problem or the content of the particular regulatory measures adopted by the UK authorities give rise to violation of Article 8.*<sup>195</sup>

### **Protection from environmental nuisance**

In *López Ostra v. Spain*<sup>196</sup> the Court established the **full applicability of Article 8 to the context of environmental nuisance**. The applicant complained about smells, noise and polluting fumes caused by a waste treatment plant situated a few metres from her home and the infringement of her right to respect for her home, private and family life that this caused. On the facts of the case, the Court noted that the applicant and her family had had to live with the plant for a number of years and it considered the domestic findings related to the damage caused to their health to be convincing. Even taking the State's margin of appreciation into account, however, it held that the State did not succeed in striking a fair balance be-

tween the interest of the town's economic well-being – that of having a waste treatment plant – and the applicant's effective enjoyment for her right to respect for her home and family life.

#### *What medical evidence will be required to establish an interference with home and family life caused by pollution?*

Given the difficulty which may be experienced in proving a causal link between environmental pollution and damage to health, it is important that the Court accepted in *Lopez Ostra* that **actual damage to health was not required** by Article 8. On the facts it concluded that

*[n]aturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family health adversely without, however, seriously endangering their health.*<sup>197</sup>

This suggests, therefore, that while evidence is necessary to illustrate an infringement with the enjoyment of home and family life under Article 8, it is not necessary to establish a clear and direct causal link between the pollution and the health problems of the applicants.

#### *Access to information about environmental risks*

Where there are risks to health from severe environmental pollution, it appears that persons who

194 *Powell and Rayner v. the United Kingdom*, judgment of 21 Feb. 1990.

195 *Powell & Rayner v. the United Kingdom*, judgment of 21 Feb. 1990, para. 45.

196 *López Ostra v. Spain*, judgment of 9 Dec. 1994.

197 *López Ostra v. Spain*, judgment of 9 Dec. 1994, para. 51.

may claim to be affected **may derive a right to obtain information about these risks** from the relevant authorities under Article 8 of the Convention. While Article 10 contains a right to receive information, the Court has maintained its view that this relates only to information which others wish to impart. In *Guerra and Others v. Italy*<sup>198</sup> the applicants, who lived near a chemical factory which had experienced a serious explosion in the past and had been found to fall short of standards, claimed that they had not been given information about the risks produced by the factory or the measures to be adopted in case of an accident. The Court found that **through its failure to provide the applicants with essential information about the risks posed to them by severe environmental pollution, the State had failed to fulfil its obligation to secure the applicants' right to respect for private and family life.**

### Regulation of ownership

The compulsory transfer of property between private individuals may be justified under the Convention where it pursues legitimate, social and economic policies. Moreover, where expropriation is concerned, the State enjoys **a wide margin of appreciation** as to how to respect the home due to the nature of the political, economic and social issues involved. The Court has stated in this area that

it will respect the legislature's judgement as to what is in the public interest unless it is "manifestly without reasonable foundation".<sup>199</sup>

### Does Article 8 include a right to live in one's home?

It is clear from the case-law of the Court that **the right to respect for one's home under Article 8 does not always include a right to live there.** This issue arose in the case of *Gillow v. the United Kingdom*,<sup>200</sup> in which the Channel Islands' strict residential housing control was challenged under Article 8 of the Convention. Mr and Mrs Gillow built a house on the island of Guernsey and obtained a licence to live on the island. After living there for five years, the Gillows lived in a variety of places for eighteen years since Mr Gillow's employment took him around the world. The couple also maintained a house in England. When they returned to live in Guernsey after this eighteen-year absence, they were refused the required licence and they argued that this violated their right to respect for their home. Although the Court found that the legislation in question pursued a legitimate aim of regulating population to prevent overdevelopment and to maintain the economy, it held that the refusal of both temporary and permanent licences to the applicants was disproportionate to that aim. In particular, the Court criticised the insufficient weight

198 *Guerra and Ors v. Italy*, judgment of 19 Feb. 1998.

199 *James v. the United Kingdom*, judgment of 21 Feb. 1986, para. 46.

200 *Gillow v. the United Kingdom*, judgment of 24 Nov. 1986.

which the Housing Authority had given to the special circumstances which weighed in favour of the applicants. It was relevant, the Court said, that the applicants had **built this house as a home for themselves** and their family; they had rented out the house while they were away thereby contributing to the available housing stock on the island; there were **no other tenants** for the property, which was in need of repair; and when they returned, the applicants had **no other home** in England or elsewhere.

The Court reached a different conclusion in *Velosa Barreto v. Portugal*,<sup>201</sup> where the applicant was prevented from taking possession of the house he inherited from his parents to live in it himself. The Court held that because the measure was aimed at the social protection of tenants and the domestic courts had found that he had no urgent need for the property as he lived with other members of his family, it held that a fair balance had been struck between the individual and the community interest under Article 8.

*Buckley v. the United Kingdom*<sup>202</sup> concerned the right of the applicant, who was a gypsy, to live in a caravan on a piece of land which she had purchased for that purpose. The refusal to allow her planning permission which would have allowed her to live in the caravan on that land was found by the Court to constitute an interference by a public authority with the exercise of her right to respect for her home. However, in considering whether the interference

could be justified with reference to the need to protect the economic well-being of the country and the rights and health of others under Article 8 para. 2, the Court went on to find that a fair balance was struck between the general interest and the applicant's right to respect for her home, a right which is pertinent to her and her children's personal security and well-being. It emphasised that **in the area of planning controls the authorities enjoyed a wide margin of appreciation** under Article 8 and noted that it was not its role to enter into the merits of planning decisions. It was thus sufficient to verify that the competing claims were given due consideration in a fair procedure.

### Searches and seizures of property

The Court has acknowledged that Contracting States may consider it necessary to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence of certain offences. While such measures will normally interfere with a person's rights under Article 8 para. 1 – whether private life or home – the **reasons adduced to justify such measures must be relevant and sufficient** and not disproportionate to the aim pursued. Moreover, the Court must be satisfied that the relevant legislation and practice afford individuals **adequate and effective safeguards against abuse**. The case-law has thus concen-

201 *Velosa Barreto v. Portugal*, judgment of 21 Nov. 1995.

202 *Buckley v. the United Kingdom*, judgment of 25 Sep. 1996.

trated on the requirements that searches be "lawful" and attended by adequate procedural safeguards against arbitrariness and abuse. Notwithstanding the margin of appreciation which the Contracting States have in this sphere, therefore, the Court must be particularly vigilant where the authorities are empowered under national law to order and effect searches without a judicial warrant.<sup>203</sup> According to the Court, if individuals are to be protected from arbitrary interference by the authorities with the rights guaranteed under Article 8, a legal framework and very strict limits on such powers are called for. Secondly, the Court must consider the particular circumstances of each case in order to determine whether, in the concrete case, the interference in question was proportionate to the aim pursued.

#### *What safeguards are required?*

In *Camenzind v. Switzerland*<sup>204</sup> it fell to the Court to consider whether the Swiss legal framework governing home searches provided adequate protection of the applicant's rights. According to the Court, the following features of the law were significant in this context:

- A search may only be effected under a written warrant issued by a limited number of designated senior public servants and carried out by officials specially trained for the purpose.

- These officials each have an obligation to stand down if circumstances exist which could affect their impartiality.
- Searches can only be carried out in dwellings and other premises if it is likely that a suspect is in hiding there or if objects or valuables liable to seizure or evidence of the commission of an offence are to be found there.
- They cannot be conducted on Sundays, public holidays or at night "except in important cases or where there is imminent danger".
- At the beginning of a search the investigating official must produce evidence of identity and inform the occupier of the premises of the purpose of the search and that person or a relative or other household member must be asked to attend.
- In principle, there will also be a public officer present to ensure that the search does not deviate from its purpose.
- A record of the search is drawn up immediately in the presence of the persons who attended and if they so request, they must be provided with a copy of the search warrant and of the record.
- Searches for documents are subject to special restrictions.
- Suspects are entitled to representation whatever the circumstances.
- Anyone affected by an "investigative measure" who has "an interest worthy of protection in

203 *Camenzind v. Switzerland*, judgment of 16 Dec. 1997.

204 *Camenzind v. Switzerland*, judgment of 16 Dec. 1997.

having the measure ... quashed or varied" may complain to the federal court

- ▶ A "suspect" who is found to have no case to answer may seek compensation for any loss sustained.<sup>205</sup>

On the facts, the Court noted that the search was carried out by a single official; and it took place in the applicant's presence after he had been allowed to consult the file on his case and telephone a lawyer. Although it did last almost two hours and covered the entire house, the investigating official did no more than check the telephones and television sets; he did not search in any furniture, examine any documents or seize anything. As a result, the Court accepted that the interference with the applicant's rights was proportionate to the aim pursued and no violation of Article 8 was found.

Although it is clear that a search of this kind, based on a law containing such safeguards, will not violate Article 8, it is uncertain whether a law in which one or two of these safeguards are omitted will contain sufficient protection. The following issues have been considered by the Court however.

## Does judicial supervision provide adequate protection of Article 8 rights?

Where orders are issued by courts, with an **element of judicial supervision** built in, there is likely

to be sufficient protection to satisfy Article 8. For example, in *Chappell v. the United Kingdom*<sup>206</sup> it was sufficient that the plaintiff's solicitor rather than a court official carried out the Anton Piller order, since he was subject to heavy sanctions in breach of the undertakings to the court.

### **Is prior judicial authorisation essential to satisfy Article 8?**

In the course of enforcement of the ordinary criminal law, search warrants will generally **require prior judicial authorisation** if they are to be regarded as proportionate to that purpose under Article 8. Where this is not the case – and domestic law permits home searches without requiring a prior judicial warrant – it will only be compatible with Article 8 where the other **legal rules governing the search contain sufficient protection** for the applicant's rights under that provision. Thus, in *Funke v. France*<sup>207</sup> the customs authorities had searched the applicant's house in order to obtain information of his assets abroad and seized documents concerning foreign bank accounts in connection with customs offences, which were of a criminal character under French law. Under French law at the time, the customs authorities had very wide powers, including "exclusive competence to assess the expediency, number, length and scale of inspections". Above all, the Court held that

205 *Camenzind v. Switzerland*, judgment of 16 Dec. 1997, para. 46.

206 *Chappell v. the United Kingdom*, judgment of 30 March 1989.

207 *Funke v. France*, judgment of 25 Feb, 1993.

*in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law ... appear too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued.*

### **Is a judicial warrant sufficient to comply with Article 8?**

Although the Court in the *Funke* case stressed the essential nature of judicial authorisation for the actions of search and seizure, **the fact that a judicial warrant has been obtained will not always be sufficient to comply with Article 8 para. 2.** In *Niemietz v. Germany*<sup>208</sup> the Court found that a search of the premises of a lawyer in pursuit of documents to be used in criminal proceedings was disproportionate to its purposes of preventing disorder and crime and protecting the rights of others, notwithstanding the prior judicial approval. The Court held that the warrant was drawn in terms which were **too broad** and the **search impinged on the professional secrecy** of some of the materials which had been inspected. As a result and because German law did not provide for any special procedural safeguards relating to the exercise of search powers, it was disproportionate to the aim which it pursued and was found to violate Article 8.

### **Searches and seizures in the investigation of terrorism**

It is clear that in their efforts to combat terrorism states are entitled to take measures which might otherwise be unjustifiable under Article 8 para. 2. The case of *Murray v. the United Kingdom*,<sup>209</sup> for example, concerned the situation in Northern Ireland. Mrs Murray and her family complained that the entry into and search of their family home by the Army, including the confinement of five family members for a short while in one room, violated Article 8. Considering whether this was the case the Court adverted to the responsibility of an elected government in a democratic society to protect its citizens and its institutions against the threats posed by organised terrorism and to the special problems involved in the arrest and detention of persons suspected of terrorist-linked offences. These two factors, it said, affect the fair balance that is to be struck between the exercise by the individual of the right guaranteed to him or her under Article 8 para. 1, and the necessity under Article 8 para. 2 for the State to take effective measures for the prevention of terrorist crimes. On the facts, the Court noted that the domestic courts found that the principal applicant, Mrs Murray, was genuinely and honestly suspected of the commission of a terrorist-linked crime and it itself also found that this suspicion was a reasonable one for the purposes of Article 5 of the Convention. The Court thus accepted that there

208 *Niemietz v. Germany*, judgment of 16 Dec. 1992.

209 *Murray v. the United Kingdom*, judgment of 28 Oct. 1994.

was, in principle, **a need for powers to enter and search** the home of the Murray family in order to arrest Mrs Murray. Furthermore, the “conditions of extreme tension”, as the House of Lords put it, under which such arrests in Northern Ireland have to be carried out must be recognised. The Court noted the analysis of one of the Law Lords, when he said

*[t]he search cannot be limited solely to looking for the person to be arrested and must also embrace a search whose object is to secure that the arrest should be peaceable. I ... regard it as an entirely reasonable precaution that all the occupants of the house should be asked to assemble in one room. ... It is in everyone's best interest that the arrest is peaceably effected and I am satisfied that the procedures adopted by the Army are sensible, reasonable and designed to bring about the arrest with the minimum of danger and distress to all concerned.*

The European Court confirmed that these were indeed **legitimate considerations** which go to explain and justify the manner in which the entry into and search of the applicants' home were carried out. The Court failed to find that the means employed by the authorities in this regard were disproportionate to the aim pursued.

### **Searches and seizures in the investigation of tax evasion**

In *Miailhe v. France*<sup>210</sup> the Court established that in other areas too the State may need to have re-

course to measures such as house searches and seizures. In particular, it held that in order to prevent capital outflows and tax evasion States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and to the immense scope for international investment, made all the easier by the relative porousness of national borders. It therefore recognised that **the State may need to conduct house searches and seizures in order to obtain physical evidence of exchange-control offences** and, where appropriate, to prosecute those responsible. However, it went on to state that the relevant legislation and practice must afford adequate and effective safeguards against abuse. This was not so in the present case. In particular, the Court held that the authorities had very **wide powers** and in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in **law appeared too lax and full of loopholes** for the interferences with the applicants' rights to have been strictly proportionate to the legitimate aim pursued. The Court went on to criticise the fact that the seizures made on the applicants' premises were wholesale and indiscriminate to such an extent that the customs authorities considered several thousand documents to be of no relevance to their inquiries and returned them to the applicants. Accordingly, there was a violation of Article 8.

210 *Miailhe v. France*, judgment of 25 July 1993. See the similar cases of *Funke v. France*, judgment of 25 Feb. 1993 and *Cremieux v. France*, judgment of 25 Feb. 1993, which examined the same French customs law.







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