RECENT DEVELOPMENTS IN ECHR CASE LAW IN THE UK AND POTENTIAL RELEVANCE TO IRISH ISSUES

Brian Kennelly BL

Blackstone Chambers, London

Introduction

1. This paper addresses recent UK case law applying the European Convention on Human Rights ("ECHR"). The full application of the ECHR in the UK courts in 2010/2011 is too large a subject for this paper. I focus only on those areas which may be of particular relevance to Irish law, namely fair trial rights under Article 6 and housing and privacy rights under Articles 8 and 10. All references below to the "Supreme Court" refer, unless otherwise indicated, to the recent British invention and not to its more venerable Irish counterpart.

The application of the ECHR in the UK

2. The ECHR is incorporated into English law by the Human Rights Act 1998 ("HRA"). The HRA 1998 came into force in the UK on 2 October 2000. It contains the Articles and Protocols of the ECHR that are deemed to apply in the UK (Schedule 1, HRA).

3. The principal provisions of the HRA are as follows:

   (1) UK courts are required as far as possible to interpret all legislation, whenever enacted, in a way that is compatible with the Convention (section 3, HRA)

   (2) Where a court is asked to decide whether a provision of primary or subordinate legislation is compatible with a Convention right, the court can make a declaration of incompatibility (section 4, HRA). A declaration

of incompatibility does not affect the validity, continuing operation or enforcement of the relevant provision (section 4(6), HRA).

(3) It is unlawful for public authorities to act in a way that is incompatible with the Convention (section 6, HRA). The public authority has a defence if it could not have acted in any other way because of another provision of primary legislation (section 6(2), HRA). A public authority includes "*any person certain of whose functions are functions of a public nature*" (section 6(3)(b), HRA). However, in relation to a particular act, a person will not be a public authority under section 6(3)(b) if the nature of the act is private (section 6(5), HRA). A public authority includes a court or tribunal and the Supreme Court (section 6(3) and (4), HRA).

(4) A person may bring proceedings against a public authority relying on a Convention right if they (a) claim that a public authority has acted (or proposes to act) in a way that is incompatible with a Convention right; and (b) are, or would be, a victim of that act (section 7(1), HRA).

4. The balance struck in the HRA between the roles of the legislature, executive and judiciary reflects the constitutional arrangements in the UK. Despite allegations by politicians and the press in the UK that the judiciary has exceeded its brief under the HRA, this is plainly not the case.[1]

5. The HRA has, however, re-calibrated the relationship between the individual and the state in the UK. This re-calibration was achieved first, by clearly establishing the ECHR rights as a standard (in the absence of valid and relevant derogation) to be observed; secondly, by exposing existing legislation to a retrospective health-check for compliance with the ECHR; and thirdly and most importantly, by requiring the executive positively to declare (and thereby to

[1] Lord Bingham of Cornhill, "*The Human Rights Act: A View from the Bench*" [2010] 6 EHRLR 568, 570-573

consider) whether or not draft legislation presented to Parliament complied with the ECHR.[2]

The jurisprudence

(1) Article 6: when do social benefits give rise to "civil rights and obligations"?

6. Article 6(1) ECHR provides (among other things) that "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"*

7. The early jurisprudence of the ECtHR[3] established that the use of the word 'civil' in art 6(1) incorporated the distinction between private and public law, with civil rights and obligations being rights and obligations in private law.

8. In the particular area of social security and social assistance, the ECtHR initially approached the issue of whether there was a 'civil right' by examining the nature of the benefit and weighing the private law features of the particular insurance scheme against its public law features.[4] More recently, however, the court has held that the 'principle of equality of treatment' means that the general rule is that Article 6(1) applies in the field of social insurance,[5] even where the benefit is a non-contributory form of public assistance granted unilaterally by the state, with the full cost borne by the public purse. In the same way, in the UK private law rights have been held to arise in the provision of social housing by the state.[6]

[2] Ibid, 569.
[3] *Ringeisen v Austria* (1971) 1 EHRR 455, ECtHR, at para 94
[4] *Feldbrugge v Netherlands* (1986) 8 EHRR 425, ECtHR
[5] *Salesi v Italy* (1993) 26 EHRR 187, ECtHR
[6] *Desnousse v Newham London Borough Council* [2006] EWCA Civ 547, [2006] QB 831, at para 96

9. In *Ali v Birmingham City Council* [2010] UKSC 8, [2010] 2 WLR 471, the Supreme Court considered how and in what circumstances the award of social benefits in kind amounts to an individual right attracting Article 6 protection.

10. The Housing Act 1996 places a duty on local housing authorities to ensure that suitable accommodation is available for homeless persons who fulfil certain criteria. An authority may cease to be subject to that duty where an applicant refuses an offer of accommodation, but only if the authority notifies him, in writing, that it regards itself as having discharged its duty. If dissatisfied with an authority's decision that its duty has been discharged, an applicant may appeal to the county court. But he may only do so on a "point of law" arising from the decision; the county court judge is not entitled to decide factual disputes as to whether or not events have happened.

11. In this case, Birmingham City Council maintained that it had successfully discharged its duty to a number of applicants who were homeless and fulfilled the relevant criteria. The applicants disputed this, claiming that, although written notification of the kind the law requires may have been sent to them by the authority, they never actually received it. The dispute between the parties as to whether the duty had been discharged therefore turned entirely on a pure question of fact. It was therefore of a nature which a county court judge on appeal has no power to determine.

12. Before this Court, the applicants argued that the lack of a fact-finding jurisdiction for a county court on appeal put that aspect of the system in breach of Article 6(1) ECHR, which guarantees the right to a fair trial in the determination of civil rights and obligations.

13. Two main issues arose for the court's determination: (1) whether an appeal to the county court involved the determination of a "civil right" for the purposes of Article 6(1); and (2) if so, whether Article 6(1) required that a court hearing such

an appeal must itself be able to determine issues of fact such as those raised in the present case.

14. The Supreme Court unanimously dismissed the appeal. It held that a decision that a local housing authority takes under the Housing Act 1996 that it has discharged its duty to an applicant is not a determination of the applicant's "civil rights" for the purposes of Article 6(1). The Court also held that, although it is unnecessary to decide the point, the appeal procedure as a whole complied with Article 6(1) in any event.

15. As to the first issue, Lord Hope (with whom Lady Hale and Lord Brown agreed) reasoned that in cases such as this, where the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met, Article 6(1) is not engaged (see [49]). Lord Collins, whilst agreeing with Lord Hope's reasoning, placed less emphasis on the evaluative nature of the decision making process ([58]). The mere fact that evaluative judgments are required did not take the case out of Article 6(1) ([61]). The main reason why the decision fell outside the scope of the Article was that the statutory duty lacked precision. There was no right to any particular accommodation; the duty was simply to ensure that accommodation was available. Together with the essentially public nature of the duty, those factors meant that the duty did not give rise to an individual economic right ([73]).

16. As to the second issue, the Court held that factual question was just one among a number of interlinked questions that had to be addressed to determine whether the housing authority's duty had been discharged. No case of the ECtHR was to the effect that an appeal from such a determination on a point of law only would constitute a breach of Article 6(1) ([53]-[55], [79]).

17. This was the issue which the House of Lords dodged in *Runa Begum,* namely where is the line to be drawn (if at all) between social security payments (Article 6 applies) and social welfare provision (Article 6 does not apply). The Supreme Court (Lord Hope) drew a distinction between those cases, such as *Salesi v Italy,* who substance the domestic law defines precisely and those benefits which are in their essence dependent on the exercise of judgment by the relevant authority. In the former camp, Lord Hope placed the rights in issue in *Tsfayo v UK* (housing and council tax benefit), in the latter, *Runa Begum* and this case.

(2) Article 8: proportionality in housing disputes

18. If the Supreme Court in one way restricted the protection potentially offered by the ECHR in *Tomlinson* (above), they extended it under Article 8 in the case of *Manchester City Council (Respondent) v Pinnock* (Appellant) [2010] UKSC 45.

19. Article 8(1) ECHR provides that "*Everyone has the right to respect for his private and family life, his home and his correspondence*".

20. This appeal concerned the question of whether Article 8 ECHR required UK courts to consider the proportionality of evicting an occupier from his home in claims for possession by local authorities and, if so, whether the demoted tenancy regime in the Housing Acts 1985 and 1996 (the "1985 Act" and "1996 Act" respectively) can properly be interpreted so as to comply with the requirements of article 8.

21. Most residential occupiers of local authority properties are "secure tenants" under Part IV of the 1985 Act who cannot be evicted other than pursuant to the grounds in section 84 of the 1985 Act. The Anti-Social Behaviour Act 2003 Act gave the courts power, however, to remove this security of tenure by making a "demotion order". A demoted tenancy will last for a year and then revert to being a secure tenancy, unless within that year the landlord brings possession proceedings under section 143D of the 1996 Act effectively requesting a court to

end the demoted tenancy. Section 143D(2) provides that "the court must make an order for possession unless it thinks that the procedure under sections 143E and 143F has not been followed". Under sections 143E and 143F of the 1996 Act, before issuing possession proceedings against a demoted tenant, the landlord must serve a notice informing the tenant, inter alia, of its decisions (with reasons why) to seek possession and, if so requested by the tenant, must carry out a review of its decision.

22. Mr Pinnock, the appellant, was a demoted tenant. He contested a possession order made against him under section 143D. Mr Pinnock had lived in a property owned by Manchester City Council (the "Council"), for over 30 years with his partner, Ms Walker, and, from time to time, with all or some of their five children. The demotion order was made on the basis of a number of incidents of serious anti-social behaviour caused by all members of Mr Pinnock's family (other than Mr Pinnock himself) at or near the property.

23. A day before the effective lapse of the demoted tenancy, the Council served a notice under section 143E seeking possession of the property and citing further incidents of anti-social behaviour by Mr Pinnock's sons which had occurred after the demotion order. A review under section 143F effectively upheld the Council's possession notice. The Council then issued a claim for possession in the Manchester County Court. Following a two-day hearing, the court granted an order for possession of the property. Mr Pinnock appealed to the Court of Appeal, who dismissed his appeal. Mr Pinnock then appealed to the Supreme Court.

24. Mr Pinnock's main contention was that the possession order violated his right to respect for his home under article 8 as it was disproportionate. In view of the previous line of the House of Lords authorities, both the Manchester County Court and the Court of Appeal rejected Mr Pinnock's article 8 arguments on the basis that it was not open to them to review the Council's decision on the ground

that it was disproportionate. Approaching the matter on a domestic law basis, both courts concluded that the Council's decision to seek possession was rational.

25. In a judgment of the Court delivered by Lord Neuberger, the Supreme Court unanimously dismissed the appeal (but for different reasons from those of the County Court and the Court of Appeal).

26. The Court identified four issues of increasing specificity facing the court in the appeal [21]:

(1) whether the ECHR requires domestic courts to consider the proportionality of evicting a person from his home before making an order for possession;

(2) if so, the general implications of this conclusion in practice for claims for possession;

(3) the implications of this conclusion on the compatibility of the statutory demoted tenancy regime with the Convention; and

(4) the application of conclusions (1)-(3) above to the facts of Mr Pinnock's appeal.

27. In light of the clear and constant line of jurisprudence of the ECtHR, the Court departed from the previous line of the House of Lords authorities and concluded that a court, which is asked by a local authority to make an order for possession of a person's home, must have the power to assess the proportionality of making the order and, in making that assessment, to resolve any factual disputes between the parties [49], [74].

28. The Court emphasised that this conclusion relates to possession claims by local authorities and is not intended to bear on cases where the person seeking possession is a private landlord, which issue will have to be determined when it arises [50].

29. The Court noted that the appeal involved a comparatively rare type of possession claim, a claim against a demoted tenant. Nevertheless, the Court was able to make certain general points [61]-[64]:

(1) Article 8 only comes into play where a person's "home" is involved;

(2) as a general rule, the proportionality of seeking possession will only need to be considered if the point is raised by the occupier concerned;

(3) any Article 8 defence should initially be considered summarily;

(4) even where an outright order for possession is valid under domestic law, Article 8 may justify granting an extended period for possession, suspending any possession order or refusing an order altogether;

(5) the conclusion that the court must have the ability to consider the Article 8 proportionality of making a possession order may require certain statutory and procedural provisions to be revisited; and

(6) Article 8 proportionality is more likely to be relevant in respect of occupiers who are vulnerable, due to either a mental or a physical disability.

30. The Court went on to conclude that it was possible to read and give effect to section 143D(2) in a way that would permit the court to review the proportionality of a landlord's decision to seek possession and, if necessary, to

make its own assessment of facts in dispute. In particular, by virtue of section 7(1) HRA, County Court judges have the necessary jurisdiction to carry out the Article 8 proportionality review [77]-[80]. It therefore followed that the demoted tenancy regime is compatible with the Convention [104].

31. Given the above conclusions, the Court went on to consider whether it was proportionate to evict Mr Pinnock and his family from the property in light of their Article 8 rights. Having regard to the undisputed evidence of three serious offences committed by Mr Pinnock's sons in, or in the vicinity of, the property during the year when the demotion order was in force, the Court concluded that the possession order against Mr Pinnock was indeed proportionate and should be upheld [127]-[132].

32. This case has clear implications for Ireland, in view of the challenges to the similar regime under Irish law. In Ireland, of course, the challenge is in private context also. In *Colette Heffernan v AG and Ireland,* one of the reliefs sought is *"a declaration, pursuant to s. 5 of the European Convention on Human Rights Act 2003 ("the 2003 Act") that the law and practice in the State with regard to applications for possession of a family home on foot of a mortgage ("the State's Mortgage Law and Practice") is incompatible with the provisions of Articles 6, 8 and 13 of the ECHR insofar as it requires the County Registrar, the Circuit Court or the High Court, as the case may be, to grant an order for possession in the absence of any independent consideration of the proportionality of the order sought in light of the right of the persons dwelling in the home for respect for family and private life."*

33. The complaint about the State's Mortgage Law and Practice is premised on the state of the law as exemplified in the case of *Anglo Irish Bank Corporation plc v Fanning* [2009] IEHC 141. These challenges have been brought by lawyers acting pro bono through the New Beginnings group.

34. There is also a challenge on foot to s. 10 of the Housing (Miscellaneous Provisions) Act 1992, as amended by s. 32 of the Housing (Traveller

Accommodation) Act 1998. The complaint here is that Article 8 is violated as there are no procedural safeguards in s. 10 to ensure that a decision to issue a notice can be examined on its merits by an independent tribunal.

35. There may be parallels between that latter litigation and the decision of the UK Supreme Court in *Mayor and Burgesses of the London Borough of Hounslow (Respondents) v Powell* (Appellant), *Leeds City Council v Hall and Birmingham City Council v Frisby* [2011] UKSC 8.

36. These appeals concerned the making of orders for possession of a person's home in favour of a local authority. The issue is whether, in circumstances where the occupier is not a secure tenant, the court that makes the order must consider the proportionality of making it.

37. Most residential occupiers of property owned by local authorities in the UK are secure tenants under the Housing Act 1985. This restricts the circumstances in which they can be evicted. Certain types of tenancy, however, are excluded from that regime. The case of London Borough of Hounslow v Powell involved one such type: accommodation provided under the homelessness regime in Part VII of the Housing Act 1996. In order to regain possession of such accommodation, domestic law requires only that the local authority must give notice to quit and obtain a court order.

38. Ms Powell, as a homeless person to whom the local authority owed a duty to provide accommodation, had been given a licence to occupy property under Part VII. Rent arrears of over £3,500 accumulated and the local authority issued a claim for possession of the property. The court hearing the claim made an order requiring Ms Powell to give up possession.

39. The cases of Leeds City Council v Hall and Birmingham City Council v Frisby involved a second type of non-secure tenancy: introductory tenancies entered

into under Part V of the Housing Act 1996. This type of tenancy is designed to provide an initial period of probation. It remains introductory for a period of one year, after which it becomes secure unless the introductory tenancy has been terminated. If the local authority decides to terminate the introductory tenancy the tenant is entitled to a review of that decision, but once the relevant procedures have been gone through section 127(2) of the 1996 Act provides that the court "shall make" a possession order. Mr Hall and Mr Frisby had both been granted introductory tenancies, by Leeds and Birmingham City Councils respectively. Allegations were made against them of noise nuisance and anti-social behaviour. The local authorities served notices indicating their intention to seek possession, which were upheld on review. In possession proceedings the courts found in favour of the local authorities.

40. The three occupiers appealed to the Court of Appeal. They argued that Article 8 ECHR required that the court hearing the possession proceedings must be able to assess the proportionality of making the orders against them. As the court did not do this, there was a breach of their Article 8 right. The Court of Appeal dismissed the appeals and the occupiers appealed to the Supreme Court.

41. The Supreme Court held unanimously that a court must have power to consider the proportionality of making possession orders under the homelessness and introductory tenancy schemes. The Supreme Court applied *Pinnock* (above) to the homelessness and introductory tenancy schemes. In all cases where a local authority seeks possession of a property that constitutes a person's home under Article 8, the court must be able to consider the proportionality of making the order. [3]

42. The Court then set out general guidance on meeting this requirement. A court will only have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and has crossed the high threshold of being seriously arguable. The threshold will be crossed in only

a small proportion of cases. The question then will be whether making an order for possession is a proportionate means of achieving a legitimate aim. Two legitimate aims should always be taken for granted: the making of the order will (a) vindicate the authority's ownership rights; and (b) enable the authority to comply with its public duties in relation to the allocation and management of its housing stock.

43. The authority is not required to plead in advance any more particularised reasons or to advance a positive case that possession would accord with the requirements of Article 8: such a requirement would collapse the distinction between secure and non-secure tenancies. Where the local authority has a particularly strong or unusual reason for seeking possession, however, it is entitled to ask the court to take that reason into account and it should plead the reason if it wishes the court to do so. If a court entertains a proportionality argument, it must give a reasoned decision as to whether or not a fair balance would be struck by making the order sought. [33]-[49]

44. On the face of it, section 127(2) of the Housing Act 1996 gives the court no discretion in the case of an introductory tenancy. But this does not prevent the court considering proportionality. Given that lawfulness is an inherent requirement of the procedure for seeking a possession order, it is open to the court to consider whether that procedure has been lawfully followed in respect of the defendant's Article 8 rights. [56] Section 89 of the Housing Act 1980, however, does restrict the court's discretion as to the period for which the taking effect of the order can be deferred. The section provides that a court making a possession order cannot postpone the date for possession for more than fourteen days or, in the case of exceptional hardship, six weeks.

45. The Supreme Court held that the mandatory language of the section prevents a court allowing a longer period to comply with the requirements of proportionality. There was, however, no indication that proportionality requires

a longer period and therefore no reason to declare section 89 incompatible with Article 8. [64]

46. This judgment arguably goes too far in the other direction; a classic case of giving with one hand and taking away with the other.

(3) Article 8: privacy rights

47. Two recent cases demonstrate the consequences of local and central government seeking to impose very strict controls on potential sex offenders. In reacting to significant public pressure (and seeking to vindicate an entirely legitimate aim) they went too far in ignoring the Article 8 rights of these individuals.

48. In *R(F (by his litigation friend)) v Secretary of State for the Home Department* [2010] UKSC 17, under section 82 Sexual Offences Act 2003 all persons sentenced to 30 months' imprisonment or more for a sexual offence become subject to a lifelong duty to keep the police notified of where they are living and of travel abroad ('the notification requirements'). There is no right to a review of the necessity for the notification requirements at any time.

49. The respondents are convicted sex offenders subject to the notification requirements. Both brought claims for judicial review claiming that the absence of a right of review of the requirements rendered them a disproportionate manner of pursuing the legitimate aim of preventing crime and thereby breached their right to privacy protected by Article 8 ECHR.

50. The Divisional Court granted the respondents' claims and made a declaration that s 82 (1) Sexual Offences Act 2003 was incompatible with Article 8. The Court of Appeal dismissed an appeal by the Secretary of State for the Home Department, who then appealed to the Supreme Court.

51. The Supreme Court unanimously dismissed the appeal and repeated the declaration of the lower courts that s 82(1) Sexual Offences Act 2003 was incompatible with Article 8 because it made no provision for individual review of the notification requirements.

52. Lord Phillips (with whom all the members of the court agreed) stated that the issue in the case was one of proportionality. It was common ground that the notification requirements interfered with the offenders' rights to privacy, that the interference was in accordance with the law and that it was directed at the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others. The court had to consider three questions: (1) what was the extent of the interference with the Article 8 rights, (2) how valuable were the notification requirements in achieving the legitimate aims and (3) to what extent would that value be eroded if the notification requirements were made subject to review [41]?

53. If someone subject to the notification requirements could demonstrate that they no longer posed any significant risk of committing further sexual offences, there was no point in subjecting them to the interference with their Article 8 rights, which would then merely impose an unnecessary and unproductive burden on the responsible authorities [51]. The critical issue was whether a reliable risk assessment could be carried out in the case of sex offenders. The research into reoffending rates relied on by the Secretary of State showed that 75% of the sexual offenders who were monitored over a 21 year period were not reconvicted and there was no evidence before the court that showed that it was impossible to identify some at least who posed no significant risk of re-offending [56].

54. For various other provisions affecting sex offenders the degree of risk of reoffending had to be assessed. It was obvious that there must be some circumstances in which an appropriate tribunal could reliably conclude that the risk of an individual carrying out a further sexual offence could be discounted to

the extent that continuance of the notification requirements was unjustified. The existence of review provisions in other countries with similar registration requirements for sex offenders suggested that a review exercise was practicable [57].

55. Accordingly the courts below were correct to find that the notification requirements constituted a disproportionate interference with Article 8 rights because they made no provision for individual review of the requirements.

56. In *H & L v A City Council* [2011] EWCA Civ 403, the appellants (H and L) appealed against the decision that the respondent local authority's past or possible future disclosure of H's conviction for indecent assault of a child to organisations in which he was involved was lawful.

57. H and L, who were married, were both severely disabled and received weekly direct payments which they used to fund care assistants in their home. The local authority became aware that H faced trial for another child sex offence, that he had a further previous conviction for failing to disclose his indecent assault conviction when applying for a job, that he was active in organisations and committees concerned with disabled people, and that he and L ran their own company which sought and obtained contracts from public bodies.

58. Having determined, following a meeting to which H had been neither notified of nor invited, that he posed a risk to children, the local authority informed nine organisations connected to H about his indecent assault conviction and potential for future convictions. It notified H and L that it would decide on a case-by-case basis what disclosures it would make to any organisations that H and L became involved with in the future, and that it intended to enforce a regime whereby H and L's care assistants should sign letters that set out its view that they should not take their children to work or allow H and L unsupervised contact with

children outside of work, and that payment of care assistants would be through a managed account operated by a third party.

59. H was acquitted of the alleged sexual assault. He and L issued judicial review proceedings complaining that (1) the local authority's disclosure of H's previous conviction and its approach to future disclosures were unlawful, being in breach of their rights both at common law and Article 8 ECHR; (2) the regime which the local authority proposed to enforce in relation to H and L's care assistants was similarly unlawful, as was the imposition of a managed account, not merely for the same reason but in any event as being ultra vires the local authority's powers under the. The judge found for the local authority on the first issue, and for H and L on the second.

60. The Court of Appeal allowed the appeal on the following bases:

(1) Neither the local authority nor the judge had engaged with the critically important fact that H and L did not work with children. The local authority had adopted a blanket approach, its stance being that H should stand down from all the bodies and committees he was involved with and that it would make disclosure to all H's known contacts and, indeed, to any further contacts of which it became aware. That approach was neither fair nor balanced nor proportionate.

(2) That part of the judge's decision had to be set aside and H and L were therefore entitled, in principle, to a quashing order and appropriate declaratory relief. The local authority's disclosure decision should, however, be quashed in any event for procedural irregularity since it had been made behind H's back. H and L had been given no opportunity to make representations: they were simply presented with a fait accompli. The process by which they were condemned, unheard, was unfair and fell

far short of what was required both by the common law and by Article 8. Those serious shortcomings vitiated the entire process.

(3) Neither was the local authority's proposed procedure as to future disclosure adequate: if the process met the requirements of procedural fairness demanded both by the common law and by Article 8, the local authority had to consult with H (and L) and give them a proper opportunity to make their objections to what was proposed, after the local authority has decided what disclosure to make, and to whom, and before it did so (see [60]-[62], [69]).

Article 10: privacy *v.* free speech

61. Article 10 ECHR provides, among other things, that "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…*"

62. In *Guardian News & Media Ltd (Ahmed v HM Treasury, Al-Ghabra v HM Treasury, HM Treasury v Youssef)* [2010] UKSC 1, [2010] 2 AC 697, the applicant media organisations applied to set aside anonymity orders made by the administrative court in favour of the appellants (X, K, M and G) and one respondent (H).

63. H and the appellants were alleged to have links with Al-Qaeda and were suspected of facilitating acts of terrorism. As a result, they were designated under the relevant order and their assets were frozen. They brought proceedings challenging the freezing orders. G and H's designation had been publicised by the Treasury and both were named in the press. In addition, H had brought earlier proceedings against the Home Office for wrongful imprisonment, in which he was named and his full circumstances described. He had also been named by the press in various articles since 1999. The anonymity order in relation to G was lifted prior to the instant hearing. X and K had given no

instructions to their counsel in relation to the instant hearing and had left their home address.

64. However, if they were named it would have the effect of identifying their brother (M). M submitted that publication of his name would breach his rights under the Article 8 and cause serious damage to his reputation in circumstances where he was not charged with any offence and was unable to challenge the allegations made against him. He also argued that if he were identified it would lead to a loss of contact with the local Muslim community and adversely affect his family.

65. The media organisations argued that the anonymity orders breached their rights under Article 10. They relied on a decision of the ECtHR *Karako v Hungary* (39311/05), and maintained that M's reputation did not fall within the scope of Article 8 ECHR.

66. The Supreme Court granted the application granted. In *Karako* the ECtHR had accepted that some attacks on a person's reputation could be of such a seriously offensive nature as to have a direct effect on the victim's private life. However, the ECtHR's conclusion that Karako's Article 8 rights had not been infringed did not mean that the Court had proceeded on the basis that Karako's claim did not fall within the scope of Article 8.

67. In *Karako* no specific effects on the victim's private life were mentioned by the court. However, in the instant case, M had explained how he anticipated his private life would be affected if his identity were revealed. Accordingly, both Article 8 and 10 were applicable and the court had to weigh the competing claims of M and his family under Article 8, and of the press under Article 10.

68. The question for the court was whether there was sufficient general public interest in publishing a report of the proceedings which identified M to justify any resulting curtailment of his right, and his family's right, to respect for their

private and family life, applying *Von Hannover v Germany* [2004] EMLR 21 and *Campbell v Mirror Group* [2004] UKHL 22.

69. In the circumstances, there was a powerful general public interest in identifying M which justified curtailment of his Article 8 rights. M's argument really amounted to saying that the press should be prevented from printing what was true for fear that some of those reading the reports might misinterpret them and act inappropriately. Doubtless, some might indeed draw the unjustified inference that M feared. However, there was no reason to assume that most members of the public, including the local Muslim community, would be unable to draw the necessary distinction between mere suspicion and guilt, and to respond appropriately to any revelation that the treasury suspected that M might have facilitated terrorism.

70. Furthermore, a report of the proceedings challenging the freezing orders which did not reveal the identities of the appellants would be disembodied. Readers would be less interested and editors would then tend to give the report a lower priority. In that way, informed debate about freezing orders would suffer. If newspapers could identify the people concerned, they could give a more vivid and compelling account which would stimulate discussion about the use of freezing orders. A more open attitude would be consistent with the correct view that freezing orders were merely indicative of suspicion rather than guilt. By concealing identities the courts were actually helping to foster an impression that the mere making of an order justified sinister conclusions about those individuals. That was particularly unfortunate when they were unlikely to have any opportunity to challenge the alleged factual basis for the orders.

71. The evidence of the potential effect on M's private and family life was very general and, for that reason, not particularly compelling. The apparent lack of reaction to the naming of G was also relevant, since it suggested that the impact of identification on an individual's relationships with the local community was

not likely to be as dramatic as the judge had anticipated when making the order. The anonymity order in relation to X, K and M was therefore set aside. There had never been any justification for the order in favour of H, especially given that he had already been named in a press release several years ago, and had been named in proceedings in public and in numerous other press articles. H's order was therefore also set aside.

72. In *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439, the appellant (K) appealed against the refusal of his application for an interim injunction against the respondent newspaper (N). N cross-appealed against the decision that K's rights under Article 8 were engaged.

73. K, who was a married man working in the entertainments industry, began a sexual relationship with a colleague (X). The relationship became obvious to those working with them and K's wife found out. K ended the relationship with X. The employers subsequently informed X that her services were no longer required. News of those events was leaked to N and K was alerted to N's wish to publish the fact of the affair and that the affair was the real cause of X leaving her employment. K applied for an injunction preventing publication of the article. The judge held that K's Article 8 rights were engaged but that there was public interest in the effect of the adultery and he refused the injunction because N intended to go no further than reporting the fact of the affair with the resultant dismissal of X. He further held that the adverse effect on K's children did not tip the balance in favour of granting an injunction.

74. The Court of Appeal allowed the appeal and dismissed the cross-appeal. The Court held that the judge was right to hold that K's Article 8 rights were engaged. The sexual relationship was essentially a private matter and the knowledge of their work colleagues did not put the information into the public domain (*Browne v Associated Newspapers* [2007] EWCA Civ 295).

75. K was reasonably entitled to expect that his colleagues would treat as confidential the information they had acquired whether from their own observations or from gossip (see [11]-[12] of judgment). A balance had to be struck between K's Article 8 rights and N's Article 10 rights. Any restriction on N, under Article 10(2) could only be justified if proportionate. Weight had to be given not only to K's Article 8 but also to those of his wife, children and X; both X and K's wife opposed the publicity.

76. The judge had erred in holding that the harmful effect to the children could not tip the balance. When the court was deciding where the balance lay between Article 8 and Article 10 rights it should accord particular weight to the rights of children likely to be affected by the publication.

77. Where a tangible and objective public interest tended to favour publication the balance may be difficult to strike. The force of the public interest would be highly material and the interests of affected children could not be treated as overriding. In the instant case, the benefits to be achieved by publication in the interests of free speech were wholly outweighed by the harm that would be done through the interference with the rights of privacy of all those affected ([13]-[14], [17]-[20] and [22]).

78. The decisive factor was the contribution the published information would make to a debate of general interest. Whilst publication may satisfy public prurience that was not a sufficient justification for interfering with the private rights of those involved. The judge erred in his decision and the case was one where it was more likely than not that an injunction would be granted following a trial ([23]-[24]).

79. On their face, the judgment of the Supreme Court in *Ahmed* and that of the Court of Appeal in *ETK* might appear contradictory. In fact, they both reflect a trend in the UK courts to adopt a more generous approach to the media provided that

some genuine public interest can be shown in publication (however slight). Where there is none and the interest is public prurience only, an injunction will normally be granted: see *MNB v News Group Newspapers* [2011] EWHC 528 (QB).

80. If there had been any public interest in publication in the *ETK* case, the injunction would probably not have been granted despite the concerns about the effects on the families of the individuals concerned. The Supreme Court has endorsed a more sceptical approach to allegations of severe effects on families in the event of publication.