

ARTICLE 8: THE PACE OF CHANGE

*Jane Liddy, Former Member of the European Commission of Human Rights*¹

“It is obvious that human progress has depended tremendously on the initiative of the individual; and as individuals, we are each instinctively committed to preserving human freedom. But we are already seeing that control, at least of the production of new individuals by population limitation, is a necessity; and that the only general lesson that is clear to me is that the whole balance of Nature is such an intricate and marvellous matter that, although benefit may well be derived from changing this balance artificially, it should be done as carefully and gently as possible, because the minds of men are not powerful enough to foresee all the consequences of even the simplest change. It may therefore be necessary from time to time to retrace our steps and think afresh; and that may be impossible if the change has been too violent. This, to me, is the best argument for not forcing too quickly any change in the balance between the individual and society.”

These are the words of Professor R.V. Jones in his paper “Some threats of technology to Privacy” delivered at a human rights Colloquy in Brussels in 1970.²

The purpose of this contribution some thirty years later is to look briefly at four issues under Article 8 of the European Convention on Human Rights (prisoners, immigrants, gypsies and environment) which, whether widely recognised as such or not, have been problematical since the Convention was adopted in 1950. Then four other issues (new forms of family life, medical privacy, surveillance and intrusive publicity) will be approached which, by reason of advances in technology, could well engage the increasing attention of the European Court of Human Rights in the decades to come. It has frequently been stated by the Court that the Convention must be interpreted in the light of present-day conditions. The question is whether this bird’s-eye view of selected old and new problems reveals an evenly and appropriately measured pace of development in the interpretation of Article 8. That Article reads:

- “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

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² *Privacy and Human Rights* (ed. A.H. Robertson,) Manchester University Press 1973.

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.”

THE “OLD” ISSUES

(a) Prisoners’ Correspondence

In 1974 Professor Francis Jacobs criticised two decisions of inadmissibility taken by the European Commission of Human Rights, the former first-instance filtering and investigatory jurisdiction whose functions are now performed by the new Court. In these cases the Commission found that the refusal of the authorities to allow a child to visit her father in prison or to correspond with him and the refusal of permission to a prisoner to attend his daughter’s funeral were justified.³ Professor Jacobs’s concern was that these decisions appear to have been based on reference to the general provisos in Article 8(2) rather than on a full examination of the merits of the particular cases, including an assessment of the reasons given by the authorities for their actions.

Subsequently the Commission developed the principle that it is an essential part of both private and family life and the rehabilitation of prisoners that their contact with the outside world be maintained as far as practicable, in order to facilitate their reintegration into society on release, and this is effected by providing visiting facilities and by allowing correspondence. It also recognised that there can be a heavy administrative and security burden in providing visiting facilities in prison and that some general limitations were reasonable.⁴ Nonetheless, Convention case-law does not appear to have developed any minimum level of frequency of visits as a norm to be aimed at. It may be that the early Commission decisions had a certain inhibiting effect on other possible applicants: they were taken within what was – at the time Professor Jacobs wrote – a Council of Europe of just eighteen Member States, only thirteen of which had accepted the then optional right of individual complaint.

Neither can it be said that the Court’s early jurisprudence on the question of censorship of detainees’ correspondence was encouraging. In the Vagrancy Cases in 1971⁵ the Court without further explanation said that “even in the case of persons detained for vagrancy, th[e] authorities had sufficient reason to believe that it was ‘necessary’ to impose restrictions for the prevention of disorder or crime, the protection of health or morals, and the protection of the rights or freedoms of others.” In this case, one of the letters not forwarded by the director of the detention centre was addressed to the Minister for Justice.

³ Appln 2306/74 *X v Austria*, Dec. 19.7.1966, CD.21; Appln 4623/70, *X v UK*, Dec. 19.7.1971, C.D.39; see Francis Jacobs, *The European Convention on Human Rights* (1975) Cavendish Press, Oxford.

⁴ Appln 9054/80, *X v UK*, Dec 8 10 1982, DR 30,113.

⁵ *De Wilde, Ooms and Versyp v Belgium*, Judgment of 18 June 1971, Series A No. 12.

Happily, jurisprudence on censorship has developed somewhat since then. Thus, the Court has held that under Convention law prison authorities may open a letter from a lawyer only when they have reasonable cause to believe that it contains an illicit enclosure; even then it should be opened in the presence of the prisoner and the reading of correspondence will only be justified in exceptional circumstances.⁶ More generally, it is not enough that national law provides a domestic legal basis for the action in order to meet the Convention requirement that an interference be “in accordance with the law”. While it may be impossible to attain absolute certainty in the framing of a law, and the likely outcome of any search for certainty would be rigidity, the quality of the law must be such as to reduce the risk of arbitrariness. In *Domenichini v Italy*⁷ the Court said that the law in question gave the authorities too much latitude:

“In particular, it goes no further than identifying the category of persons whose correspondence may be censored and the competent court, without saying anything about the length of the measure or the reasons that may warrant it. . . Italian law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities, so that Mr. Domenichini did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society. . .”.

This dictum may have relevance for many States. For example, in Ireland Rule 63 of the Prison Rules 1947 gives the Governor discretion to stop a letter to or from a prisoner “if the contents are objectionable”. A recent complaint on the issue was declared inadmissible by the Commission for non-exhaustion of domestic remedies.⁸

In sum, there is no reason to be complacent that in the Europe of 41, convicts who have been punished with deprivation of their liberty or other detainees who live a life of closed routine, often in deplorable conditions, can rely on a reasonable or even minimum degree of written contact and visits with and from the outside world as of right under national law rather than as a privilege that might be withdrawn arbitrarily. This “old” problem is one which the new Court may have reason to address in more depth in the coming decades.

(b) Immigrants

In 1974 Professor Jacobs was able to comment that there were two types of situation that had most frequently raised issues under Article 8 to that date. One was the case where some action by the authorities, such as expelling a person from a country or refusing to admit somebody, may result in separation of husband and wife or of parents and children. (The other, which it is not proposed to address in this article, concerned questions of custody of or access to children.) At that time the case-law of the Commission rejecting as manifestly ill-founded such expulsion or family reunification cases

⁶ *Campbell v United Kingdom*, Judgment of 25 March 1992, Series A No. 233.

⁷ Judgment of 15 November 1996, Reports of Judgments and Decisions, 1996-V.

⁸ *Holland v Ireland*, Appln 24827/94, Dec. 14.4 1998, DR 93, 15.

indicated the need to establish that there was not merely a family relationship but also family “life”. The Commission placed a significant onus on the applicant to satisfy it in this respect by reference to a criterion of particularly close links such as financial dependence.⁹ But even if there was family life, there would be no interference with the right to respect for family life if the unit could be preserved by establishing the family’s residence in the country to which the member of the family is to be expelled or from which he seeks admission.¹⁰

Case-law has developed these principles somewhat in the years that followed. If sufficiently *de facto* family life can be shown to exist, the Court treats a deportation measure as an “interference by a public authority” and examines whether the deportation satisfies the conditions in paragraph 2 of Article 8. A deportation that has been ordered because of a history of delinquency or criminality can be taken as being aimed at the prevention of disorder, but when regard is had to all the circumstances of family ties and the age of the individual at the time of the offences, it may still be that deportation is a disproportionate response to that aim and hence not “necessary in a democratic society”. In such circumstances there may be a violation of Article 8 if there is a failure to achieve a proper balance between the individual’s interest in maintaining a family life and the public’s interest in the prevention of disorder.¹¹

What of the case where the measure complained of is a refusal by a State to give residence rights to a family member of a settled immigrant? In such cases the Court may still regard the matter as involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8(1) to “respect” family life. The boundaries between a State’s positive and negative obligations under Article 8 do not lend themselves to precise definition, the Court has said, but in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole; in both contexts the State enjoys a certain margin of appreciation. The extent of a State’s obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest; and in the latter respect the Court accepts that a State has the right to control the entry of non-nationals into its territory and that Article 8 does not impose on it a general obligation to respect the immigrants’ choice of the country of their matrimonial residence and to authorise family reunion on its territory.¹²

At a time of long-publicised concern about what Judge Martens, in a dissenting opinion¹³, called “situations where political pressure – such as the

⁹ Appln 5269/71, Dec. 8.2.1972, C.D.39.

¹⁰ Appln 2535/65, dec. 16.7.1965, C.D.17.

¹¹ *Moustaquim v Belgium*, Judgment of 18 February 1991, Series A No 193; *Boughanemi v France*, Judgment of 24 April 1996, Reports of Judgments and Decisions 1996-II.

¹² *Gul v Switzerland*, Judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I; *Ahmut v Netherlands*, Judgment of 28 February 1996, Reports of Judgments and Decisions 1996-VI.

¹³ *Gul v Switzerland*, above.

growing dislike of immigrants in most member States – may inspire State authorities to harsh decisions”, it is at least reassuring to note that the principles elaborated in Convention jurisprudence provide some tools with which the Court may check abuses or incidents of official inertia in immigration matters where such violate the right to respect for family life. These tools were needed when the Convention was signed in 1950, they are needed today in different contexts from those of the past and they will be needed in the coming decades in situations not yet imagined.

It might be noted, however, that jurisprudence has not developed in a way that would explicitly call for legislative and/or procedural safeguards against the risk of arbitrariness in decision-making at national level, unlike the case-law discussed above in relation to prisoners and below in relation to gypsies and environmental matters.

(c) Roma, gypsies and travellers

Although the minority lifestyle and culture of roma, gypsies and travellers has been a feature of life in member States since before the signature of the Convention, sensitivity to their rights is a rather recent phenomenon, except within relatively small circles. Indeed it is noteworthy that the Court in the above-mentioned *Vagrancy* cases of 1971¹⁴ made no attempt to distinguish between members of such minority groups and the vagrants referred to in Article 5(1)(e) of the Convention when it accepted for its purposes Belgium’s definition (“Vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession”).

There were certain dicta in Commission decisions of inadmissibility to the effect that a minority group is, in principle, entitled to claim the right to respect for the particular lifestyle it may lead as “private life”, “family life” or “home”.¹⁵ However it was not until 1994 that the Commission declared admissible an application from a gypsy alleging that she was prevented from living with her family in caravans on her own land and from following the traditional lifestyle of a gypsy, contrary to Article 8. In the event the Court found no violation of Article 8 in this, the *Buckley* case.¹⁶ Nonetheless the judgment holds out hope for other gypsies and for roma or travellers whose plight might be considered worse. In the first place, the Court accepted that even though there was no planning permission to park the caravan on the site in question, the facts showed that Mrs Buckley had established a real “home” there which attracted the guarantees of Article 8. Secondly, in examining whether the measures taken to compel Mrs Buckley to remove the caravans were justified as “necessary in a democratic society”, the Court said that the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8. Applying this test, the Court was satisfied by the State’s offer of alternative (albeit less satisfactory) accommodation, the relatively minor sanctions for failing to remove the caravan, and what it considered to be

¹⁴ Note 5 above.

¹⁵ *Eg* Applns 9278/81, and 9415/81, *G v Norway*, Dec. 3.10.1983, DR 35,30.

¹⁶ *Buckley v United Kingdom*. Judgment of 25 September 1996, Reports of Judgments and Decisions 1996-IV.

relevant and sufficient reasons offered by the planning authorities in the domestic proceedings.

In his dissenting opinion Judge Pettiti said that Europe has a special responsibility towards gypsies:

“During the Second World War, States concealed the genocide suffered by gypsies. After the Second World War this direct or indirect concealment continued (even with regard to compensation). Throughout Europe, and in Member States of the Council of Europe, the Gypsy minority have been subject to discrimination, and rejection and exclusion measures have been taken against them. . . . In Eastern Europe the return to democracy has not helped them. Can the European Convention provide a remedy for this situation?”

Time will give the answer to Judge Pettiti’s question, but for the present it suffices to note that not all – and perhaps not even many – of the 41 member States of the Council of Europe can be taken to provide the procedural guarantees against being forced unjustifiably to “move on” that satisfied the Court in the *Buckley* case. At the time of writing the Court is facing the task of ruling on many serious complaints in an Inter-State Case¹⁷, including an issue of respect for the homes and private and family lives of the Turkish Cypriot gypsy community.

(d) Environmental Issues

Concerns about risk to health by reason of radiation and concerns about noise and smell levels in the environment were just as valid in 1950 when the Convention was signed as they are today. Recently expressed protests against genetically modified crops bring a reminder of challenges in the 1960s to the fluoridation of water supplies (for example, when the Irish Supreme Court found that the ingestion of water fluoridated to the extent proposed was harmless and so could not injure bodily integrity¹⁸). In 1985 the Court said that the concept of “private life” covers the physical and moral integrity of the person.¹⁹ Notwithstanding this background the most important jurisprudence on environmental risks only began to take shape in the 1990s.

In 1990, within the context of an Article 13²⁰ issue, the Court said that Article 8 was a material provision in relation to the quality of the applicant’s private life and the scope for enjoying the amenities of his home that had been adversely affected by the noise generated by aircraft using Heathrow Airport.²¹

Four years later the Court was faced more directly with the issue in the form of a complaint about a plant for the treatment of liquid and solid waste twelve metres away from the applicant’s home in Spain. There was

¹⁷ *Cyprus v Turkey*, Appln 25781/94, Comm. Rep. 4 June 1999.

¹⁸ *Ryan v Attorney General* [1965] IR 294.

¹⁹ *X and Y v Netherlands*, Judgment of 26 March 1985, Series A No. 91.

²⁰ Guaranteeing the right to an effective remedy.

²¹ *Powell and Rayner v United Kingdom*, Judgment of 21 February 1990, Series A No. 172.

independent expert evidence to the effect that hydrogen sulphide emissions from the plant exceeded the permitted limit and could endanger the health of those living nearby. Moreover, there was a domestic court finding that the nuisances in issue impaired the quality of life of those living in the plant's vicinity. In finding a violation of Article 8 the Court said that 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 life adversely. The Court found that the measures taken by the State "did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of the right to respect for her home and her private and family life".²²

In this, the *Lopez Ostra* case, the applicant was in the relatively well-armed situation of having scientific expertise and a domestic court statement supporting her case to a degree. Article 8 may also be relevant in relation to the possibility of gaining access to scientific information that would enable an individual to assess the risks he runs by remaining in his home. In *Guerra v Italy*²³ the applicants were able to point to some information about an explosion at a factory years beforehand which led to the hospitalisation of 150 people and also to an expert report on the direction in which emissions from the factory were channelled. However a major factor for the Court was that pursuant to Directive 82/501/EEC (the "Seveso" Directive) Italian law had classified the factory, which produced fertilisers and caprolactum, as "high risk". The Court concluded that Article 8 was applicable because of the direct effect of the toxic emissions on the applicants' right to respect for their private and family life. Referring to the long wait endured by the applicants for essential information that would have enabled them to assess the risks they and their families might run if they continued to live in a town particularly exposed to danger in the event of an accident at the factory, the Court found that Spain did not fulfil its positive obligation to secure the applicants' right to respect for private and family life. The omission of a reference to the right to respect for the "home" may indicate that the technical evidence in this case was not so compelling as in the *Lopez Ostra* case but nonetheless sufficed for a more nuanced finding of violation of Article 8.

The issues of radiation from nuclear plants or by reason of nuclear tests have been approached very cautiously by both the Commission and the Court. In *Taura v France*²⁴ the Commission, by a majority, rejected an application by residents of Tahiti and Mangareva concerning France's decision to resume nuclear testing in 1995 and 1996 in the vicinity of their islands. The Commission said that in order for an applicant to claim to be a victim of a violation of the Convention owing to a future violation of, *inter alia*, Article 8 he must produce "reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur . . .". Subsequently, in an Article 6²⁵ case, *Balmer-Schafroth v Switzerland*²⁶, the Court by 12 votes

²² *Lopez Ostra v Spain*, Judgment of 9 December 1994, Series A No. 303.

²³ Judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I.

²⁴ Appln 28204/95, Dec 4.12.1995, DR 83,112.

²⁵ Guaranteeing the right to a fair trial.

to 8 likewise put a high onus on an applicant to show a direct link between the operating conditions of a nuclear power station and their domestic law right to protection of their physical integrity such that they should have access to a court. It found that the applicants had failed to show that the operation of the nuclear power station “exposed them personally to a danger that was not only serious but also specific and, above all imminent”. The minority commented that in 1997 Western Europe continued to be affected by the fallout from the Chernobyl accident and they said that a finding that Article 6 had been infringed was all the more necessary because European comparative law shows that the national systems of States such as Belgium, France, Italy, Spain and Germany possess a whole array of review machinery for dealing with disputes of this type. To that comment it might be added that if national courts are not required to take seisin of such domestic law disputes except where there is “imminent” danger it is difficult to be confident that later review at Strasbourg level can be effective.

However in 1998, in another judgment of non-violation, *McGinley and Egan v United Kingdom*²⁷, the Court allowed some prospect that Article 8 might, in different circumstances, have a role to play in regard to suspected radiation hazards. In 1958 the United Kingdom had carried out a number of atmospheric tests of nuclear weapons at Christmas Island in the Pacific Ocean. The applicants, who were army and naval servicemen, were on duty in the vicinity. Years later they suspected that their health problems were related to exposure to radiation but they were unable to establish the link for the purpose of obtaining relevant pension payments. The Court found that there was a positive obligation under Article 8: where a Government engages in hazardous activities, such as those in issue in the case, which might have hidden adverse consequences on the health of those involved in the activities, respect for private and family life requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information. In the event the Court found by five votes to four that there was an adequate procedure open to the applicants in the United Kingdom to seek relevant radiation records. The case seems to leave open for future consideration whether the obligation to provide a procedure enabling access to relevant information carries a concomitant obligation on Governments engaging in such hazardous activities to create and keep medical and/or other monitoring records of individuals at particular risk.

In its decision of inadmissibility in the French nuclear test case (*Taura*) the Commission said that it did not consider it within its remit to rule on the scientific validity of the various reports to which the parties referred, especially as there was controversy surrounding a number of points amongst experts. The extent of the Court’s ability to assess such important issues in the future may depend on the extent to which it is willing to follow the logic of the above-mentioned *Guerra v Italy*²⁸ and *McGinley and Egan v UK*²⁹ cases by identifying an obligation on the part of States to keep and

²⁶ Judgment of 26 August 1997, Reports of Judgments and Decisions 1997-IV. This jurisprudence was confirmed by the new Court in *Athanassaglou v Switzerland*, Judgment of 6 April 2000.

²⁷ Judgment of 9 June 1998, Reports of Judgments and Decisions, 1998-III.

²⁸ Note 23 above.

²⁹ Note 27 above.

make available to the public records such as independent environmental studies on the impact of new scientific methods. Much has been written about the influence of human rights law on the jurisprudence of the European Court of Justice in Luxembourg: it would be fitting if the initiatives taken by the European Union in environmental matters were to find an echo, via the Strasbourg Court, in the application of Article 8 within the 41 member States of the Council of Europe.

GENERAL COMMENT ON THE “OLD” ISSUES

It may be seen from the above how far the Court has moved from what may have been the expectation of many of the original States Party when they ratified the Convention. Such States may have assumed that they were answerable only for an “interference by a public authority” with private and family life, home and correspondence and that, given a domestic legal basis for an official action, their main task in defending a case in Strasbourg would be to demonstrate the necessity for the measure in the interests of one of the aims listed in paragraph 2 of Article 8. In fact, the cases declared admissible by the Commission enabled jurisprudence to develop in such a way as to make it clear that there can be a violation of Article 8 by reason of a failure of States to take positive action to “respect”, within the meaning of Article 8(1), private and family life, the home and correspondence, because of the absence of a legal regime with sufficient procedural safeguards for the individual.³⁰ Such safeguarding procedures would mean that the national authorities, rather than an international judicial body, would be the first to test the evidence and the competing arguments in relation to the particular situation of a given individual and hence the justification for the measure as perceived at national level. This principle of there being a procedure under national law whereby the authorities most familiar with national conditions are enabled to balance in a disciplined fashion the individual interest and the general interests is found also within the autonomous concept of the phrase “in accordance with the law” in Article 8(2). However, there is little sign as yet of its finding a place in cases concerning immigration and expulsion, where the Court carries a heavy onus in its task of supervising whether the search for balance that is inherent in Convention rights has been attained in a given case.

THE “NEW” ISSUES

(e) New forms of “family life”: the impact of science and technology

There are many old forms of family life or relationship which, even if atypical in any given context, nonetheless are well-known phenomena in the sense that they are based on a biological link and the oldest habits of human conduct.

³⁰ Relatively early indicators of this approach were identifiable in *Airey v Ireland*, Judgment of 9 October 1979, Series A No. 32 and in *W v United Kingdom*, Judgment of 8 July 1987, Series A No. 121, concerning, respectively, the absence of a civil legal aid scheme to facilitate legal separation proceedings in Ireland and, in the United Kingdom, procedures governing access to children taken into care.

Thus the Convention expression “family life” in the case of a married couple normally implies cohabitation.³¹ Even where there is no cohabitation, family life embraces the tie between a parent and his or her child, regardless of whether or not the latter is “legitimate” and even if the mother is married to another ; although that tie may be broken by subsequent events this can happen only in exceptional circumstances.³² Stronger evidence of *de facto* family “life” can be crucial in more distant blood relationships – such as with grandparents, siblings and uncles or aunts.³³

With regard to children, until 1997 the Court had only been called upon to consider family ties existing between biological parents and their offspring. In that year it gave judgment in a case where the application of two aspects of recent technology and medical science coincided in an unusual combination of facts. X was a female-to-male transsexual who had lived with Y, a biological woman, to all appearances as her male partner since 1979. A child Z was born to Y as a result of artificial insemination by anonymous donor. X had been involved throughout the process of the seeking and granting to Y of AID treatment in the United Kingdom and since the birth he had acted in a father-role to Z in every respect. In these circumstances the Court was satisfied that the *de facto* family unit was such that Article 8 was applicable. However there was no violation of the right to respect that family life by reason of a refusal to register X as Z’s father on the birth certificate.³⁴ In its reasoning the Court noted that there was no consensus among the member States of the Council of Europe on the question of whether the best interests of a child conceived by AID are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor’s identity. It said that “the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront. . .”.

The Commission had earlier been called upon to examine whether there was “family life” between a man who donated his sperm in order to enable a woman in a lesbian relationship to become pregnant through artificial insemination and the child subsequently born: the particular facts proved insufficient for the Commission to accept that there was an adequately close tie between father/sperm-donor and child to fall within the scope of Article 8 and thus attract its guarantees.³⁵

These cases prompt the question as to how long it will be before the Court has occasion to give judgment on a claim that the right to respect for private and family life includes the right to conceive a child by artificial insemination by donor (anonymous or otherwise) or to have a child born by a

³¹ *Abdulaziz, Cabales and Balkandi v United Kingdom*, Judgment of 28 May 1985, Series A No.94.

³² *Boughanemi* Case note 11 above; *Keegan v Ireland*, Judgment of 26 May 1994, Series A No.294; *Kroon v Netherlands*, Judgment of 27 October 1994, Series A No.297.

³³ See further the author’s article “The Concept of Family Life under the ECHR” in (1998) *EHRLR* 15.

³⁴ *X, Y and Z v United Kingdom*, Judgment of 22 April 1997, Reports of Judgments and Decisions 1997-II.

³⁵ Appln 16994/90, *M v Netherlands*, Dec 8.2.1993, DR 74,120.

surrogate mother. There are certain indications, in line with the Court's dicta in the *X, Y and Z v United Kingdom* case³⁶ concerning the child's possible interest in knowing its parentage (and thus, by implication, the circumstances of its conception), that a cautious approach will be taken in Strasbourg. Thus, in a complaint under Article 8 that a single woman was unable to adopt a child, the Commission referred to the fact that under Article 12³⁷ the right to found a family implied the existence of a couple and it rejected the application.³⁸ Also, within the context of Article 11³⁹, the Commission had regard to the fact that French law criminalised incitement to abandon a child when it rejected a complaint about the refusal to register an association the aim of which was to promote the interests of surrogate mothers.⁴⁰

It seems to be only a matter of time before the Court will also be faced with even more profoundly thought-provoking issues. It may be that experiments on the cloning of humans are not permitted within Council of Europe member States and that they are not imminent elsewhere. However, at a time when it has been reported that the cloning of a primate – the rhesus macaque monkey – has moved a step closer⁴¹, one can envisage the possibility that a non-European research institute could be funded by a wealthy donor with a view to such experiments. As a result of what has been called “bioethical tourism”⁴² it may be that issues will arise about the recognition of sex-change operations or the parentage of a surrogate birth child as a result of events crossing different jurisdictions with different control thresholds even within Council of Europe member States. The issue of abortion arose indirectly in a complaint about the right to information about the location of clinics outside a given jurisdiction⁴³; issues could likewise introduce themselves indirectly with regard to the possible cloning of, for example, a mortally injured child or with regard to transgenetic therapy or germ line therapy. (Lord Winston, Chairman of the House of Lords Science and Technology Committee is reported⁴⁴ as believing that the use of germ line therapy is inevitable. The writer understands⁴⁵ germ line therapy as meaning the correction of a genetic defect in the germ or reproductive cells of a patient so that the offspring of the patient also inherits the corrected gene – thus future generations would be research subjects without their consent.)

Considerations such as the foregoing underline the importance of the above-mentioned dicta in the *X and Y v Netherlands* case⁴⁶ and in the *X, Y and Z v*

³⁶ Note 34 above.

³⁷ Guaranteeing the right to marry.

³⁸ Appln 31924/96, *Di Lazarro v Italy*, Dec. 10.7.1997, DR 90,134.

³⁹ Guaranteeing freedom of assembly and association.

⁴⁰ Appln 14223/88, *Lavisse v France*, Dec.5.6.1991, DR 70,218.

⁴¹ *Science Magazine*, Vol.287, No.5451, pp 317-319.

⁴² Deirdre Madden “Reproductive Rights and Assisted Conception” in *Human Rights: an Agenda for the 21st Century* (ed. Hegarty/Leonard,) Cavendish Publishing Ltd 1999.

⁴³ *Open Door and Dublin Well Woman v Ireland*, Judgment of 29 October 1992, Series A No.246.

⁴⁴ *Daily Telegraph* 27 January 2000.

⁴⁵ From David Smith, “Life and Morality: Contemporary Medical-Moral Issues” (1996) Gill and MacMillan Ltd, pp 139-141.

⁴⁶ Note 19 above.

United Kingdom case⁴⁷ as well as of Article 7 of the United Nations Convention on the Rights of the Child (“The child shall . . . have . . . as far as possible, the right to know. . . his or her parents”). They also underline the significance of the case of *Gaskin v United Kingdom*⁴⁸ where the Court found to the effect that the records contained in a file compiled for and by a local authority about the past and formative years of an applicant undoubtedly did relate to his “private and family life” in such a way that the question of his access thereto fell within the ambit of Article 8. These new forms of relationships and genetic history and identity, emanating from recent and potential scientific developments, pose weighty questions about respect for the physical and moral integrity of the person that may fall for step-by-step resolution in the years and decades to come.

(f) Medical Privacy

If one side of the coin of private and family life is the interest of an individual in knowing about his genetic inheritance, the other side of the coin is his interest in keeping secret his medical history or genetic makeup. The principles of existing case-law probably have been elaborated largely on the premise that an individual can keep secret his real or likely disposition, tastes, addictions, health and family background except such as revealed in ordinary social interaction or to the extent necessary on the occasions when he crosses the path of officialdom deliberately, culpably or inadvertently. The year 2000 sees the time of the Human Genome Project which seeks to decode the genetic strand to uncover humans’ chemical structure and find its shortcomings: it has been reported⁴⁹ in this context that project researchers have budgeted approximately 5 per cent of their funds to investigate any legal and ethical complications that may arise from their findings. The concept of medical privacy is not new in itself but the backdrop to future case-law is new now that individuals have reason to believe that the whole of their genetic makeup may be decoded and accessible.

In 1970 Jaques Velu in his contribution to the Brussels Colloquy on Privacy referred to Commission decisions of inadmissibility concerning compulsory medical examinations of accused persons and the investigation of a person’s social background by the department responsible for protecting young persons. He stated:

“The problem of the infringement of the right to respect for private life is much more complex when it comes to using methods which really do amount to an assault on an individual’s privacy – projection tests which reveal ideas or feelings which he cannot or does not wish to express, sincerity tests used to assess his moral level and above all narco-diagnosis, which consists in administering sodium barbiturate tablets and taking advantage of the weakening of consciousness thus produced in order to carry out various neurological, psychological or psychiatric examinations.”

⁴⁷ Note 34 above.

⁴⁸ Judgment of 7 July 1989, Series A No.160.

⁴⁹ *Sunday Tribune* 28 May 2000.

On the whole, Convention case-law since then has not thrown up major issues in the areas identified by M. Velu but this is not to say that problems of the nature that he described do not exist at national level.

The Commission has found that a compulsory medical intervention, even if it is of minor importance, must be considered as an interference with the right to respect for private life. However the public has a prevailing interest that the courts should have the power to make use of harmless scientifically-proved methods of obtaining evidence for the purpose of determining paternity relationships.⁵⁰ The Commission also rejected a complaint about the obtaining of medical evidence in a case where there was concern as to the applicant's mental competence to handle his affairs.⁵¹ Likewise, the Commission considered that a requirement to undergo methods of tuberculosis screening was justified to protect both public health and the applicant's health and was not disproportionate to that aim.⁵² The Court, for its part, found no violation of Article 8 by reason of the forcible administration of food and neuroleptics in a situation where it was argued that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue and where the patient was regarded as entirely incapable of taking decisions for himself.⁵³

The individual's interest in not being compelled to disclose her private medical history unnecessarily was an implicit factor in the Court's reasoning when it agreed with the Commission that, as a result of the frequent necessity for a French transsexual to disclose information concerning her private life to third parties, she suffered distress which was too serious to be justified on the ground of respect of the rights of others.⁵⁴ The question of confidentiality of medical information arose more directly in the case of *M.S. v Sweden*.⁵⁵ The applicant, who had made a claim for compensation for industrial injury from the Social Insurance Office, complained about the communication of her medical records from a women's clinic at the request of that Office. The records contained information about an abortion. The Court found no violation on the facts but said that domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees of Article 8. On the other hand there was such a violation in another 1997 case, where a Finnish court had named the applicant, Z, as being an HIV carrier. The domestic proceedings primarily concerned the applicant's husband who, following complaints of rape, was ultimately convicted of various counts of attempted manslaughter by reason of having deliberately subjected a number of individuals to a risk of HIV infection. The Court found that the publication of the applicant's own name and HIV infection was not supported by cogent reasons and gave rise to a violation of her right to respect for private and family life.⁵⁶ The reasoning in both of these cases started from the principle

⁵⁰ Appln 8278/78, *X v Austria*, Dec.13.12.1979, DR 18,154.

⁵¹ Appln 8509/79, *X v FRG*, Dec.5.5.1981, DR 24,131.

⁵² Appln 10435/83, *Acmanne v Belgium*, Dec.10.12.1984, DR 40,251.

⁵³ *Herczegfalvy v Austria*, Judgment of 24 September 1992, Series A No.244.

⁵⁴ *B v France*, Judgment of 25 March 1992, Series A No.232.

⁵⁵ Judgment of 27 August 1997, Reports of Judgments and Decisions 1997-IV.

⁵⁶ *Z v Finland*, Judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I.

that confidentiality is necessary to preserve confidence in the medical profession. In the *Z* case the Court went on to say:

“Without such protection [of personal medical data], those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate medical treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community.”

Against the background of such Convention case-law, the Court’s attentions may be focused in future years on new issues arising out of increasing use of DNA tests. How far would the reasoning in the *Z* case be applicable in the event of a complaint that national law permits insurance companies to seek genetic testing to assess a person’s risk of inheriting serious illness and/or that the law permits financial institutions or employers to compel individuals to undergo such testing and to give access to the results? Does the right to physical and moral integrity include the right to respect the wish of an individual leading an ordinary working, insured and mortgage-prone life to remain personally ignorant – and, by implication, to keep others ignorant – of future health risks, in much the same way as a pregnant woman may not wish to know in advance whether her child is brain-damaged? What countervailing interests could justify the imposition of such knowledge or its disclosure to third parties? Absent official concern about health risks to the community⁵⁷, the most obvious interest in the balance is an economic one: that of insurance companies to weight insurance premiums in a manner most financially advantageous; and that of employers to assess the risks to the efficiency of their enterprises. At a time when the market economy has an extraordinarily pervasive effect on the culture of many member States, it is not easy to be sanguine about the future balancing of the public interest in the economic well-being of the country with the individual’s right to respect for private life.

The position may be simpler within the context of family relations (such as voluntary pre-marriage medical tests) and within the context of the investigation of crime and the obtaining of evidence to that end. Existing Convention case-law on the gathering and storing of data relating to the private life of an individual may provide some guidance as to the safeguards against arbitrariness that would help justify any such interference.⁵⁸

(g) Surveillance measures

Secret surveillance of telephone conversations by or with the assistance of the security forces is a long established phenomenon. Because of the lack of public scrutiny and the risk of misuse of power it has been established that domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the

⁵⁷ As in the case of tuberculosis screening : see note 52 above.

⁵⁸ *Leander v Sweden*, Judgment of 26 March 1987, Series A No. 116; *Amann v Switzerland*, Judgment of 16 February 2000.

circumstances in and conditions on which public authorities are empowered to resort to any such secret measures.⁵⁹ Calls made from business premises as well as from the home may be covered by the notions of “private life” and “correspondence”. It seems to follow from the *Halford* case⁶⁰ that at least in the absence of any warning given that office calls would be liable to interception a Government employee or office-holder may have a reasonable expectation of privacy so that the guarantees of Article 8 would apply.

This jurisprudence seems sufficiently highly developed to cope with complaints concerning other methods of surveillance by State authorities, whether by means of old technology in new circumstances (such as the use of listening devices in a prisoner’s confessional or against the wall of a suspect’s home) or in relation to new technology (such as Internet or E-mail communications).

What seems to be a new phenomenon is the extent to which private individuals can gain access through legitimate commercial outlets to sophisticated surveillance equipment for the purpose of spying on other private individuals. The paper presented by Professor Jones at the 1970 Brussels Colloquy⁶¹ gives, with the benefit of his experience as Director of Scientific Intelligence in the Ministry of Defence, descriptions of the “major weapon[s] of espionage and security services, of the private enquiry agent and of industrial espionage” at a time when “the cost is so high that only a small proportion of individuals could be kept under surveillance all the time”. Thirty years later it is necessary to be aware of measures that may be taken relatively cheaply by such small actors on the stage as parents wishing to monitor the conduct of a baby-sitter in their absence.

With regard to the use of surveillance techniques by private employers, the non-governmental organisation Liberty argued in their third party intervention in the *Halford* case that, even if the State was not the employer, Article 8 imposes a positive obligation to protect employees against surveillance. (In the above-mentioned case of *X and Y v Netherlands*⁶² the Court had said that the positive obligations under Article 8 “may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”) However, this step was not necessary for the Court’s reasoning in the *Halford* case leading to a finding of violation, and the Court refrained from taking it.

The issue of surveillance by private parties, if not already pending before the Court, may present itself before long, in the light of the spiralling usage in the workplace of closed circuit television (over 700 per cent increase in two years in Ireland, according to reports⁶³). Commission case-law on video and photographic surveillance is not particularly helpful. In *Appln 18670/91v*

⁵⁹ *Klass v FRG*, Judgment of 6 September 1978, Series A No.28; *Malone v United Kingdom*, Judgment of 2 August 1984, Series A No.82; *Huwig v France*, Judgment of 24 April 1990, Series A No.176; *A v France*, Judgment of 23 November 1993, Series A No.277.

⁶⁰ Judgment of 25 June 1997, Reports of Judgments and Decisions 1997-III.

⁶¹ Note 2 above.

⁶² Note 19 above.

⁶³ *Irish Independent* 18 February 2000.

*Ireland*⁶⁴ the applicant objected to the taking by a private investigator of photographs from outside the boundary of her home but showing her inside it closing a window. The case was rejected for non-exhaustion of domestic remedies. More recently, in a case against Belgium⁶⁵, a complaint was made that there was no legislative provision governing forms of visual surveillance that did not involve the recording of data. The Commission decided that there was no appearance of an interference with private life. Its reasoning was that the photographic systems in question were likely to be used in public places or in premises lawfully occupied by the users of such systems in order to monitor those premises for security purposes. Moreover, all that could be observed was, essentially, public behaviour: the data was identical to that which somebody could have obtained by being on the spot in person.

In the light of this case-law and where there is an absence of national laws adequately regulating such matters, there seems ample scope for the development of Convention jurisprudence concerning unwarned audio or visual surveillance not only on streets and other public places but also in privately owned or controlled premises. Clothing stores, for example, could have an interest in monitoring the conduct of possible shop-lifters in changing rooms or of staff in taking unauthorised cigarette breaks. The test seems to be the Court's willingness to apply, in an appropriate case, the principle that Article 8 can require the taking of measures to secure respect for private life in the sphere of relations between private individuals.

(h) Intrusive publicity

The Commission has been prepared to take steps in the direction of such a positive obligation to regulate relations between private individuals in the areas of intrusive publicity and harassment. The question of intrusive publicity has new relevance at the turn of the century by reason of the ease and speed with which allegations or facts about an individual's private life can now be communicated world-wide and by reason of possible new and more intrusive development and/or application of information technology. When these developments in the means of transmitting information are associated with the apparently new phenomenon of surveillance technology being widely and affordably available in commercial outlets, the scope for turning the details of an individual's intimate life into a saleable commodity and against his will seems to be unprecedented.

In the relatively innocent days of the 1970 Brussels Colloquy on privacy, M. Velu was in a position to say:

“The point of balance between the requirements of Article 8 and those of Article 10⁶⁶ would seem to lie in the notion of public interest, which, of course, must be distinguished from public curiosity. In principle the press is not entitled to interfere in the private lives of individuals . . . But in certain exceptional circumstances the making known through the

⁶⁴ Dec.1.12.1993, apparently unreported.

⁶⁵ Applns.32200/96 and 32201/96, *Herberg v Belgium*, Dec. 14.1.1998, DR 92,92.

⁶⁶ Guaranteeing, with qualifications, the right to freedom of expression including freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers.

press, film or television of facts which normally form part of private life may be justified because required in the public interest, especially if that person is a public figure.”

The two major decisions (both of inadmissibility) in this difficult area emanated from the Commission in the 1990s and do in fact concern well-known persons but the Commission did not pronounce on whether these were “public figures” and the extent, if any, of “public interest” in the material. These decisions had been preceded by a decision of inadmissibility – for non-exhaustion of domestic remedies – in a case where the Commission nonetheless accepted that the State was under an obligation to secure the applicant’s Article 8 rights by providing adequate protection to her against deliberate persecution in the form of harassment by a former partner.⁶⁷

In one of these two cases⁶⁸ complaints were made about the failure of the United Kingdom to prohibit the publication and dissemination of information relating to the private life of the first applicant (for example, references to the state of his marriage) and about the taking with a telephoto lens of photographs (which were subsequently published) of the second applicant while she was in the private grounds of a clinic where she was obtaining treatment. The Commission said that it would not exclude that the absence of an actionable remedy in relation to the publications could show a lack of respect for their private lives. In the event the Commission concluded that the remedy of breach of confidence (against the newspapers and their sources) was available to the applicants and that that they had not demonstrated that it was insufficient or ineffective to the circumstances of their cases.

That case concerned intrusive publicity regardless of whether the material published was true or false. In the other case⁶⁹ the applicant, in contrast, wished to take proceedings in malicious falsehood (but under domestic law could not in the absence of evidence that the publication was calculated to cause him financial loss) or in libel (but there was no legal aid for such and in any event he was advised not to sue in libel due to his pre-existing infamous reputation as a moors murderer). There was evidence that the material had been fabricated and that its publication had led to a significant deterioration in the applicant’s mental condition. The Commission said that in limited circumstances the Convention will impose a positive obligation on a High Contracting Party to protect the right to respect for private life. However, it considered that the right to privacy was protected by these two remedies and that the fact that the applicant in the particular circumstances of his case could not succeed in establishing either cause of action did not cast doubt on their effectiveness.

The same line of thinking was brought to bear in a case⁷⁰ introduced by a company whose object was the sale to its customers of information which it

⁶⁷ Appln 20357/92, *Whiteside v UK*, Dec.7.3.1994, DR 76,80.

⁶⁸ Applns 2881/95 and 2882/95, *Earl and Countess Spencer v UK*, Dec.16.1.1998, DR 92,56.

⁶⁹ Applns 27436/95 and 28406/95, *Ian Stewart-Brady v UK*, Dec.2.7.1997, DR 90,45.

⁷⁰ Appln 32849/96, *Grupo Interpres S.A. v Spain*, Dec.7.4.1997, DR 89,150.

sought to obtain from court registries. The Commission, in rejecting the complaint, said that where the exercise of the right to freedom of expression may interfere with the rights of others, and in particular the rights protected by Article 8, the scope of the right of access to the information in question is limited by the wording of Article 10(2).

However, for its part the new Court seems to be some distance away from envisaging a right to protection against intrusive publicity, if one is to judge by the priority it gave to freedom of press issues over the application of defamation remedies in the recent case of *Tromso v Norway*.⁷¹ The Court found that, in the particular circumstances, a newspaper was not required to carry out its own research into the accuracy of the facts reported and that the undoubted interest of the defamed crew-members of a seal-hunting vessel in protecting their reputation was not sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest (methods of killing seals). The forcefulness of the dissenting opinions in this case is reminiscent of an earlier Article 10 case where, notwithstanding invocation of the necessity for the protection of the reputation or rights of others (members of a different race), a violation was found, prompting some members of that minority to protest that, while they appreciated that some judges attached particular importance to freedom of expression (“the more so as their countries had largely been deprived of it in quite recent times”), they could not accept that this freedom should extend to encouraging racial hatred and contempt.⁷²

Against this background, it seems that, while there are the beginnings of stepping stones in the Commission’s case-law for the tools to cope with the failure by persons engaged in the exercise of freedom of expression to keep in mind their “duties and responsibilities” referred to in Article 10(2), there is not a strong body of Article 8 jurisprudence to which legislatures can refer when addressing the threats to privacy posed by new and evolving technology, including the transnational implications of the Internet.

GENERAL COMMENT ON THE “NEW” ISSUES

New and potential scientific and technological developments, whatever their benefits, pose grave risks that some individuals in future years and decades may become involuntary research subjects; that information as to the likely development of their lives may be thrust on them against their will with consequent pressure on their lifestyle; that their intimate words and actions may be secretly monitored by private entities or individuals; and that material thus gathered may be made available globally almost instantaneously. The structure of Article 8 as it has been interpreted contains the means to condemn *ex post facto* a State’s failure to provide an appropriate legal regime that would regulate potential invasions of one individual’s private or family life by other individuals or entities, not forming part of the apparatus of government and pursuing essentially private interests. However, it may be that the person whose privacy or family life has been intruded upon will not become aware of a cause for complaint until

⁷¹ Judgment of 20 May 1999.

⁷² See the Dissenting Opinion of Judges Golcuklu, Russo and Valticos in *Jersild v Denmark*, Judgment of 23 September 1994, Series A No.298.

years after the event, if ever. The pace of change in Article 8 jurisprudence may be indirectly determined or driven by applications brought by these other, “intruding”, individuals or entities invoking freedom of expression or of association or property rights or, indeed, their own self-development as an aspect of private or family life. The case-law that would facilitate national legislatures to identify clearly their responsibilities under Article 8 to regulate the conduct of private individuals in certain areas may take longer. In the meantime there may be an important role for third party interventions before the Court by organisations representing neither the interests of a given applicant nor the interest that a Government may have in defending its own country’s chosen legislative regime.⁷³

CONCLUSION

The foregoing consideration of four “old” aspects and four “new” aspects of Article 8 could lead some to consider that Convention jurisprudence has from the outset been developing in an adequately measured pace to meet the challenges of the future at any given stage. It could lead others to wonder whether the degree of protection of, for example, prisoners’ rights might not be more visible at the end of the twentieth century if priority categories of issues affecting particularly vulnerable individuals could be identified sufficiently early in the consideration of a case.

In his essay “Reflections on the Eve of the Twenty-First Century”⁷⁴ Alexandr Solzhenitsyn commented:

“Today, self-limitation appears to us as something wholly unacceptable, constraining, even repulsive, because we have over the centuries grown unaccustomed to what, for our ancestors, had been a habit born of necessity. They lived with far greater constraints, and had far fewer opportunities. The paramount importance of self-restraint has only in this century arisen in its pressing entirety before mankind.”

It is clear that many of the “new” issues arising out of medical, technological and other scientific developments raise fundamental ethical questions, as was recognised by the Court in the case of *X, Y and Z v United Kingdom*⁷⁵. In this respect, it is heartening to note that, while the clause “for the protection of morals” in paragraph 2 of Articles 8 and 10 has often been regarded as relating to sexual mores, some judges appear to have advocated a broader approach towards the interpretation of the word “morals” as a permissible aim for an interference with such rights, so that it may include, where appropriate, allowance for the imperatives of the historical context of a given country⁷⁶. The contrast between the speed of change in the last

⁷³ See the Concurring Opinion of Judge Pettiti in *X, Y and Z v United Kingdom*, note 34 above.

⁷⁴ “At Century’s End” ed. Gardels N.P.; publ. 1997 Wolfhound Press Dublin; 1995 ALTI San Diego.

⁷⁵ Note 34 above.

⁷⁶ *Lehideux and Isorni v France*, Judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII; see dissenting Judgment of Judges Foighel and Loizou and Sir John Freeland with regard to a law concerned with offences of collaboration with the enemy.

decades in the culture of some geographical areas within the jurisdiction of the Council of Europe and the continuing relatively traditional form of lifestyle in other such geographical areas is likely to be mirrored on a wider scale in future decades. If the Court is seen to be adopting a restrained approach towards the interpretation of Article 8 in coming years this may be more a reflection of what Professor Jones, quoted at the beginning of this article, saw as a need to think afresh from time to time rather than an indication of any diminution in the standards of protection of human rights consequent upon the recent accession of many new member States to the Council of Europe.