

Wainwright V United Kingdom: Filling the Gaps of Common Law Rights To Privacy Under The European Convention On Human Rights

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ABSTRACT:

Human Rights took a significant shape following the Universal Declaration in 1948. Since then systems of law have sort to see that these rights are guaranteed and protected. The common law system in the United Kingdom is one of such systems that have ensured the protection of rights of its citizens. But one glaring aspect of rights which remained lagging as seen in the decisions of courts in England was the right to privacy. The criticism that followed the shortcoming of the common law system in guarantying right to privacy appears to have been put to rest following the Decision in *Wainwright v United Kingdom* and the domestication of its principles. By analysing the case of *Wainwright v United Kingdom*, this article x-rays and exposes the shortcomings of the common law system and celebrates the stability now being enjoyed by the legislative intervention of British parliament in domesticating the European Convention of Human Rights into the Human Rights Act, 1998.

1. INTRODUCTION

Human beings as a matter of natural course are entitled to certain rights which are a reflection of a necessary good for common humanity. Such rights are perceived to be so fundamental and inalienable that its denial will derogate and perhaps extinct the very essence of human existence. This point is richly emphasised in the American declaration of independence on 4th July 1776 that “we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness”.

It was on recognition of these that the General Assembly of the United Nation on 10th December 1948 adopted the Universal Declaration of Human Rights. Article 1 declares that ‘all human beings are born equal in dignity and rights...endowed with reason and conscience and should act towards one another in spirit of brotherhood’¹. This emergence of human rights law in international sphere is one of the most significant developments since the Second World War.²

Sequel upon this therefore, states have over the years evolved systems of legal structure to provide adequate safeguard of these fundamental principles of human right and rules of equality for the protection of human dignity and right of existence of all persons. In pursuit of this, it was realised that even within the western bloc, sovereignty and exclusive jurisdiction of states to provide its citizens of these sacred rights without international interference was no longer adequate. As a result, the emphasis for the creation of an international instrument for human right protection that will bind every member state became necessary to provide effective global legal structure to offer the much needed protection respecting the rights of victims of human right violations in any member state. This entails a substantial surrender of sovereignty and jurisdiction of state to accommodate a common good of humanity. These views dominated in the proposal for the European Convention on Human Rights which confers upon individuals rights enforceable against the state within the community confines. The underlying principle of human rights as properly enshrined in the convention is regard for human dignity and freedom of persons. And human freedom and human dignity requires that individuals should be given the leverage and latitude to choose how best to shape their life or conduct their personal affairs and relationships

¹ See Article 1 United Nation Universal Declaration of Human Rights.

² C.T Emejuru and J.O Okpara, ‘ Human Rights and State Sovereignty in International Law: An Examination of some Contentious Issues’. Kogi State University Bi-Annual Journal of Public Law, vol.3, No.2, 2010. Pp 36-46

with others without unnecessary interference. The “right to be left alone” as it is being described in some jurisdictions like the USA, is not the limit of responsibility of the state in guaranteeing these rights as envisaged by the convention. There is therefore a positive responsibility on the part of the state to ensure that these rights are provided and where there is a possible breach, adequate framework for remedy should be in place.

In England, the rights under the convention are not automatic in terms of domestic application. The convention must therefore be incorporated into the domestic law by Act of parliament as exemplified in the Human Rights Act 1998. This is very important to the significance of the convention under the British constitutional law arrangement to which the parliament is supreme. In the words of Lord Bridge in *R V. Home Secretary, exp. Brind*:¹

“It is accepted, of course, by the applicant that, like any other treaty obligations which have not been embodied in the law by statute, the convention is not part of the domestic law, that the court accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with Convention, the courts must nevertheless enforce it.”²

Prior to the reception of the Act, it is not to be said that the common law as well as statutes did not recognise various facets of human rights in England even as recognised by the convention. Rights such as the right to life, rights to personal liberty, freedom of expression, freedom of conscience and religion, freedom of association and assembly, freedom from arbitrary search and seizure, personal injury tort, and so on all have been recognised by the English law.

But strikingly, it has been held by the courts in England that the common law as well as statute has no room for general right to privacy as such. In the words of Glidewell L J in *Kaye v. Robertson*³

“...it is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person’s privacy”

But subsequently, the courts appeared to have displayed willingness to establish law of privacy by introducing the common law breach of confidence.⁴

However the measure of rights protected under common law breach of confidence is below the degree of protection of privacy to which the convention guarantees under Article 8 of the European Convention on Human Rights which provides for right to respect for private and family life and correspondence. This point became glaring following the House of Lords decision in *Wainwright v United Kingdom*⁵.

In this paper, we consider the scope of the right guaranteed under Article 8 ECHR against the backdrop of the decision in *Wainwright v United Kingdom* (supra). We expose in this paper the very limitation and deficiency of the traditional common law system of protecting Human Rights following the decision of the House of Lords in this case⁶ and examine the very ambit and the scope of right under the convention via the domestication Act⁷ as a necessary legislative instrument in filling the gaps.

2. HUMAN RIGHTS IN THE UNITED KINGDOM PRIOR TO HUMAN RIGHTS ACT 1989: AN ANALYSIS OF THE WAINWRIGHT’S CASE.

Rights are important to humans. And every modern society makes laws which are geared towards the provisions of rights to protect its citizens as well as ensure order and social security in a democratic climate.

¹ (1991) 1 A.C 696, 747

² *C Baker, The Act in Outline in Christopher Baker (gen. ed), Human Rights Act 1998: A practitioner’s Guide* (sweet & Maxwell, London 1998) 5

³ (1991) FSR 62 at 66

⁴ See *Hellewell V Chief Constable of Derbyshire* (1995) 1 WLR 804 at 807

⁵ (2007) 44 E.C.H.R. 40

⁶ *Wainwright’s case*

⁷ Human Rights Act, 1989

A right simply implies that a person has the entitlement to lay claim over a thing either in rem or in persona. As has been identified by Hohfeld, there are; claim rights, where a person holds an assertion over a thing above another's claim on the same thing; liberty rights, where a person is free to conduct his affairs and business as he deems proper; a power, entitling or empowering a person to partake in something; and an immunity where a person is protected against the arbitrary power of another person.¹

According to Charles Humana² Human rights are the laws, customs, and practices that have evolved over the centuries to protect ordinary people, minorities, groups, and races from oppressive rulers or governments.

The English law over the years have developed system which recognises the civil and political rights of citizens. Prior to the reception of the Act, the common law as well as statutes did recognise various aspects of human rights even as guaranteed by the European convention on Human Rights. Rights such as the right to life, right to personal liberty, freedom of expression, freedom of conscience and religion, freedom of association and assembly, freedom from arbitrary search and seizure, personal injury tort etc. Apart from these, there also exist parliamentary enactments which are specifically provided to ensure that the rights of citizens are adequately guaranteed.³ However, it is obvious that there is no specific statute which sought to guarantee the citizens' right to privacy neither did the common law. As pointed out, the lack of specific law of privacy in English law was felt to be one of the most glaring deficiencies of the traditional common laws system of protecting human rights.⁴ Although, attempts were made by the common law Courts in England to develop certain rights which sought to protect certain aspect of privacy interest such as common laws of trespass, defamation, and confidentiality. In the case of *Malone v Metropolitan commissioner*⁵ the court was of the opinion that the action must fail partly on grounds that the applicant's claim for breach of privacy was an action not recognised by English law. On the same breath, in *kaye v Robertson*⁶ the court of appeal after admitting that the invasion by reporters into the applicant's hospital room while he lay sick and conducted an interview with him was 'monstrous', however held that there was no law for breach of privacy under the common law as such, that the claimant would have relied on the law of malicious falsehood to remedy his claim.⁷

The effect of the obvious lacuna in the common law became more glaring following the controversial but celebrated case of *Wainwright v Home Office*⁸ where the House of Lords in upholding the decision of the Appeal court affirmed that there was no right to privacy under the common law.

The facts are that Mrs Wainwright and her disabled son went to visit her son O'Neill in prison at HMP Armley, Leeds, who was remanded on grounds of suspected murder. He was suspected by prison authority of supplying drugs in the prison to which the governor, acting under Rule 86(1) of the prison Rules 1964 (consolidated 1998) which empowers the prison authority to conduct searches on any visitor of the prison, had ordered that all visitors to the prison be strip-searched. They were subsequently upon their arrival taken to different rooms to be searched. Mrs Wainwright was asked to remove her cloths and underwear in a room overlooking an open window and had her genitals and anus inspected. Her son was also told to remove his cloths and his boxer shorts and he had his penis lifted by an officer. They both were made to sign a consent form to which they did not read before signing. They did not continue with the visit. Upon examination, Mrs Wainwright was found to have suffered from emotional stress and her existing mental condition had deteriorated. Alan the son had suffered from post-traumatic disorder as a result of his experience.

The applicants subsequently brought an action before the Leeds crown court for alleged battery, trespass to person and breach of privacy. The Judge was of the position that the search was conducted contrary to the prison Rules as it was not proportionate to legitimate concern to prevent drug smuggling in the prison and was as such unlawful. The court held further that the search constituted a breach of the applicants' rights to privacy as they

¹ R Clayton and H Tomlinson, *The Law of Human Rights* (vol 1, Oxford 2000) 19-20

² In his book, *world Human Rights Guide* (3rd edn Oxford 1992) 4

³ For instance, Abortion Act 1967, Education Act 1996, Data protection Act 1998, are all specific statutes which seeks to protect human rights.

⁴ S Foster 'Prison searches, the rights to privacy and the European Convention on Human Rights' (2006)11(2) Cov. L.J, 59-68

⁵ (1979) Ch 344

⁶ (1991)FSR

⁷ S Forster 'Prison Searches, the rights to privacy and the European Convention on Human Right' (2006) 11(2) Cov. L.J 59-68

⁸ (2004)2 AC 406

could rely on the provisions of Article 8 of ECHR even though the Act had not been domesticated at the time of the breach.

On appeal, Court of Appeal held that actionable trespass upon which the action is based does not extend to where a person was asked to take off her clothes. The court further held that the applicants could not rely on Human Rights Act 1998 as the act complained of took place before the Act was domesticated and came into force. The claimants therefore could not rely directly on Article 8. The court however found the touching of the boy's genital as battery as it was in breach of the prison rules.

The claimants further appealed to the House of Lords. The House of Lords in dismissing the appeal held that there is no such action available for invasion of privacy in English law. The House of Lords also held as an obiter dictum that the action may not have succeeded even if the Act was applicable following the fact that a negligent act which eventually affected the privacy of an individual does not necessarily give rise to a right under Article 8.

The action was finally taken before the European Court of Human Right where the applicants claimed violation of Article 3, Article 8 and Article 13 of the convention respectively.

In considering the issues before it as to whether there was a breach of Article 3, the court took into account whether the purpose of the search was to humiliate the personality of the complainant. In properly applying the case of *Yankov v Bulgaria*¹ the court held that for there to be a breach of Article 3 the search must have been conducted in a manner which tends to humiliate and in fact degraded the personality of the complainant evidenced in the procedure adopted. Where a search is carried out with a legitimate intent and with respect for human dignity, Article 3 need not be invoked. In the instant case, the treatment was not severe enough to warrant a breach of the said section.

However, the court held that the requirement to submit to strip-search is an interference with the rights under Article 8. The court was of the opinion that although the search was in legitimate pursuit of fighting drug problem in the prison, it was however carried out in a disproportionate manner for failure to adhere strictly with the prison rules. As a result of the circumstances above, there was also a breach of Article 13 of the convention.

3. NATURE OF RIGHTS PROTECTED UNDER ARTICLE 8 OF ECHR

The convention under Article 8 has indeed filled the obvious gap of the traditional common law as long as Right to privacy is concerned. Its subsequent domestication into the English law with its full effect enforceable from October 2000 has indeed marked a change in the British constitutional and legal arrangement. As pointed out by Professor A T H Smith²:

“There can be little doubt that, through the enactment of the Human Rights Act 1998, the UK is on the verge of making major changes to its constitutional arrangement for the protection of rights, and commensurate with that, to the fabric of common law”

This arrangement is beautiful and worth appreciation to the extent that while the Rights are been incorporated and domesticated, it allows and recognises the legislative supremacy of the parliament.

Article 8 of the European Convention on Human Rights states as follows:

- (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 in accordance with the law and is necessary in a democratic society in the interest 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 freedom of others.

From the tenor of the forgoing provision, it is obvious that the Article 8 is aimed at safeguarding those aspects of rights which are considered private to the human person. The wording of the provision clearly shows an outright intention to protect the individual from any arbitrary interference to his personal life by state authority. A liberal

¹ (2005)40 E.C.H.R 36

² *The Human Rights Act 1998(1999)CLR 251* in S Makkan *The Human Rights Act 1998: The Essentials* (London 2000) vii

approach to the interpretation of the ambit of this provision may be misleading as to suggest that a state that merely refrains from interfering with the rights sought to be protected will be in total compliance. It definitely requires more than that. There is therefore a negative as well as a positive responsibility on the part of the state in complying with the provision. The court in *Marckx v Belgium*¹ emphasised on the positive responsibility of the state when it stated that;

“When the state determines in its domestic legal system the regime applicable to certain family ties...it must act in a manner calculated to allow those concerned to lead a normal family life”.²
It was on the basis of this positive responsibility that formed the basis upon which the court held in *Airey v Ireland*³ that failure to provide legal aid for a woman who sought judicial separation amounted to a violation of the said right under Article 8.

However, the right under Article 8 is not absolute in nature. There are given instances when these rights can be interfered with but only in limited circumstances. The state under such circumstances will be justified to interfere with these rights provided that such interference is within the justifiable ambit of Article 8(2) that is to say; in accordance with the law, necessary in a democratic society in the interest of national security, economic well-being of the country, prevention of crime, and protection of rights and freedom of others.

The substantive areas of right protected under Article 8 are;

- (a) Private life;
- (b) Family life;
- (c) Home; and
- (d) Correspondence.

(a) Private life

The concept of respect to private life is definitely wider in scope and goes beyond the mere right to privacy. The European commission in the application brought before it in *Bruggemann and Scheuten v Federal Republic of Germany*⁴ stated that;

“The right to respect for private life is of a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons. In principle, therefore, when the state set up rules for the behaviour of the individual within this sphere, it interferes with the respect for private life and such interference must be justified in the light of paragraph (2) of Article 8”.

The court further stated in *Niemietz v Germany*⁵ that;

“The court does not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life’. However, it would be too restrictive to limit the notion to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationship with other human beings.”

¹ (1979-80)2 ECHRR 330

² D Gomien *short guide to the European Convention on Human Rights* (3rd eds 2005 council of Europe)80

³ (1979) 2 EHRR 305

⁴ 10 DR 100 (1977) (para 55 of the commission’s report

⁵ (1992) 16 EHRR 97, para 29.

Thus, the scope of what constitutes private life has generated some arguments among human right lawyers. But plethora of cases suggest that the following areas of private life are protected;

Right to moral and physical integrity

An individual is entitled a respect to his moral and physical integrity. The state must therefore make provision for vulnerable persons to seek remedy. A person must not also be subjected to compulsory treatment or physical examination. In *Y.F v Turkey*¹ the court held that the gynaecological examination carried out on the applicant's wife while she was in detention without her consent amounted to a violation of her right to respect for private life. Similarly, in *X and Y v The Netherlands*² the court held that the refusal to make available the right to prosecute for sexual assault by a mentally handicapped minor was a violation of her right to respect for personal life. Similarly, in *Raninen v Finland*³ the court was of the view that the unlawful detention and handcuffing of the applicant by the military authority and several refusals to allow him to carry on with military training violated this right.

However, it is to be noted that not every degree of act which affects individual moral and physical integrity will necessitate a violation of this right.⁴

Right to personal identity

Every individual has a right to his or her personal identity without unnecessary interference from any state authority. The individual should be at liberty to shape his life the way and manner in which he wishes to be identified according to his personal perception. He should be able to choose his name⁵, mode of dressing, appearance, and sexuality. The court has also held that an individual under this right is entitled an access to information relating to his upbringing as that cannot be refused on grounds of confidentiality⁶.

Respect for private space

Embedded in the provision of Article 8 is the right to respect for private space. This is not only limited to the right to quiet enjoyment of permanent place of abode but also include temporary places like the hotel rooms, restaurant and other semi-public places like in the car. Any act of invasion by the authority aimed at interfering with this right will be in contravention of the Article. It is however to be noted that the more public the act occurs will determine to an extent whether there is a violation of this right. The court has held in the case of *Friedl v Austria*⁷ that there was no violation of this provision following the applicant being photographed by the police during a political demonstration to which he was involved.

Rights to sexual orientation

Considered to be intimate with personal life is one's sexual relation and orientation. Inherent in the personal life of a person is his or her exclusive ability to rule his or her sexual world. The court has in a number of cases held that it is an unjustifiable interference for a law to prohibit homosexuality. In *Dudgeon v. the United Kingdom*⁸ where legislation in Northern Ireland makes the act of homosexuality an offence whether it was committed in public or in private. The applicant argued that such was an interference with his right to respect for personal life. The court held that such interference was not justified provided it was between consenting adult parties.

Closely related to this is the right of transsexuals. The position has seen some developments in recent time as opposed to earlier views⁹ where the court refused to hold that the refusal by the UK authority to amend official

¹ (2003)

² (1985) 8 EHRR, 22-27

³ (1997) 26 EHRR563

⁴ See for instance the court's decision in the case of *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112

⁵ *Burghartz v Switzerland* (1993) 18 EHRR 101, *Konstandinis v Stadt Altensteigstandamst* (1993) ECR-I 1191, ECJ

⁶ *Gaskin v United Kingdom* (1989) 12 EHRR 36

⁷ (1995) 21 EHRR 83

⁸ (1981) 4 EHRR 149

⁹ See *Rees v. United Kingdom* (1986) 9 EHRR 56 and *Cossey v. United Kingdom* (1990) 13 EHRR 56

records in order to give effect to the new personality of the transsexuals. Though this view is different from the views held by the court in the Belgian case of *Van Oosterwijk v Belgium*¹ where such act amounted to violation of Article 8. The reason dominating the views being that official registers in the UK are of historic significance. The court has also stated in *Sheffield and Horsham v. United Kingdom*² that the detriments suffered by transsexuals in the United Kingdom in certain context is of minor significance to consider refusal to alter the registry an infringement to this right.

But in more recent cases there appears to be a change in the position. In *Christine Goodwin v. United Kingdom*³ as well as *I. v. United Kingdom*⁴ the court has held a violation of the right to private life of transsexuals under Article 8.⁵

(B) Family Life

The right guaranteed under the convention is not that which seeks to protect a person's right to achieve and form a family but to protect an existing one. The court has however held in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*⁶ that it is not to be said that all intended families are entirely out of the scope of Article 8.

The interpretation given by the convention to the notion of 'family life' and what should constitute one has been an evolution that follows closely to the social dynamics of family life. The court in deciding whether or not an arrangement falls under this category so as to be protected by Article 8 takes into consideration a number of factors. The most primary basis of a family life is a husband and wife relationship. But a marriage entered into for purposes of immigration might not be protected by Article 8 as the state will be justified to act in violation. A marital relationship with evidence of consummation and cohabitation will be sufficient to establish the existence of family life. A relationship between a biological child and mother or that between step-mother and child is a clear indication of a family life except on exceptional cases. In *Berrehab v. Netherlands*⁷ the European court of Human Rights held that:

“the concept of family life embraces, even where there is no cohabitation, the tie between a parent and his or her child regardless of whether or not the latter is legitimate...Although that may be broken by subsequent events, this can only happen in exceptional circumstances”

As it is with all rights protected under Article 8, the state in according respect for family life is not only expected to refrain from interference but should act positively to ensure such protection. In emphasising this, the court in *Marckx v. Belgium* (supra) held that the Article 8;

“... does not only compel the state to abstain from...interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life”⁸

Family life under Article 8 extends to relationships otherwise than marriage. The court in *Kroon v. Netherlands*⁹ recognised instances of de facto family ties where partners are living together and make children outside marriage.

Respect for family life requires that each member of the family should have the right to enjoy family togetherness.

¹ (1981) 3 EHRR 557

² (1998) 27 EHRR 27

³ (2002)

⁴ (2002)

⁵ See D Gomien *short guide to the European Convention on Human Rights* (3rd eds 2005 council of Europe)80

⁶ (1985) 7 EHRR 471

⁷ (1988) 11 EHRR 322

⁸ Lord Lester & D Pannick *Human Rights Law* (Butterworths, London 1999)176

⁹ (1995)19 EHRR 263

(c)Home

The right guaranteed under this heading is synonymous and closely related to the one of respect for family life. There shall be no interference to one's enjoyment to his home. There should be peaceful and quiet enjoyment of home free from arbitrary searches, smell, noise, pollution and any sort of interference. Aircraft noise has been held to violate this right to respect for home. In *Hatton v United Kingdom*¹ the court found the complaint of the applicants who lived near RAF airbase where the jet aircraft produced noise that disturbed the peace of the occupants thereby causing depreciation in the value of the house to be violation of this right.

However, not all noise arising from an aircraft will give rise to a right under this heading.²

In *S v France*³ noise, night lights and creation of microclimate from a nuclear power station which affected the value of the house was held to be in violation of Article 8 but the court went on to hold that such interference was justifiable in the overall benefit of the community.

Apart from this category of interference, personal invasion such as arrest at home or forcible entry as well as denial from access to one's home have all been held to be interference to this right.

The right for respect for home presupposes that the state must act positively to remedy any act of interference to private home or justify such continuous interference relying on (2) of 8 of the Article.

(d)Correspondence

Interference with private correspondence is one of the vital categories of right protected by Article 8. It is an extension of what constitutes our private life relating to our communication with others. It appears though that those who drafted the wordings of Article 8 may have envisaged mail and telephone correspondence. But with the rise in technological advancement and rise in the variety of means of electronic communications, the Article is now interpreted to cover areas such as e-mails, fax transmission, text messages etc.

It will constitute a violation where the state uses its powers to gather private information and forms security data of a person without his consent or knowledge.

The instances under which this infringement can occur ranges from obtaining of personal detail from the security, photographing of an individual for purposes of police investigation, utilisation of fingerprint by the police after conclusion of a case, maintaining of medical records, tapping of telephone conversation, intercepting electronic correspondence, censoring prisoner's correspondence as well as mounting surveillance on a person. In *Silver v United Kingdom*⁴ where the prison authority placed a restriction on the category of personal correspondence which the prisoner can either receive or transmit, the complaint by the prisoners that such restriction were in violation of their Article 8 right was upheld by the court on grounds that such interference was not justifiable in a democratic society.

There has been concern over the justifiability of the use of such closed-circuit television cameras, telephone tapping devices and video recording constantly used by security agents for crime detection and prevention as such easily infringe the provisions of Article 8. This is particularly very significant in relation to the admissibility of the evidence procured in violation of Article 8 in criminal prosecution, especially when it is the only available evidence which the prosecution requires to sustain conviction. The court will certainly look at the manner of intrusion into the private life by use of the device to come with the overall conclusion as to whether such violation was in accordance with the law and justifiable in a democratic society. In *Khan V United Kingdom*⁵, the prosecution relied on the evidence obtained through illegal mounting of a listening device by the police where Mr Khan had made a confession to a friend of his involvement in a drug smuggling to which his cousin had been convicted of. The European court held that Article 8 had been violated although, the trial cannot be said to have been unfair. The court further held that the United Kingdom has violated Article 13 for failure to provide remedy for Article 8 violation.

¹ (2003) 37 EHRR 28

² See *Powell and Rayner v. United Kingdom* (1990) 12 EHRR

³ (1990) 65 DR 250

⁴ (1983) 5 EHRR 347

⁵ (2001) 31 EHRR 45

In all, surveillance and indeed any form of interference must be conducted in accordance with the law and necessary in a democratic society. The parliamentary enactment of the Regulation of investigatory powers Act 2000 after the Khan's case which provides a guideline to determine whether or not any state surveillance may infringe or justify the breach of Article 8 is a major step intended to reduce the risk of the breach of Article 8.¹

4. JUSTIFICATION FOR INTERFERENCE WITH THE ARTICLE 8 RIGHTS

Common with many principles of law is the attitude of striking a balance between a general position and circumstances that give rooms for limitation. It may lead us to the temptation of running into a hasty conclusion that there is no such thing like 'a right in absolute'.

This is why the provision has properly been made under Article 8 (2) which gives a guide as to when the state will be justified to interfere with those rights that form the basis of individual autonomy. There are two major grounds of interference, they are;

(a) Interference must be in accordance with the law

Article 8 (2) requires that any interference must be in accordance with the law. This simply means that there must be a domestic law which not only permits but also clearly prescribes procedure for such interference. Such domestic law must be a proper law with reasonable accessibility and not some form of norm or unpublished official directives.

(b) Interference must pursue a legitimate aim

The protection of public safety, national security, the prevention of crime, protection of other people's rights and freedom, economic well-being of the country and the overall interest of the community are basic recognised legitimate aims pursuant to which interference can be justified.

There is no doubt that issues of real purpose may arise but Strasbourg authority is always minded to favour the states.²

(c) Interference must be necessary in a democratic society

Any state which seeks to justify any act of interference in addition to establishing other requirements show that there was an urgent or pressing social need which when measured against the legitimate aim pursued will be proportionate. In short, the margin of appreciation which the state enjoys should be proportionate in measure.

5. CONCLUSION

Article 8 of the European Convention on Human Rights clearly remains a vital instrument that speaks volume of the need for social harmony not only as between individual citizens and the state but between citizens themselves as well. Its wordings have been given a wide range of interpretation to embrace those very vital aspects of our private life that requires the best of protection and as time goes on more principles will emerge through case laws to cover more areas.

States have in no doubt strived through domestic legislative initiatives and judicial interpretations of domestic courts to bring in alliance the rights guaranteed under Article 8 as exemplified by the United Kingdom Human Rights Act, 1989.

It is to my mind that the United Kingdom now enjoys a measure of stability in the legal climate over Right to privacy that was so dominated by criticisms before the decision in *Wainwright v United Kingdom*.

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¹ See D Hoffman & J Rowe *Human Rights in the UK An Introduction to the Human Rights Act 1998* (2nd edn Pearson Longman 2006)237-239

² C Baker; *The Act in Outline in Christopher Baker (gen. ed), Human Rights Act 1998: A practitioner's Guide* (sweet & Maxwell, London 1998)75

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