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The Human Rights Act 1998, section 12 - press freedom over privacy?

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*Ent. L.R. 36 Introduction

The Human Rights Act 1998 gives direct effect in this jurisdiction to the most significant Articles of the European Convention on Human Rights ("ECHR").¹ It is likely to enter fully into force before the middle of the year 2000. Much of the public debate during the Human Rights Bill's passage through Parliament concerned the potential conflict between "privacy" and "freedom of expression" to which it could give rise. In particular, representatives of the media expressed the fear that incorporation of Article 8 of the ECHR (protecting *inter alia* "private life") will lead to the introduction of a legal right to protect privacy in this jurisdiction.²

In response, the Government put forward an amendment to the Bill at a relatively late stage in its legislative progress. This amendment was accepted and resulted in the introduction of section 12, which expressly instructs courts to "have particular regard" to the right to freedom of expression. During the parliamentary debates on the amendment, the Home Secretary sought to offer reassurance to the media. He claimed that the effect of section 12 would be to require courts to take account of "the extent to which [the European Court of Human Rights] has come down in favour of press freedom as opposed to privacy."³

It is our purpose in this article to examine whether or not such reassurance is well founded and to ask whether section 12 will prove effective in alleviating media concern about the development of a right to privacy.⁴ We focus upon situations in which the arguments in favour of legal protection for privacy are most compelling. We are not interested in the private lives of Bill Clinton or Peter Mandelson. Rather, we are concerned with cases in which an assertion of a "right to privacy" is made on behalf of individuals with no evident "public" significance. If section 12 is effective in preventing such individuals from bringing claims of infringement of privacy, it will *a fortiori* be effective in preventing actions brought by public figures where arguments in favour of disclosure of information are much stronger.

An example of such a compelling case was provided by Clive Soley M.P. during the parliamentary debate on section 12. He reminded the Commons of the plight of an individual whom we shall call "X". In January 1998, X's father, who was a helicopter winchman, rescued nine people from a sinking freighter off the Shetland Islands. Following the rescue of the final person, he was swept to his death. In the wake of these events, the press made repeated attempts to interview X and publicise his situation. He was driven to make a public plea to be allowed to grieve in peace.⁵ It seems unlikely that any existing legal remedy would have enabled him to prevent this invasion of his privacy.⁶ In future, will the Human Rights Act allow those in similar situations to obtain legal redress against the press or other media?⁷

Does Article 8 "cover" unwanted media attention?

In order to answer this question, we must first establish whether disclosure of details about personal relationships and emotional reactions are actually "covered" by Article 8.⁸ This Article provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is

in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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.

Someone in the position of X is most likely to claim that they have suffered an interference with their ***Ent. L.R. 37** "private life".⁹ This phrase has been interpreted in a particularly creative way at Strasbourg. The European Court of Human Rights (hereafter "the European Court") has accepted that the criminalisation of consensual homosexual intercourse¹⁰ or the denial of access to personal records¹¹ can in certain circumstances infringe Article 8.

In addition, the Article covers matters which fall within the more restricted scope of the Anglo-Saxon notion of a "right to privacy", *i.e.* the right to object to the unwanted obtaining and disclosure of personal information. For example in *Malone v. United Kingdom*, the European Court held that the tapping of the applicant's telephone without his knowledge or consent constituted a breach of Article 8.¹² In that case, it was not simply telephone tapping which was found to constitute an interference for the purposes of Article 8. The *disclosure* of information derived from the "metering" of the applicant's telephone was also covered.¹³ There is little doubt that the form of unwanted publicity suffered by X would constitute an interference with "private life" for the purposes of the European Court.

Any such interference will therefore only be justifiable if done in pursuit of any of the purposes set out in Article 8(2). A journalist or newspaper proprietor's right to freedom of expression will, in the majority of cases, be covered by the legitimate aim of "the protection of the rights or freedoms of others" within Article 8(2). However, it is only where interference with an individual's private life is "necessary in a democratic society" that it will be justifiable under Article 8(2). The existence of such necessity will hinge upon the strengths of the respective parties' competing rights. As an individual in X's position would seem to have a strong privacy claim in this context, much would hinge upon the strength of any countervailing right to freedom of expression. Indeed, the counterbalancing weight of the media's claim to freedom of expression is at the heart of the issue considered in this article.

However, prior to exploring it further, we need to pause to investigate an important procedural question. Would someone in X's position actually be able to bring proceedings under the Human Rights Act? Would, for example, a newspaper in private ownership be bound by the Act? In other words, would the Act have "horizontal" as well as "vertical" effect? This is an issue which has excited considerable and divergent comment over the last few months.¹⁴

An applicant to Strasbourg can only bring an action against a *state* High Contracting party to the ECHR.¹⁵ This suggests that only public bodies have to comply with the protected rights. However, the situation is more complex than that. The requirement to "respect" the rights protected by Article 8 has been interpreted by the European Court to include an obligation upon states in certain circumstances to ensure that their laws adequately secure the protected rights against *private* parties.¹⁶ This is likely to extend to require a state to regulate media activities interfering with the interests protected by Article 8.¹⁷ In addition, the drafting of the Human Rights Act raises the possibility that it will have an impact upon private as well as public media organisations. Section 6 of the Act states that: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." This provision may allow someone in a situation like that of X to rely upon Article 8 in a number of different ways.

First, it is possible that certain media bodies, such as the BBC, will be "public authorities" in their own right and will therefore be committing an unlawful act if they interfere with an individual's private life, for example by broadcasting intimate details of a subject's personal history, without justification. Secondly, it is also likely that media watchdog bodies, such as the Press Complaints Commission, will be "public authorities" for the purposes of the Act and consequently will also be bound to "respect" the private lives of complainants in arriving at their decisions. Thirdly, it is arguable that the Human Rights Act will have a "horizontal" impact by virtue of the inclusion of *courts* within the definition of a "public authority".¹⁸ It can be argued that courts will therefore be obliged to respect the "private life" of parties in *any* case, even in litigation between private parties. A plaintiff such as X may invite a court to develop the common law in such a way as to secure his or her privacy. If a court were to refuse this invitation, it may be possible to argue that the court itself had failed to respect his or her interest under Article 8 and had therefore acted unlawfully.¹⁹

***Ent. L.R. 38** On balance, it would seem that the media have reasonable grounds for fearing that the Human Rights Act could lead to a "right to privacy". Disclosure of intimate personal facts would appear to be "covered" by Article 8 and it is strongly arguable that breaches of that Article will be

actionable against both public and private bodies. How then is it possible to explain repeated governmental assurances that incorporation of the ECHR will not lead to a “back-door” right to privacy?²⁰ These appear to be based upon the belief that the media's own rights to freedom of expression, protected by Article 10 of the ECHR, will be sufficient to prevent such a development. As will be seen, it is this belief which underlies section 12.

Human Rights Act 1998, section 12

Section 12 will apply whenever:

a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.²¹

The detailed requirements of “the Convention right to freedom of expression” (*i.e.* of Article 10) are considered below.²² First, however, it is significant to note that section 12 is expressly intended to apply *whenever* a court is considering a case giving rise to issues of freedom of expression, *i.e.* even if the parties are all private individuals or bodies.²³ In such a case, certain procedural safeguards for the media are introduced. *Ex parte* injunctions are prohibited save in the most exceptional of circumstances.²⁴ In any event, under section 12(2), interlocutory injunctions are not to be made on ordinary *American Cyanamid* principles.²⁵ Section 12(3) provides that:

Norelief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

This is likely to assuage fears of ambush by “gagging” order. However, it is the impact of the *substantive* protection provided by section 12 which is most interesting. Indeed, given that, under section 12(3), the decision on the award of an interlocutory injunction is to depend upon the likelihood of success in a final hearing, the Act's procedural protection is based upon this substantive protection for freedom of expression. Section 12(4) states that:

The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to--

(a) the extent to which--

- (i) the material has, or is about to, become available to the public; or
- (ii) it is, or would be in the public interest for the material to be published;

(b) any relevant privacy code.

Subsection 12(4)(a)(i) is likely to discourage courts from repeating the *Spycatcher* fiasco by awarding an injunction against the disclosure of information already in the public domain.²⁶ However, subsections 12(4)(a)(i) and 12(4)(b) introduce requirements which are unlikely to be of much assistance to courts faced with a difficult conflict between freedom of expression and private life. There are privacy codes for all main forms of media but they are subject to extensive exceptions in favour of the “public interest”.²⁷ Courts are unlikely to consider themselves to be bound by subsection 12(4)(b) to take account of the decisions of the regulatory bodies on the interpretation of the codes.

The requirement in subsection 12(4)(a)(ii) to pay particular regard to the extent to which it would be “in the public interest for material to be published” is likely to be similarly unhelpful without further theoretical consideration of the conflict of public interests in a “privacy” case. The common law defence of “public interest” has, to date, generally been used as a justification for permitting the publication of details revealing criminal or wrongful conduct,²⁸ of information of vital importance to public safety or liberty²⁹ or of hypocrisy.³⁰ It is a notoriously indeterminate defence and is not, as it stands, likely to provide courts with a useful tool for negotiating the difficult conflict between the right to a “private life” and the right to freedom of expression.

The most significant feature of section 12(4) is likely to be its general stipulation that courts must “have particular regard to the importance of the Convention right to freedom of expression”. In a case such as those under consideration here, this provision will force courts to confront the meaning of “freedom of expression”, and of the relationship between that right and the right to a “private life”, in a more systematic way than hitherto. They will be required to do this within a framework provided by the

ECHR. It is our purpose in the remainder of this article to consider whether this enforced enterprise is likely to secure the interests of **Ent. L.R. 39* the media against plaintiffs claiming infringement of privacy. What then is meant by an obligation to pay “particular regard” to Article 10?

“Particular regard”?

This phrase clearly does not oblige a court *expressly* to favour freedom of expression over the protection of privacy; *i.e.* to prefer Article 10 above Article 8. A proposed amendment in those terms was rejected in favour of section 12.³¹ In any event, such an inflexible elevation of one fundamental right over another would surely itself be incompatible with the Convention. The intention behind the provision seems rather to *emphasise* the particular significance that the European Court has granted to freedom of expression by comparison with the interest in “private life”.³²

In announcing the Government's intention to table the amendment, the Home Secretary stated that his department had produced a document containing an abstract of relevant cases decided at Strasbourg.³³ He claimed that this document, which was available in the Commons Library, demonstrated “the extent to which [the European Court of Human Rights] has come down in favour of press freedom as opposed to privacy and the right to family life”.³⁴ He added:

It is always the case that some legal concepts have greater force than others; it happens to be the case that the European Court has given much greater weight to [A]rticle 10 rights to freedom of expression than to [A]rticle 8 rights to privacy. We want to reflect that in our domestic law.³⁵

These remarks support the impression that section 12(4) is intended simply to draw courts' attention to the European Court's tendency to value Article 10 more highly than Article 8 when the two rights are in conflict.

However, the remarks are certainly not supported by the document to which the Home Secretary referred. It demonstrates no such preference. This is not surprising because the European Court has not yet considered the conflict between Article 8 and Article 10 in the context of media activity. Several applications to the European Commission of Human Rights (hereafter “the Commission”) claiming a violation of Article 8 arising from press activity have raised this issue and some are noted in the document.³⁶ These claims have generally been declared inadmissible on procedural grounds³⁷ or because of the availability of remedies against *false* allegations in the domestic law.³⁸ None however have been decided in a way which can reasonably be regarded as demonstrating a preference for Article 10 over Article 8.

In *Winer v. The United Kingdom*,³⁹ the Commission stated only that, in establishing whether a state has a positive obligation to protect against invasions of privacy by private parties, “Article 10 must be taken into account”.⁴⁰ Indeed, in the admissibility decision in *Earl Spencer and Countess Spencer v. United Kingdom*, the Commission went so far as to state that it:

would not exclude that the absence of an actionable remedy in relation to the publications of which the applicants complain could show a lack of respect for their private lives. It has regard in this respect to the duties and responsibilities that are carried with the right to freedom of expression guaranteed by Article 10 of the Convention and to the Contracting States' obligation to provide a measure of protection to the right of privacy of an individual affected by others' exercise of their freedom of expression.⁴¹

Despite the Home Secretary's claims, the Strasbourg jurisprudence shows no clear preference for Article 10 over Article 8. Accordingly, domestic courts seeking to resolve any apparent conflict between the rights will have to explore in greater detail the meaning of “freedom of expression” and “private life” and their respective values in a particular case. As a plaintiff in X's position has a strong privacy claim and as section 12 is expressly concerned with freedom of expression, much is likely to depend upon the precise weight to be accorded to the expression interest in any particular circumstances. It is to this issue that we now turn.

**Ent. L.R. 40* The requirements of Article 10

The “Convention right to freedom of expression” is contained in Article 10:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Paragraph 10(1) has been interpreted widely by the European Court. It has been held to cover forms of expression as diverse as written political criticism,⁴² graphic artistic works,⁴³ and commercial speech.⁴⁴ This broad interpretation has been possible, in part, because the right is not protected in absolute terms. As in the case of Article 8, Article 10 permits interference in defined circumstances. In particular, paragraph 10(2) gives national authorities power to restrict the exercise of freedom of expression for the “protection of the rights of others”. Such rights could, for example, include rights under Article 8. Any such restrictions are permissible only in so far as they are “prescribed by law” and are “necessary in a democratic society”. However, within this broad range of expression covered by Article 10, there exists a variable standard of protection depending on the type of speech involved. The extent to which the European Court has been willing to permit interference with freedom of expression has depended greatly upon the extent to which the particular claim to protection under Article 10 conforms with the fundamental reasons or justifications for the right of freedom of expression.

Several such justifications have been offered over the last 150 years.⁴⁵ Foremost amongst these have been the justifications from truth,⁴⁶ self-fulfilment and democracy. At Strasbourg, emphasis has been placed on the latter two justifications.⁴⁷ The justification from self-fulfilment⁴⁸ asserts that the freedom both to impart and receive ideas and arguments is a vital part of each individual's right to self-development and fulfilment. People will only be able to maximise their potential as human beings if they are free to express, and have expressed to them, ideas, beliefs and arguments. This justification has its greatest relevance in cases of artistic or cultural expression. It is obviously of limited application in a case such as X's where it is difficult to comprehend how self-fulfilment might be derived by a journalist from reporting on the personal grief of X.

The justification from democracy has been the philosophical foundation most relied upon by the European Court.⁴⁹ In its historical origins, it is particularly associated with Alexander Meiklejohn.⁵⁰ He argued that, in all democracies, ultimate sovereignty rests with the people and that the state is run on the principle of popular representative self-government. In order for this system to work effectively, it is vital that a free flow of information and ideas exists so that the people can make fully informed decisions. Without this, the sovereign body will be inhibited in carrying out its task, the deliberative process will be impaired and democracy will suffer. Freedom of the press is a vital element in this process and therefore is also of crucial importance.

The European Court's reliance upon the justification from democracy has caused it to be particularly sensitive to interferences with what could be broadly described as *political* expression. For example, in *Castells v. Spain* the European Court stated that:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.⁵¹

The vital “public watchdog” role of the press has also frequently been noted:

[I]t is incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise the press would be unable to play its role of public watchdog.⁵²

***Ent. L.R. 41** The extent to which a particular claim to the right to freedom of expression accords with the justification from democracy will be highly significant in establishing the strength of that claim under Article 10. As we have seen, the strength of the claim ought, in turn, to determine whether or not it prevails over an assertion of the right to respect for private life.

Which particular claims to the right to freedom of expression will benefit from this high level of protection bestowed by the justification from democracy? On a narrow definition, we may simply include speech relating to the actual processes of government and the public roles of the actors therein. Nevertheless, while the justification from democracy may have its greatest impact in cases of

narrowly political speech, it could certainly be argued to cover a much wider range of expression. The citizen requires information about many different issues of general public concern in order to exercise his or her democratic responsibilities. These could include, for example, information relating to the administration of justice, the running of public companies, the environment and privatised utilities.

The European Court's decisions seem to favour a definition extending beyond the narrowly political. For example, the case of *Thorgeir Thorgeirson v. Iceland* concerned a journalist's newspaper articles alleging brutality by members of the Reykjavik police force.⁵³ Thorgeirson was found guilty of criminal defamation by the Icelandic court. On an application to Strasbourg under Article 10, the Icelandic government argued, *inter alia*, that:

[T]he wide limits of acceptable criticism in political discussion did not apply to the same extent in the discussion of other matters of public interest. The issues of public interest raised by the applicant's articles could not be included in the category of political discussion, which denoted direct or indirect participation by citizens in the decision-making process in a democratic society.⁵⁴

The Court roundly rejected this argument and stated that:

[T]here [was] no warrant in [the European Court's] case law for distinguishing between political discussion and discussion of other matters of public concern.⁵⁵

Thus, while it is apparent that it is the justification from democracy that gives a special position to freedom of expression and of the press, the Strasbourg Court has not been restricted to an interpretation that is narrowly political.⁵⁶ How far then do "matters of public concern" extend? In particular, to what extent could the events surrounding someone like X constitute matters of public concern?

Certainly, if a narrowly political definition were to be adopted, the court would conclude that the reporting of the grief of X could have no relevance to the governmental process. It would not therefore be deserving of a high level of protection. If, as seems likely, a wider definition is used, this will still not provide a strong justification for the media's activities in X's case. It could be argued by the press that the circumstances of the tragedy itself may be matters of legitimate public concern, but it would surely be to stretch this argument beyond breaking point to claim that the private sorrow of X could be encompassed within the ambit of "public interest". If our courts recognise the theoretical basis provided for Article 10 in the Strasbourg case law (as they are required to do by section 2 of the Human Rights Act), it is difficult to see how they could find that X's personal tragedy falls within the scope of the principle, even in its most widely drawn form.

Conclusion

The rhetoric of the debate on section 12 in Parliament and in the media suggests general acceptance that the development of a right to privacy has been successfully forestalled. Lord Wakeham, on behalf of the Press Complaints Commission, is reported to have said of the amendment: "I warmly welcome it--as I know does the newspaper industry--and I am grateful for the skilful way the Government has dealt with the potential problems."⁵⁷

The clear impression fostered by the Home Secretary in the House of Commons was that, in the jurisprudence of the European Court, Article 10 always takes precedence over Article 8 and, accordingly, that the media has little to fear from the Human Rights Act. On closer analysis, this confidence seems misplaced. In a case of unwanted media attention, the subject of attention could well have a strong claim deriving from Article 8. Article 10 can only then "take precedence" where the subject is a legitimate subject of public concern. The protection offered to the media by section 12 could prove to be rhetorical rather than real.

Ent. L.R. 1999, 10(2), 36-41

1. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950 U.K.T.S. 71 (1953), Cmd 8969.

2. See, for example, A. Rusbridger, "Privacy rights and a free press", *The Guardian*, February 7, 1998.

3.

See *Hansard* , February 16, 1998 at col. 778.

4. It has frequently been stated that there is no "right to privacy" in this jurisdiction. See, for example, *Kaye v. Robertson* [1991] F.S.R. 62, CA at 66 (*per Glidewell L.J.*). For more detailed analysis of the state of privacy protection in this jurisdiction, see Wacks, *Privacy and Press Freedom* (Blackstone Press, 1995), Fenwick, *Civil Liberties* (2nd ed. Cavendish Press, 1998), pp. 317-362 and Singh, "Privacy and the Media after the Human Rights Act" [1998] E.H.R.L.R. 712.
5. See *Hansard* , July 2, 1998 at col. 547.
6. See discussion in texts listed at n. 4 above.
7. Our main concern here is not with the *intrusion* into X's private life arising from press harrassment. The application of the right to freedom of expression, upon which s. 12 rests, is controversial in cases of intrusion alone. Our focus is rather upon subsequent media *disclosure* of information where the right to freedom of expression is clearly relevant.
8. In the language of rights, a particular claim is said to be "covered" by a right if it falls within the scope of that right. This does not necessarily mean that the claimant will be able to demonstrate that his or her right has been infringed. Often, as in the case of Arts 8 and 10 of the ECHR, the right is qualified so as to permit interferences with that right in the pursuit of certain legitimate purposes.
9. Such a person could also have suffered interference with other interests protected under Art. 8, for example "home" or "family life". However, as has been noted above, we are concerned with the *disclosure* of information. This need not necessarily affect an individual's home directly. It is also possible to have no family and yet to suffer unwanted media attention.
10. *Dudgeon v. United Kingdom* (1982) 4 E.H.R.R. 149.
11. *Gaskin v. United Kingdom* (1989) 12 E.H.R.R. 36.
12. (1985) 7 E.H.R.R. 14.
13. *ibid.* at para. 84.
14. See, for example, Hunt, "The horizontal effect of the Human Rights Act" [1998] P.L. 423 and Singh, "Privacy and the Media after the Human Rights Act" [1998] E.H.R.L.R. 712.
15. Art. 34.
16. See, for example, *X and Y v. The Netherlands* (1986) 8 E.H.R.R. 235.
17. See text accompanying n. 41 below.
18. s. 6(3).
19. This interpretation seems to have been intended by the promoters of the legislation. During the Committee stage in the House of Lords, the Lord Chancellor stated that: "We believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals. Why should they not? In preparing this bill, we have taken the view that it is the other course, that of excluding convention considerations altogether from cases between individuals, which would have to be justified. We do not think that would be justifiable; nor indeed do we think it would be practicable." (Lord Chancellor, House of Lords, Committee Stage, see *Hansard* , November 24, 1998 at col. 783.) Much will depend on whether protecting someone in X's position will be possible by means of a *development* of the common law or will require the creation of an entirely new cause of action. The most likely candidate for development is the action for breach of confidence (See Fenwick and Phillipson, "Confidence and privacy; a re-examination" (1996) 55 C.L.J. 447).
20. See, for example, *Hansard* , February 16, 1998, col. 776.
21. s. 12(1).
22. See s. 5 below.
23. See *Hansard* , July 2, 1998, col. 536.
- 24.

"If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied--(a) that the applicant has taken all practicable steps to notify the respondent; or(b) that there are compelling reasons why the respondent should not be notified".

- [25.](#) [1975] A.C. 396. Courts are already sensitive to the dangers of prior restraint. See, for example, the rule in defamation proceedings deriving from *Bonnard v. Perryman* [1891] 2 Ch. 269.
- [26.](#) See *Attorney-General v. Guardian Newspapers (No.2)* [1990] 1 A.C. 109.
- [27.](#) See, for example, clause 3 of the Press Complaints Commission's Code.
- [28.](#) See, for example, *Gartside v. Outram* (1856) 26 L.J. 113.
- [29.](#) See, for example, *Lion Laboratories v. Evans* [1985] Q.B. 526.
- [30.](#) See, for example, *Woodward v. Hutchins* [1977] 2 All E.R. 751.
- [31.](#) See *Hansard*, July 2, 1998, col. 535.
- [32.](#) It seems a little odd that such an express statement should be considered necessary. Courts are already required, by s. 2 of the Act, "to take into account" the Strasbourg jurisprudence where relevant. "A court or tribunal determining a question which has arisen under this Act in connection with a Convention right must take into account any--(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."
- [33.](#) See *Hansard*, February 16, 1998, col. 775. "Press freedom and the Human Rights Bill; details of cases concerning the press and broadcasters in respect of Article 10 of the European Convention on Human Rights", undated 1998. H.C.Lib.Ref: DEP/3 6042.
- [34.](#) *ibid.* at col. 778.
- [35.](#) *ibid.* at col. 779.
- [36.](#) See *Winer v. The United Kingdom*, App. No. 10871/84, D.R. 154; *Ian Stewart Brady v. The United Kingdom*, App. Nos 27436/95, 28406/95, 24 E.H.R.R. C.D. 39 and *Earl Spencer and Countess Spencer v. United Kingdom*, App. Nos 28851/95, 28852/95, (1998) 25 E.H.R.R. C.D.105. Until the coming into force of Protocol 11 of the ECHR on November 11, 1998, the Commission had a mixed fact-finding and filtering role. It retains transitional responsibilities but its role will eventually be assumed by the European Court.
- [37.](#) See, for example, *Earl Spencer and Countess Spencer v. United Kingdom*, *op. cit.*
- [38.](#) See, for example, *Winer v. The United Kingdom*, *op. cit.* and *Ian Stewart Brady v. The United Kingdom*, *op. cit.*
- [39.](#) In which (somewhat dubiously) the U.K.'s defamation laws were found to be adequate to secure respect for the applicant's rights under Art. 8.
- [40.](#) *Winer v. The United Kingdom*, *op. cit.* at 170.
- [41.](#) (1998) 25 E.H.R.R. C.D. 105 at 112. The applicants' claim was declared inadmissible because by omitting to bring proceedings for breach of confidence, they had failed to exhaust domestic remedies.
- [42.](#) *Lingens v. Austria* (1986) 8 E.H.R.R. 103.
- [43.](#) *Muller v. Switzerland* (1991) 13 E.H.R.R. 212.
- [44.](#) *Markt Intern Verlag GmbH v. Germany* (1990) 12 E.H.R.R. 161.
- [45.](#) For a fuller investigation of these justifications, see the excellent discussions in Schauer, *Free speech--A philosophical enquiry* (Cambridge University Press, 1982), and Barendt, *Freedom of speech* (Oxford University Press, 1985).

- [46.](#) See Mill, *On Liberty and other writings* (Cambridge University Press, 1989). A variation of the argument can be seen in the reasoning of the American judge Oliver Wendell Holmes, who argued that truth can only emerge from the cut and thrust of the "free market place of ideas". See *Abrams v. United States*, 250 U.S. 616 (1919) (dissent of Holmes J.). See also *Schenk v. United States*, 249 U.S. 47 (1919) (judgment of Holmes J.).
- [47.](#) This is apparent in the famous statement made by the European Court in *Handyside v. United Kingdom* (1 E.H.R.R. 737, at para. 49): "Freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man."
- [48.](#) See Schauer, *Free speech--A philosophical enquiry* (Cambridge University Press, 1982), ch. 4, Barendt, *Freedom of speech* (Oxford University Press, 1985), pp. 14-20 and T. Scanlon "A Theory of Free Expression" in *The philosophy of law*, R. Dworkin (Oxford University Press, 1977).
- [49.](#) See the argument of Mahoney in "Universality versus subsidiarity in the Strasbourg case law on free speech: explaining some recent judgements" (1997) E.H.R.L.R. 364. In particular note his comparison of the European Court's decision in *Jersild v. Denmark* (1994) 19 E.H.R.R. 1 with that in *Otto-Preminger-Institut v. Austria* (1994) 19 E.H.R.R. 34.
- [50.](#) Mciklejohn, "Free speech and its relation to self-government", reprinted in *Political freedom: the constitutional powers of the people* (R. Dworkin, New York, 1965).
- [51.](#) *Castells v. Spain* (1992) 14 E.H.R.R. 445, at para. 43. See also *Lingens v. Austria* (1986) 8 E.H.R.R. 407, at para. 42.
- [52.](#) *Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 843, at para. 64. See also *Observer and Guardian v. United Kingdom* (1992) 14 E.H.R.R. 153, at para. 59.
- [53.](#) *Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 843.
- [54.](#) *ibid.* at para. 61.
- [55.](#) *ibid.* at para. 64.
- [56.](#) On this question of where to draw the "contours" of free speech, see Marshall, "Press freedom and free speech theory" [1992] P.L. 40 at 45. See also Mahoney, "Universality versus subsidiarity in the Strasbourg case law on free speech: explaining some recent judgements" (1997) E.H.R.L.R. 364.
- [57.](#) *Hansard*, July 2, 1998, at col. 541.