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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY AARON STERRITT FOR JUDICIAL REVIEW

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Before: Morgan LCJ and McCloskey LJ

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Representation

Appellant: Mr Ronan Lavery QC with Mr Sean Mullen, of counsel (instructed by DA Martin Solicitors)

Respondent: Mr Tony McGleenan QC with and Mr Aidan Sands, of counsel (instructed by the Departmental Solicitor)

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McCLOSKEY LJ (giving the judgment of the court)

Anonymity

The appellant previously had the protection of anonymity in these proceedings, suing as "JKL". This issue was raised with the parties by the court, mindful that he has now attained his majority and, further, that there is extensive information about his case in the public domain arising out of the publicity attendant upon his initial arrest and questioning by the police and his later prosecution and conviction. The appellant's representatives, drawing to the attention of the court the decision in *R v Cornick* [2014] EWHC 3623 (QB), accepted that there is no basis for extending the grant of anonymity.

Introduction

[1] The legal challenge, exclusively of the human rights variety, brought by JKL ("*the appellant*") arises out of certain events which unfolded in the public domain immediately subsequent to 26 October 2015, when the appellant was aged 15 years.

On that date the appellant was arrested by police on suspicion of having committed offences under sections 1, 2 and 3 of the Computer Misuse Act 1990. Some seven hours later, following interview, he was released without charge and was subjected to the requirement of having to comply with the conditions of police bail. On the same date the Police Service of Northern Ireland ("PSNI") promulgated a press release which stated that a boy aged 15 years had been arrested. There was no disclosure of the appellant's name, address and photograph. On 27 October 2015 the PSNI made a further press release, linked to the first, stating that a boy aged 15 years had been released on bail pending further police enquiries. It is appropriate to add that the conduct of PSNI is not the subject of challenge in these proceedings.

[2] The events giving rise to the appellant's arrest unfolded during the period 15–22 October 2015 and were popularly labelled the "Talk Talk Cyber Attack". They were of some notoriety and were in the public domain, associated with considerable media interest. During the week following the appellant's arrest and release on bail several major national media outlets – the Daily Mail, Daily Telegraph and The Sun newspapers – published information which, variously, identified the appellant by name and the town in which he lived, contained his partly pixellated photograph and described his social interest in online pursuits. The foregoing material also emerged in certain websites, including that of Twitter. On 30 October 2015, five days following the appellant's arrest and release, injunction proceedings were commenced in the High Court. Interim prohibitive injunctions were made against both Google and Twitter, while the relevant newspaper organisations removed the offending materials from their respective websites and provided appropriate undertakings to the appellant.

[3] On 12 April 2017 the prosecution of the appellant was initiated. On 20 September 2017 he pleaded guilty to one offence of "hacking" in the Youth Court. On 26 February 2018 he received a disposal consisting of a Youth Conference Order.

Chronology of Proceedings

[4] On 17 November 2015 the appellant initiated judicial review proceedings, naming the Department of Justice ("*DOJ*") as respondent. As appears from the above, at this stage all of the main events had materialised; the appellant had been arrested by the police and released and the offending publications in the national media had occurred. On 3 December 2015 leave to apply for judicial review was granted. On 21 December 2016 the High Court ordered the dismissal of the judicial review application. The appellant appealed. On 26 February 2019 this court, without determining any aspect of the appeal, remitted the case to the High Court for the consideration and determination of one discrete issue of law. On 6 March 2020 the High Court found against the appellant on this issue, thereby maintaining its dismiss of the judicial review application.

[5] On 30 September 2020 the scheduled substantive hearing of the appeal before this court did not proceed in the event, following an *inter-partes* listing. An

adjournment of some eight weeks duration ensued, prompted by this court's anxiety to ensure that the contours of the appellant's case be defined and delimited with the maximum precision. This precipitated still further amendments of the appellant's pleading and the provision by both parties, sequentially, of further written submissions. On 25 November 2020 the substantive hearing proceeded and was completed.

Relevant Statutory Provisions

[6] Two statutory provisions occupy centre stage in these proceedings. The first is Article 22 (1) of the Criminal Justice (Children) (NI) Order 1998 (hereinafter "*Article 22*" and "*the 1998 Order*"), which came into operation on 31 January 1999. This provides, under the rubric of "Restrictions on Reporting Proceedings":

> "*(1) Where a child is concerned in any criminal proceedings (other than proceedings to which paragraph (2) applies) the court may direct that –*
>
> *(a) no report shall be published which reveals the name, address or school of the child or includes any particulars likely to lead to the identification of the child; and*
>
> *(b) no picture shall be published as being or including a picture of the child,*
>
> *except in so far (if at all) as may be permitted by the direction of the court.*
>
> *(2) Where a child is concerned in any proceedings in a youth court or on appeal from a youth court (including proceedings by way of case stated) –*
>
> *(a) no report shall be published which reveals the name, address or school of the child or includes any particulars likely to lead to the identification of the child; and*
>
> *(b) no picture shall be published as being or including a picture of any child so concerned,*
>
> *except where the court or the [Department of Justice], if satisfied that it is in the interests of justice to do so, makes an order dispensing with these prohibitions to such extent as may be specified in the order.*

(3) If a court is satisfied that it is in the public interest to do so, it may, in relation to a child who has been found guilty of an offence, make an order dispensing with the prohibitions in paragraph (2) to such extent as may be specified in the order, in relation to –

(a) the prosecution of the offender for the offence or a finding of guilt;

(b) the manner in which he, or his parent or guardian, should be dealt with in respect of the offence;

(c) the enforcement, amendment, variation, revocation or discharge of any order made in respect of the offence;

(d) where an attendance centre order is made in respect of the offence, the enforcement of any rules made under Article 50(3); or

(e) where a juvenile justice centre order is made in respect of the offence, the enforcement of any requirements imposed under Article 40(2).

(4) A court shall not exercise its power under paragraph (3) without –

(a) affording the parties to the proceedings an opportunity to make representations; and

(b) taking into account any representations which are duly made.

(5) If a report or picture is published in contravention of a direction under paragraph (1) or of paragraph (2), the following persons –

(a) in the case of publication of a written report or a picture as part of a newspaper, any proprietor, editor or publisher of the newspaper;

(b) in the case of the inclusion of a report or picture in a programme service, any body corporate which provides the service and any person having functions in relation to the programme corresponding to those of an editor of a newspaper,

shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(6) For the purposes of this Article a child is 'concerned' in any proceedings whether as being the person by or against or in respect of whom the proceedings are taken or as being a witness in the proceedings.

(7) In this Article –

'picture' means a picture in a newspaper and a picture included in a programme service;
'programme service' has the same meaning as in the Broadcasting Act 1990;
'publish' includes –

(a) include in a programme service;

(b) cause to be published;

'report' means a report in a newspaper and a report included in a programme service.

…. report included in a programme service."

[7] There are two related statutory provisions in the jurisdiction of England and Wales. The first is section 49 of the Children and Young Persons Act 1933. This establishes an automatic restriction on reporting the identity of children '*concerned in'* Youth Court proceedings.

*"**Restrictions on reports of proceedings in which children or young persons are concerned**.*

(1) No matter relating to any child or young person concerned in proceedings to which this section applies shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as someone concerned in the proceedings.

(2) The proceedings to which this section applies are –

(a) proceedings in a youth court;

(b) proceedings on appeal from a youth court (including proceedings by way of case stated);

(c) *proceedings in a magistrates' court under Schedule 2 to the Criminal Justice and Immigration Act 2008 (proceedings for breach, revocation or amendment of youth rehabilitation orders);*

(d) *proceedings on appeal from a magistrates' court arising out of any proceedings mentioned in paragraph (c) (including proceedings by way of case stated).*"

[8] Section 45 of the Youth Justice and Criminal Evidence Act 1999 (the "*1999 Act*") is the analogue of Article 22(1) of the 1998 Order. It confers a discretionary power on courts hearing criminal proceedings to impose reporting restrictions in respect of '*any person concerned in the proceedings while he is under the age of 18*.' It embraces the jurisdictions of England, & Wales and Northern Ireland and has been commenced in the former jurisdiction only. Each provision is essentially applicable in the Crown Court and above. Section 45 provides:

"***Power to restrict reporting of criminal proceedings involving persons under 18***.

(1) This section applies (subject to subsection (2)) in relation to –

(a) *any criminal proceedings in any court (other than a service court) in England and Wales or Northern Ireland; and*

(b) *any proceedings (whether in the United Kingdom or elsewhere) in any service court.*

(2) This section does not apply in relation to any proceedings to which section 49 of the Children and Young Persons Act 1933 applies.

(3) The court may direct that no matter relating to any person concerned in the proceedings shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings.

(4) The court or an appellate court may by direction ("an excepting direction") dispense, to any extent specified in the

excepting direction, with the restrictions imposed by a direction under subsection (3) if it is satisfied that it is necessary in the interests of justice to do so.

(5) The court or an appellate court may also by direction ("an excepting direction") dispense, to any extent specified in the excepting direction, with the restrictions imposed by a direction under subsection (3) if it is satisfied –

(a) that their effect is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and

(b) that it is in the public interest to remove or relax that restriction;

but no excepting direction shall be given under this subsection by reason only of the fact that the proceedings have been determined in any way or have been abandoned.

(6) When deciding whether to make –

(a) a direction under subsection (3) in relation to a person, or

(b) an excepting direction under subsection (4) or (5) by virtue of which the restrictions imposed by a direction under subsection (3) would be dispensed with (to any extent) in relation to a person, the court or (as the case may be) the appellate court shall have regard to the welfare of that person.

(7) For the purposes of subsection (3) any reference to a person concerned in the proceedings is to a person –

(a) against or in respect of whom the proceedings are taken, or

(b) who is a witness in the proceedings.

(8) The matters relating to a person in relation to which the restrictions imposed by a direction under subsection (3) apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular –

(a) his name,

(b) his address,
(c) the identity of any school or other educational establishment attended by him,
(d) the identity of any place of work, and
(e) any still or moving picture of him.

(9) A direction under subsection (3) may be revoked by the court or an appellate court.

(10) An excepting direction –

(a) may be given at the time the direction under subsection (3) is given or subsequently; and

(b) may be varied or revoked by the court or an appellate court.

(11) In this section "appellate court", in relation to any proceedings in a court, means a court dealing with an appeal (including an appeal by way of case stated) arising out of the proceedings or with any further appeal."

Article 22(1) of the 1999 Order analysed

[9] It is convenient to analyse Article 22 of the 1998 Order at this juncture. Its overarching aim is demonstrably to protect the identity of children in certain prescribed circumstances. The protection which it provides is triggered from the moment when a child is "*concerned in*" any criminal proceedings. By virtue of the definition of "*concerned in*", this protection arises when the child acquires the status of either (a) "*the person by or against or in respect of whom the proceedings are taken*" or (b) "*a witness in the proceedings*". (Pausing, neither status applied to the appellant at the time of the offending events.) There are two pre-requisites to securing the non-publication protections of Article 22(1) (a) and (b). The first is that the child must be "*concerned in*" criminal proceedings, in the sense just explained. The second is that the relevant court must make a non-publication order.

[10] The protection available under Article 22(1) is qualified rather than absolute, establishing two judicial discretions. The first is that in cases to which this provision applies the relevant court is not obliged to make a non-publication order. Rather it has a discretion whether to do so. The second is that where the court determines to exercise its discretion to make a non-publication direction it is not obliged to do so in the full terms of paragraph (1)(a) and (b): this follows from the "*except insofar ….*" saving clause. It follows that where a child is "*concerned in*" criminal proceedings, there is no guarantee that either (i) a non-publication direction will be ordered or, where ordered, (ii) it will be in the full terms of Article 21(1)(a) and (b).

[11] Article 22(1) is a reflection of the absence of any absolute legal rights or interests in play. It was enacted prior to the advent of the Human Rights Act 1998 ("HRA 1998"). The conferral of a discretionary power, to be contrasted with a duty, on the relevant court is a recognition that there are other interests in play. Two such interests are readily identifiable. The first is the common law principle of open justice (see the recent decision of this court in *LLD* [2020] NICA 38 at [13]). This principle, though framed in potent terms, is not absolute. The second is the right to freedom of expression. At the time when Article 22 was introduced, this right was regulated by common law principles and statutory intervention such as the Contempt of Court Act 1981. From 02 October 2000 the focus has been mainly on the right to freedom of expression protected by Article 10 ECHR under HRA 1998. Once again, this is not an absolute right.

[12] Three particular considerations regarding Article 22(1) may be highlighted. The first is that the exercise of the judicial discretionary power is not dependent upon an application to the court, it being clear from the statutory language that the court may act of its own volition. Furthermore, given that the court – at whichever tier of the legal system - is a public authority within the framework of section 6 of the Human Rights Act, it will be under a duty to make the relevant order in appropriate cases. In short, the order must be made in any case where to fail to do so would be incompatible with the relevant child's right to respect for private life, following the balancing exercise required under Article 8(2) where appropriate.

[13] The second main consideration is that as Article 8 ECHR is a qualified right the court concerned must conduct a balancing exercise. In every case this will entail balancing the principle of open justice with the right to respect for private life of the child concerned. The qualified right to freedom of expression enjoyed in particular (in this context) by media organisations under Article 10(1) ECHR will also have to be balanced in appropriate cases. Since Article 22(1) does not purport to provide an absolute protection its terms are apt to accommodate the balancing exercise required in any given case.

[14] The third of this trilogy of considerations is that all concerned must be alert to the subtle distinctions between the non-publication provisions in "*any criminal proceedings*" – Article 22(1) – and "*any proceedings in a youth court*": Article 22(2). In the latter case the non-publication prohibition flows from the statute itself, ie is automatic, requiring no order of the court.

[15] A passing observation is appropriate. While, in the abstract, Article 22(1) might give rise to issues and arguments centring on ss 3 and 4 of HRA 1998, this has not been a feature of the present case. Thus we do not venture beyond drawing attention to this possibility. The present case is all about the intrinsic limitations of Article 22(1) and the non-commenced status of a provision of primary legislation, namely section 44 of the Youth Justice and Criminal Evidence Act 1999 (*infra*).

[16] The second main statutory provision which falls to be considered in this appeal is section 44 of the 1999 Act. This provides, under the rubric "Restrictions on Reporting Alleged Offences involving persons under 18":

> *"(1) This section applies (subject to subsection (3)) where a criminal investigation has begun in respect of-*
>
> *(a) an alleged offence against the law of-*
>
> *(i) England and Wales, or*
>
> *(ii) Northern Ireland; or*
>
> *(b) an alleged civil offence (other than an offence falling within paragraph (a)) committed (whether or not in the United Kingdom) by a person subject to service law.*
>
> *(2) No matter relating to any person involved in the offence shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person involved in the offence.*
>
> *(3) The restrictions imposed by subsection (2) cease to apply once there are proceedings in a court (whether a court in England and Wales, a service court or a court in Northern Ireland) in respect of the offence.*
>
> *(4) For the purposes of subsection (2) any reference to a person involved in the offence is to -*
>
> *(a) a person by whom the offence is alleged to have been committed; or*
>
> *(b) if this paragraph applies to the publication in question by virtue of subsection (5)-*
>
> *(i) a person against or in respect of whom the offence is alleged to have been committed, or*
>
> *(ii) a person who is alleged to have been a witness to the commission of the offence;*
>
> *except that paragraph (b)(i) does not include a person in relation to whom section 1 of the Sexual Offences (Amendment) Act 1992 (anonymity of victims of certain sexual offences) applies in connection with the offence.*

(5) Subsection (4)(b) applies to a publication if-

(a) where it is a relevant programme, it is transmitted, or

(b) in the case of any other publication, it is published,

on or after such date as may be specified in an order made by the Secretary of State.

(5A) In the application of this section to Northern Ireland, the reference in subsection (5) to the Secretary of State shall be construed as a reference to the Department of Justice in Northern Ireland.

(6) The matters relating to a person in relation to which the restrictions imposed by subsection (2) apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular-

(a) his name,

(b) his address,

(c) the identity of any school or other educational establishment attended by him,

(d) the identity of any place of work, and

(e) any still or moving picture of him.

(7) Any appropriate criminal court may by order dispense, to any extent specified in the order, with the restrictions imposed by subsection (2) in relation to a person if it is satisfied that it is necessary in the interests of justice to do so.

(8) However, when deciding whether to make such an order dispensing (to any extent) with the restrictions imposed by subsection (2) in relation to a person, the court shall have regard to the welfare of that person.

(9) In subsection (7) "appropriate criminal court" means-

(a) in a case where this section applies by virtue of subsection (1)(a)(i) or (ii), any court in England and Wales or (as the case may be) in Northern Ireland which has any jurisdiction in, or in relation to, any criminal proceedings (but not a service court unless the offence is alleged to have been committed by a person subject to service law);

(b) in a case where this section applies by virtue of subsection (1)(b), any court falling within paragraph (a) or a service court.

(10) (England and Wales)

(11) In the case of a decision of a court of summary jurisdiction in Northern Ireland, to make or refuse to make an order under subsection (7), the following persons, namely-

(a) any person who was a party to the proceedings on the application for the order, and

(b) with the leave of, in Northern Ireland a county court, any other person,

may, in accordance with rules of court in Northern Ireland, appeal to, in Northern Ireland a county court, against that decision or appear or be represented at the hearing of such an appeal.

(12) On such an appeal, in Northern Ireland a county court -

(a) may make such order as is necessary to give effect to its determination of the appeal; and

(b) may also make such incidental or consequential orders as appear to it to be just.

(13) In this section ….. In this section-

(a) "civil offence" means an act or omission which, if committed in England and Wales, would be an offence against the law of England and Wales;

(b) any reference to a criminal investigation, in relation to an alleged offence, is to an investigation

conducted by police officers, or other persons charged with the duty of investigating offences, with a view to it being ascertained whether a person should be charged with the offence;

(c) any reference to a person subject to service law is to-

(i) a person subject to service law within the meaning of the Armed Forces Act 2006; or

(ii) a civilian subject to service discipline within the meaning of that Act. … within the meaning of that Act."

Under the machinery of the statute section 44 did not automatically come into force upon the receipt of Royal Assent. Rather, it was one of the provisions of the Act to be commenced by secondary legislation when appropriate. Some 21 years later it remains uncommenced.

[17] The striking feature of s 44 is that it provides protection to children from the moment when a criminal investigation begins. The members of the protected group extend beyond those belonging to the group protected by Article 22 of the 1998 Order. This protection does not require any court intervention. Rather it is provided by the statute itself and it operates automatically in every case to which section 44 applies. Those features of a child's private life which are protected essentially replicate the protection contained in Article 22(1) of the 1998 Order. Furthermore, s 44, by its terms, extends to the jurisdiction of Northern Ireland. Notably, under the machinery of section 44 the relevant criminal court has no role. Rather the prohibition against publication of the protected information is automatic. Thus there is no public authority conducting any balancing exercise. Given that by virtue of section 3 HRA 1998 s 44 must be read and construed in a Convention compliant manner, there would be the possibility of a judicial review challenge by a media organisation invoking its Article 10 ECHR rights.

The Evidential Framework

[18] While the court has of course considered the evidence assembled in its totality, as the immediately preceding analysis demonstrates, the centrality of the non-commencement of section 44 of the 1999 Act is unmistakable. This is reflected in the parties' affidavit evidence. The most salient features of the evidence are, therefore, those touching on this issue and its consequences.

[19] The following aspects of the DOJ affidavit evidence are of particular note:

(i) During the progress through Parliament of the Bill which became the 1999 Act, at the Committee stage it was noted that there had been

discussions with the broadcast and print media as a result of which "… *it was decided that the media's own regulatory arrangements could be strengthened in order to protect vulnerable children and that the aims of the reporting restriction provisions could be achieved by other means*". The outcome was that section 44 should be included in the final text of the statute but should not be automatically commenced upon receipt of Royal Assent. Rather the question of its commencement would remain under review thereafter.

(ii) In 2004 specific consideration was given to the commencement of section 44. According to the deponent "*concerns were expressed that the provisions would prevent the open reporting of matters concerning young victims and that in cases such as child abduction, where time might be of the essence, the requirement to go to court to have restrictions lifted could make matters worse*". Both the considerable media opposition to the commencement of section 44 and the commitment given by the Press Complaints Commission ("*PCC*") to strengthen the media's own regulatory requirements were weighed. Finally the availability of civil remedies was considered. The outcome was a decision not to commence section 44 and, further, that this would remain the case "… *unless press coverage gave rise to concern*".

(iii) In 2014 the Government again gave specific consideration to commencing s 44. Noting in particular the significant changes to press regulation introduced by the Royal Charter on 30 October 2013 and recording once again its view that self-regulation of the press was preferable to enforced regulation it was determined that the commencement of s 44 would not be appropriate.

(iv) The appellant's case is the only one of its kind known to DOJ since the devolution of policing and justice in April 2010.

(v) Furthermore, no relevant concerns have at any time been raised with DOJ by NGOs, children's charities, politicians or individuals.

(vi) Given the foregoing factors, DOJ has not given any <u>active</u> consideration to commencing s 44.

(vii) The Youth Justice Agency ("*YJA*") one of the divisions of DOJ, has regular engagement with entities such as the Children's Law Centre and the Children's Commissioner. None of these agencies has raised concerned about issues related to the non-commencement of s 44.

[20] The evidence includes "*The Editor's Code of Practice*" (the "*COP*"). This is an instrument of the Independent Press Standards Organisation ("*IPSO*") published in January 2016. This instrument *inter alia* contains provisions replicating (in

substance) Article 8(1) ECHR; recognising various restrictions and protections which should apply to children generally, for instance freedom to complete their education without unnecessary intrusion; prohibits the identification of children aged under 16 years who are victims or witnesses in prosecutions involving sex offences; acknowledges the particular vulnerability of children who are victims of, or witnesses to, crime, while adding that this should not restrict the reporting of legal proceedings; contains a strong, but not absolute, prohibition forbidding the identification of victims of sexual assault; and, finally, has a lengthy "*public interest*" section the effect whereof is that specified publication restrictions in the substantive provisions of the COP may be displaced.

International Standards

[21] We have already highlighted the first of the applicable international standards, namely Article 8 ECHR which, in the United Kingdom legal system, has the dual identity of a provision of an international treaty and a provision of domestic statutory law. Next there is the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "*Beijing Rules*"), adopted by General Assembly Resolution 40/33 of 29 November 1985. Its provisions include a discrete section entitled "Provision of Privacy":

> "*8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.*
>
> *8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.*"

The ensuing Commentary states:

> "*Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatisation. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as 'delinquent' or 'criminal'. Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interests of the individual should be protected and upheld, at least in principle.*"

The bespoke provisions of Rule 8 fall to be considered in tandem with the general principles contained in Rule 1, which include at paragraph 1.2:

> "*Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community which, during that period of life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible.*"

The promotion of the wellbeing of the juvenile is the dominant feature of the next succeeding provision, in paragraph 1.3.

[22] The Beijing Rules were subsequently developed in another UN instrument, namely the United Nations Guidelines for the Prevention of Juvenile Delinquency (the "*Riyadh Guidelines*"), adopted by General Assembly Resolution 45/112 of 14 December 1990. Our analysis of this document, confirmed by the parties' respective submissions, is that it adds nothing of substance to the Beijing Rules, in the present litigation context at any rate.

[23] Art 3(1) of the UN Convention on the Rights of the Child ("*UNCRC*") provides:

> *"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

Art 16, couched in general terms, protects the privacy of children:

> "*(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
>
> *(2) The child has the right to the protection of the law against such interference or attacks.*"

By Art 40(2)(vii) it is provided:

> "*Every child alleged as or accused of having infringed the penal law has at least the following guarantees ….*
>
> *To have his or her privacy fully respected at all stages of the proceedings*".

[24] The United Nations Committee on the Rights of Children (the "*UN Committee*") offered the following commentary on Article 3(1) of UNCRC in its May 2013 report:

> "*[1] Article 3, paragraph 1 of the Convention on the Rights of the Child gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. Moreover, it expresses one of the fundamental values of the Convention. The Committee on the Rights of the Child has identified Article 3, paragraph 1 as one of the four general principles of the Convention for interpreting and implementing all the rights of the child and applies it as a dynamic concept that requires an assessment appropriate to the specific context …*
>
> *[4] The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child. The Committee has already pointed out that an adult's judgement of a child's best interests cannot override the obligation to respect all of the child's rights under the Convention. It recalls that there is no hierarchy of rights in the Convention, all the rights provided for therein are in the 'child's best interests' and no right could be compromised by a negative interpretation of the child's best interests ….*
>
> *[5] The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.*"

[25] In 2008 the UN Committee reported on the implementation of UNCRC in the United Kingdom. At [24] the report expressed concerns that within the UK there was "(a) *general climate of intolerance and negative public attitudes towards children, especially adolescents, which appear to exist in the State Party, including in the media* [and] *may often be the underlying cause of further infringements of their rights*". At [25](a) the report recommended that the UK take urgent steps to prevent "*inappropriate characterisation of children, especially adolescents, within the society, including the media*". At [36](b) the report noted with concern that the UK "*… has not taken sufficient measures to protect children, notably those subject to ASBOs, from negative media*

representation and public 'naming and shaming' …". The report recommended that the UK –

> "*... urgently address the Committee's recommendation from 2008 on the demonisation of children, including in the media …* [and] …
>
> *Ensure that all relevant international standards are integrated into youth justice legislation, policy and practice, implementing commitments made under the Hillsborough Agreement.*"

The appellant's primary case

[26] Standing back panoramically, it is evident that the central complaint upon which the appellant's challenge is based is that the failure of DOJ to commence s 44 of the 1999 Act has given rise to a *lacuna* in the Northern Ireland legal system which left him without adequate legal protection at the material time, giving rise to a violation of his right to respect to private life under Article 8(1) ECHR in consequence. Mr Lavery QC was disposed to accept that if s 44 had been in force, the case mounted by the appellant would not have been feasible. Of course, in theory, certain non-State actors might have acted in breach of the s 44 automatic restrictions. The consequence of this would <u>not</u> have been the possibility of a successful challenge of the present species against DOJ for the reason that section 44 provides a perfectly adequate protective regime: so much is common case. The appellant, on the hypothesis being discussed, would of course have had available to him civil remedies against the persons and entities concerned, including claims for injunctive relief and damages and, in addition, a human rights claim against any culpable authority such as the PSNI or the DPP.

[27] The court's proactive endeavours to bring maximum clarity and definition to the appellant's case began during the case management phase when the formulation of core propositions was directed, and continued during the first of the most recent listings, when further directions were made. This judicial process unfolded in the context of proceedings which had become of protracted length, which included the need for a remittal from this court to the High Court to consider a new feature of the appellant's case, together with multiple iterations of the appellant's formal pleading, amendments of the Notice of Appeal and an ever increasing volume of skeleton arguments/written submissions. All of this is said by way of illumination and not criticism.

[28] The outcome of the foregoing process is that this court finds itself well equipped to stand back and identify the real issues of substance raised by the appellant's challenge. We consider that, fundamentally, the issue to be determined is whether the absence from the Northern Ireland legal system of the protective framework established by the uncommenced s 44 of the 1999 Act gave rise to a

breach of the appellant's right to respect for private life protected by Article 8(1) ECHR and section 6 of the Human Rights Act. It is not contested that the information belonging to the domain of the appellant's private life and qualifying for protection via his right to respect for private life encompasses the information published by major national newspapers in the summary contained in [1] and [2] above, that is to say his name, where he lived and a partial visual image of his physical appearance.

[29] The respondent in these proceedings, DOJ, did not of course engage in any of the offending acts of publication. DOJ is the public authority sued because it is the only agency empowered to commence s 44 of the 1999 Act. It is well established that Article 8 ECHR can give rise to positive obligations on the part of the public authority concerned. Given the fact of s 44 and its uncommenced status, it is quite unnecessary for this court to operate in the vacuum of statutory or other measures which DOJ *might* have devised to provide reasonable protection against the mischief of which the appellant complains. Nor does the court have to address issues relating to the limitations of DOJ's legal powers, a prime illustration being the recurring DOJ argument that only the Northern Ireland Assembly – and not DOJ – is legally competent to devise by legislation a regime for prosecuting and punishing those indulging in the kind of publications which occurred in the instant case. Rather the concrete focus is on the non-commencement of s 44 of the 1999 Act. In short, the appellant's primary case is about a positive obligation to act and an omission to do so.

Justiciability

[30] Given the analysis in [27] – [28], the first question to be determined is whether the appellant can bring his case within the machinery of the Human Rights Act. Section 6 provides:

> *"It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
>
> *(2) Subsection (1) does not apply to an act if –*
>
> *(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*
>
> *(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*
>
> *(3) In this section "public authority" includes –*

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) F1. . . . . .

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to –

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order."

[emphasis added]

Excluded (5.3.2015) by Infrastructure Act 2015 (c. 7), ss. 8(3)(b), 57(1); S.I. 2015/481, reg. 2(a)
C2S. 6(1) applied (2.10.2000) by 1999 c. 33, ss. 65(2), 170(4); S.I. 2000/2444, art. 2, Sch. 1 (subject to transitional provisions in arts. 3, 4, Sch. 2)
C3S. 6(3)(b) modified (1.12.2008 with exception in art. 2(2) of commencing S.I.) by Health and Social Care Act 2008 (c. 14), ss. 145(1)-(4), 170 (with s. 145(5)); S.I. 2008/2994, art. 2(1)
C4S. 6(3)(b) applied (1.4.2015) by Care Act 2014 (c. 23), s. 73(2)(3)127; S.I. 2015/993, art. 2(r) (with transitional provisions in S.I. 2015/995)

Section 21(1) provides in material part:

"*In this Act –*

- *"amend" includes repeal and apply (with or without modifications);*
- *"the appropriate Minister" means the Minister of the Crown having charge of the appropriate authorised government department (within the meaning of the Crown Proceedings Act 1947);*
- *"the Commission" means the European Commission of Human Rights;*
- *"the Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom;*
- *"declaration of incompatibility" means a declaration under section 4;*
- *"Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975;*
- *"Northern Ireland Minister" includes the First Minister and the deputy First Minister in Northern Ireland;*
- *"primary legislation" means any –*

(a) public general Act;
(b) local and personal Act;
(c) private Act;
(d) Measure of the Church Assembly;
(e) Measure of the General Synod of the Church of England;
(f) Order in Council –

(i) made in exercise of Her Majesty's Royal Prerogative;
(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or
(iii) amending an Act of a kind mentioned in paragraph (a), (b) or (c);

and includes an order or other instrument made under primary legislation (otherwise than by the [Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government,] a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department) to the extent to which it operates to bring one or more

provisions of that legislation into force or amends any primary legislation ...."

There is a lengthy definition of **"subordinate legislation":**

"subordinate legislation" means any—

(a) Order in Council other than one—

(i) made in exercise of Her Majesty's Royal Prerogative;
(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or
(iii) amending an Act of a kind mentioned in the definition of primary legislation;

(b) Act of the Scottish Parliament;

(ba) [Measure of the National Assembly for Wales;
(bb) Act of the National Assembly for Wales;]

(c) Act of the Parliament of Northern Ireland;

(d) Measure of the Assembly established under section 1 of the Northern Ireland Assembly Act 1973;

(e) Act of the Northern Ireland Assembly;

(f) order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation);

(g) order, rules, regulations, scheme, warrant, byelaw or other instrument made under legislation mentioned in paragraph (b), (c), (d) or (e) or made under an Order in Council applying only to Northern Ireland;

(h) order, rules, regulations, scheme, warrant, byelaw or other instrument made by a member of the Scottish Executive [, Welsh Ministers, the First Minister for Wales,

> the Counsel General to the Welsh Assembly Government,] a Northern Ireland Minister or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty;
>
> "transferred matters" has the same meaning as in the Northern Ireland Act 1998; and
>
> "tribunal" means any tribunal in which legal proceedings may be brought.
>
> (our emphasis)

[31] Thus, "*primary legislation*" under the structure of HRA 1998:

(i) Includes an order or other instrument made under primary legislation; but

(ii) Excludes an order or other instrument made under primary legislation by, inter alios, a "*Northern Ireland Department*"; and

(iii) Includes a subordinate legislative measure made under primary legislation bringing into force a provision of that legislation.

In passing, by virtue of the Department of Justice Act (NI) 2010, s1 (3), DOJ is embraced by the phraseology "*a Northern Ireland Department*".

[32] The combined effect of ss 6 and 21 in the present case is the following. There are two starting points. First, the 1999 Act is primary legislation within the scheme of HRA 1998. Second, section 44 of the 1999 Act has not been commenced. The subject matter of section 6 of the same statute is "Regulations and Orders". In the case of the Secretary of State for Justice, the power to make any order under the Act shall be exercised by statutory instrument: per section 64(1). In contrast, as regards Northern Ireland, per section 64(5):

> "*Any power of the Department of Justice in Northern Ireland to make an order under this Act shall be exercisable by statutory rule for the purposes of the Statutory Rules (NI) Order 1979.*"

We shall refer to the last mentioned instrument as the "*1979 Order*". The next piece of the jigsaw is s 68, which provides in material part:

> "*(3) Subject to subsection (4), this Act shall not come into force until such day as the Secretary of State may by*

> *order appoint; and different days may be appointed for different purposes or different areas.*
>
> > *(3A) In relation to the coming into force of any provision of this Act for the purposes of the law of Northern Ireland, the reference in subsection (3) to the Secretary of State shall be construed as a reference to the Department of Justice in Northern Ireland."*

Finally, section 68(4) provides that the provisions in the list which follows "*… come into force on the day on which this Act is passed*": s 44 is excluded.

[33] The question to be determined is this: in circumstances where DOJ ("the respondent") has not exercised its power under section 68(3A) of the 1999 Act to bring section 44 of the same statute into force, on the assumption that this failure entails acting incompatibly with the appellant's rights under Article 8 ECHR is this omission immune from challenge by reason of section 6(6) of HRA 1998? Having regard to the statutory trail sketched above, this broadly framed question telescopes to an enquiry of narrower dimensions: is a statutory rule made under the 1979 Order captured by the "*order, rules regulations …*" (etc) definition in section 21(1)(f) of HRA 1998? If "yes", the exception in parenthesis would clearly apply in the present case, as the measure under consideration would be one made under primary legislation which "*… operates to bring one or more provisions of* [that primary] *legislation into force …*"

[34] We develop the analysis as follows. By reason of s6(1) and (6) of HRA 1998 a failure on the part of a public authority to make "primary legislation", as defined, does not entail acting incompatibly with any of the protected Convention rights. In orthodox terms, the failure by DOJ to bring section 44 of the 1999 Act into force would not be a failure *to make primary legislation* as the relevant legislation has already been made and the mechanism for commencing section 44 is a statutory rule under the 1979 Order, which is plainly a measure of subordinate legislation. Thus, subject to statutory prescription, the primary legislation "shield" would not be available to DOJ. However, such prescription is (in this context) to be found in section 21(1)(f) of HRA 1998. This enshrines a general rule and an exception. The general rule is that any order, rule, regulation, scheme, warrant, bylaw or other instrument made under primary legislation has the status of "*subordinate legislation*". The exception to this general rule applies where any of the foregoing measures is made under primary legislation and is devised to either bring into force any of the provisions of the primary legislation concerned or to amend any primary legislation.

[35] By this route the question ultimately becomes: does a statutory rule made under the 1979 Order fall within the compass of section 21(1) (f) of HRA 1998? More specifically, does the statutory language of "*… rules … or other instrument made under primary legislation*" apply to a statutory rule made under the 1979 Order? We consider that the answer must be affirmative. Every member of the section 21(1) (f)

cohort is, plainly, a measure of subordinate legislation. Section 21(1) (f) enshrines the familiar dichotomy of dominant primary legislation and subservient subordinate (or secondary) legislation. One of the long established features of United Kingdom primary legislation is a mechanism whereby certain of its provisions are initially dormant, to be brought into operation by the executive via a subordinate legislative measure. We consider that this analysis clearly applies to the expansive language of section 21(1) (f). Having regard to the clearly ascertainable legislative intention underpinning sections 6 and 21 of HRA 1998, in tandem with the expansive and unambiguous nature of the statutory language employed and taking into account also that this is an imperial statute in which special provision is made for the three devolved administrations (Scotland, Wales and Northern Ireland), we are satisfied that the absence of any reference to the 1979 Order is a matter of no moment.

[36] We would add that in our determination of this issue we have derived assistance from the published works of Professor Brice Dickson, The Legal System of Northern Ireland (5th Edition), pp68 – 77 and Law in Northern Ireland, paragraphs 3.16 – 3.17. As Professor Dickson observes, commencement orders *viz* measures of subordinate legislation bringing into force provisions of primary legislation are an archetypal illustration of statutory rules made under the 1979 Order. Professor Dickson also urges caution in the matter of the nomenclature employed by the delegated authority concerned.

[37] Some illumination is also found in the proceedings in the House of Lords, Committee Stage, on 24 November 1997 (Official Report, House of Lords, Vol 583, Col 814) during which a proposed amendment of Clause 6(6) of the Bill (later section 6(6) HRA 1998) was debated. The Lord Chancellor stated:

> "*This amendment would remove that exemption so that a failure by a public authority to do one of those things would be capable of being challenged in the courts on the grounds that it was unlawful because it was incompatible with one or more of the Convention rights ….*
>
> ***In effect – and I believe this to be the compelling argument against the amendment – it would make a decision not to enact primary legislation justiciable before the courts. That would be inconsistent with a fundamental precept of our constitutional arrangements; namely that the courts do not interfere with the proceedings of Parliament. In short, the Bill is designed to preserve Parliamentary sovereignty and this amendment would encroach upon that.***"
>
> [Emphasis added.]

The constitutional arrangements emphasised in this passage do not of course apply to the Ministerial or Departmental act of introducing, or the omission of not introducing, a measure of subordinate legislation commencing a dormant provision of primary legislation. However they provide the point of departure in any consideration of the discrete regime constituted by the combined provisions of sections 6 and 21 HRA 1998. The legislative policy thus proclaimed was one of excluding the court from adjudicating upon a failure to make primary legislation. The separate legislative policy of insulating Government Ministers and Departments in the matter of commencing (or not) dormant provisions of primary legislation is comparable, particularly when one reflects on practicable realities. In this context the following observations in Administrative Law (Wade and Forsyth, 10th Edition) at page 731ff are of note:

> "*Parliament is obliged to delegate very extensive law making power over matters of detail and to content itself with providing a framework of more or less permanent statutes …*
>
> *Administrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers. But in reality it is no more difficult to justify it in theory than it is possible to do without it in practice. There is only a hazy borderline between legislation and administration and the assumption that they are two fundamentally different forms of power is misleading …. There is an infinite series of gradations, with a large area of overlap, between what is plainly legislation and what is plainly administration.*"

Thus one must be alert to the practical outworkings of the constitutional truism that the executive has no legislative power.

[38] When the court invited the parties to address this discrete issue there was no dissent from either on the correctness of the foregoing analysis. It follows that the appellant's case against DOJ is unsustainable and the appeal must fail.

Reflections on the appellant's Primary Human Rights Case

[39] While strictly unnecessary to do so, given the foregoing conclusion, we consider that it would be of benefit to address the substantive issues raised, taking into account that the court received full argument.

[40] As regards the appellant's primary case the battle lines between the parties are drawn in the following way. The starting point of the submissions of Mr Ronan Lavery QC and Mr Sean Mullan (of counsel) on behalf of the appellant is the proposition that the State must provide adequate measures to protect the anonymity of children who are formally suspected of criminal conduct. The contrast between

the situation in which the appellant found himself, namely a child suspected, but not accused, of a criminal offence and the protections available to children who are thus accused and are inconsequence the subject of criminal court proceedings. The essential ingredients of the appellant's primary case are encapsulated in the following passage in counsel's skeleton argument:

> "*The learned judge erred in law in determining that the Respondent has not acted in breach of the Applicant's rights in accordance with Article 8 ECHR. The Respondent bears the burden to ensure that this vulnerable child has his privacy protected at all stages of the criminal process. This positive obligation is not being fulfilled and was not fulfilled as evidenced by the factual matrix for this Applicant ….*
>
> *The learned judge erred in law in finding that adequate protection of the Applicant's rights under Article 8 ECHR exists by way of civil action and/or press regulation. The Applicant's circumstances showed the ineffectiveness of this approach. For example the Applicant, as a child, was forced to seek high court injunctions against national newspapers and global American corporations (Google and Twitter). By the time this was all achieved the damage was already caused. Bearing in mind the vulnerability of the Applicant, he and his family were forced to uproot and move home due to the pre-charge naming.*"

We shall consider *infra* the main decided cases upon which the appellant advances these submissions.

[41] The riposte of Mr Tony McGleenan QC and Mr Aidan Sands (of counsel) on behalf of DOJ entails the following primary contention. The civil law provides adequate mechanisms for the protection of the appellant's rights and the positive obligation dimension of Article 8 ECHR does not require DOJ either to provide further protection by legislation or to commence section 44 of the 1999 Act. It was further submitted that a human rights challenge of the species advanced by the appellant is not possible having regard to s 6(3) of the Human Rights Act.

[42] The civil law protections invoked by DOJ focus mainly on the tort of misuse of private information. DOJ also relies on the IPSO's COP (noted in [20] above). Counsel also emphasised the margin of appreciation available to Council of Europe States Parties in their adoption of measures designed to give effect to Convention rights. The latitude which this entails, it was submitted, is at its most extensive in the specific context of Article 8 positive obligations imposed on the State.

[43] We turn to consider the main decided cases invoked in the competing contentions of the parties. In *X and Y v The Netherlands* [1985] 8 EHRR 235 the ECtHR

considered the case of a mentally handicapped young person whose allegation of rape did not give rise to a prosecution. The Article 8 ECHR complaint which ensued focused on the absence of any domestic law mechanism whereby the victim could appeal against this decision. The Strasbourg Court decided that a breach of Article 8 was established by virtue of the State's failure to legislate so as to provide a right of appeal. The effect of this failure had been to violate the complainant's right to respect for private life. The court expounded the positive obligation doctrine at [23]:

> *" The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. 7 These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."*

At [27] the court rejected the Government's contention that available civil law remedies provided adequate protection for the complainant's right to respect for private life:

> "*The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted … is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal law provisions; indeed, it is by such provisions that the matter is normally regulated.*"

[44] In *Mosley v United Kingdom* [2011] 53 EHRR 30, a prominent national newspaper published an article concerning the Applicant's alleged engagement in sadomasochistic activities. The publication extended to still photographs and, on the internet, a video. The Applicant's application for an interim injunction was refused on the ground that the offending material was already in the public domain. He was subsequently awarded £60,000 damages for invasion of his privacy and breach of confidence. His ensuing application to the ECtHR centred on his complaint that the Government had failed to discharge its positive obligations under Article 8 ECHR by failing to require the media organisation to notify the Applicant in advance of its publication intentions, thereby giving him the opportunity to apply to the court for a prohibitive injunction. The ECtHR dismissed the Applicant's case. The following are the key passages in the court's judgment, which require to be reproduced in full at [118] – [132]:

"118. As noted above, 59 it is clear that a positive obligation arises under art.8 in order to ensure the effective protection of the right to respect for private life. The question for consideration in the present case is whether the specific measure called for by the applicant, namely a legally binding pre-notification rule, is required in order to discharge that obligation.

119. The Court observes at the outset that this is not a case where there are no measures in place to ensure protection of art.8 rights. A system of self-regulation of the press has been established in the United Kingdom, with guidance provided in the Editors' Code and Codebook and oversight of journalists' and editors' conduct by the PCC. 60 This system reflects the 1970 declaration, the 1998 resolution and the 2008 resolution of the Parliamentary Assembly of the Council of Europe. 61 While the PCC itself has no power to award damages, an individual may commence civil proceedings in respect of any alleged violation of the right to respect for private life which, if successful, can lead to a damages award in his favour. In the applicant's case, for example, the newspaper was required to pay £60,000 damages, approximately £420,000 in respect of the applicant's costs and an unspecified sum in respect of its own legal costs in defending the claim. The Court is of the view that such awards can reasonably be expected to have a salutary effect on journalistic practices. Further, if an individual is aware of a pending publication relating to his private life, he is entitled to seek an interim injunction preventing publication of the material. Again, the Court notes that the availability of civil proceedings and interim injunctions is fully in line with the provisions of the Parliamentary Assembly's 1998 resolution. Further protection for individuals is provided by the Data Protection Act 1998, which sets out the right to have unlawfully collected or inaccurate data destroyed or rectified.

120. The Court further observes that, in its examination to date of the measures in place at domestic level to protect art.8 rights in the context of freedom of expression, it has implicitly accepted that ex post facto damages provide an adequate remedy for violations of art.8 rights arising from the publication by a newspaper of private information. Thus in Von Hannover, the Court's analysis focused on whether the judgment of the domestic courts in civil proceedings brought following publication of private material struck a fair balance between the competing interests. In Armonienė, a complaint about the disclosure of the applicant's husband's HIV-positive

status focused on the "derisory sum" of damages available in the subsequent civil proceedings for the serious violation of privacy. While the Court has on occasion required more than civil law damages in order to satisfy the positive obligation arising under art.8, the nature of the art.8 violation in the case was of particular importance. Thus in X v Netherlands at [27], the Court insisted on the need for criminal law provisions to achieve deterrence in a case which involved forced sexual intercourse with a 16-year-old mentally-handicapped girl. In KU v Finland at [46]–[47], the availability of civil law damages from an Internet service provider was inadequate where there was no possibility of identifying the person who had posted an advert in the name of the applicant, at the time only 12-years old, on a dating website, thus putting him at risk of sexual abuse.

121. In the present case the Court must consider whether, notwithstanding its past approach in cases concerning violations of the right to respect for private life by the press, art.8 requires a pre-notification rule in order to ensure effective protection of the right to respect for private life. In doing so, the Court will have regard, first, to the margin of appreciation available to the respondent State in this field 64 and, secondly, to the clarity and potential effectiveness of the rule called for by the applicant. While the specific facts of the applicant's case provide a backdrop to the Court's consideration of this question, the implications of any pre-notification requirement are necessarily far wider. However meritorious the applicant's own case may be, the Court must bear in mind the general nature of the duty called for. In particular, its implications for freedom of expression are not limited to the sensationalist reporting at issue in this case but extend to political reporting and serious investigative journalism. The Court recalls that the introduction of restrictions on the latter type of journalism requires careful scrutiny.

(i) The margin of appreciation

122. The Court recalls, first, that the applicant's claim relates to the positive obligation under art.8 and that the State in principle enjoys a wide margin of appreciation. It is therefore relevant that the respondent State has chosen to put in place a system for balancing the competing rights and interests which excludes a pre-notification requirement. It is also relevant that a parliamentary committee recently held an inquiry on privacy issues during which written and oral evidence was taken from a

number of stakeholders, including the applicant and newspaper editors. In its subsequent report, the Select Committee rejected the argument that a pre-notification requirement was necessary in order to ensure effective protection of respect for private life.

123. Secondly, the Court notes that the applicant's case concerned the publication of intimate details of his sexual activities, which would normally result in a narrowing of the margin of appreciation. However, the highly personal nature of the information disclosed in the applicant's case can have no significant bearing on the margin of appreciation afforded to the state in this area given that, as noted above, any pre-notification requirement would have an impact beyond the circumstances of the applicant's own case.

124. Thirdly, the Court highlights the diversity of practice among Member States as to how to balance the competing interests of respect for private life and freedom of expression. Indeed the applicant has not cited a single jurisdiction in which a pre-notification requirement as such is imposed. Insofar as any common consensus can be identified, it therefore appears that such consensus is against a pre-notification requirement rather than in favour of it. The Court recognises that a number of Member States require the consent of the subject before private material is disclosed. However, it is not persuaded that the need for consent in some states can be taken to constitute evidence of a European consensus as far as a pre-notification requirement is concerned. Nor has the applicant pointed to any international instruments which require states to put in place a pre-notification requirement. Indeed, as the Court has noted above, the current system in the United Kingdom fully reflects the resolutions of the Parliamentary Assembly of the Council of Europe. The Court therefore concludes that the respondent State's margin of appreciation in the present case is a wide one.

(ii) The clarity and effectiveness of a pre-notification requirement

125. The applicant considered that the duty should be triggered where any aspect of private life was engaged. It would therefore not be limited to the intended disclosure of intimate or sexual details of private life. As such, the duty would be a relatively broad one. Notwithstanding the concerns expressed by the Government and the interveners the Court considers that the concept of "private life" is sufficiently well understood for newspapers and reporters to be able to identify when a

publication could infringe the right to respect for private life. Specific considerations would arise, for example in the context of photographs of crowds, but suitable provisions could be included in any law. The Court is further of the view that a satisfactory definition of those who would be subject to the requirement could be found. It would appear possible, for example, to provide for a duty which would apply to those within the purview of the Editors' Code.

126. However, the Court is persuaded that concerns regarding the effectiveness of a pre-notification duty in practice are not unjustified. Two considerations arise. First, it is generally accepted that any pre-notification obligation would require some form of "public interest" exception. Thus a newspaper could opt not to notify a subject if it believed that it could subsequently defend its decision on the basis of the public interest. The Court considers that in order to prevent a serious chilling effect on freedom of expression, a reasonable belief that there was a "public interest" at stake would have to be sufficient to justify non-notification, even if it were subsequently held that no such "public interest" arose. The parties' submissions appeared to differ on whether "public interest" should be limited to a specific public interest in not notifying (for example, where there was a risk of destruction of evidence) or extend to a more general public interest in publication of the material. The Court would observe that a narrowly defined public-interest exception would increase the chilling effect of any pre-notification duty.

127. In the present case, the defendant newspaper relied on the belief of the reporter and the editor that the sexual activities in which the applicant participated had Nazi overtones. They accordingly argued that publication was justified in the public interest. Although Eady J. criticised the casual and cavalier manner in which the News of the World had arrived at the conclusion that there was a Nazi element, he noted that there was significant scope for differing views on the assessment of the "public interest" and concluded that he was not in a position to accept that the journalist and editor concerned must have known at the time that no public-interest defence could succeed. Thus, in the applicant's own case, it is not unlikely that even had a legally binding pre-notification requirement been in place at the relevant time, the News of the World would have chosen not to notify in any event, relying at that time on a public-interest exception to justify publication.

128. Secondly, and more importantly, any pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it. A regulatory or civil fine, unless set at a punitively high level, would be unlikely to deter newspapers from publishing private material without pre-notification. In the applicant's case, there is no doubt that one of the main reasons, if not the only reason, for failing to seek his comments was to avoid the possibility of an injunction being sought and granted. Thus the News of the World chose to run the risk that the applicant would commence civil proceedings after publication and that it might, as a result of those proceedings, be required to pay damages. In any future case to which a pre-notification requirement applied, the newspaper in question could choose to run the same risk and decline to notify, preferring instead to incur an ex post facto fine.

129. Although punitive fines or criminal sanctions could be effective in encouraging compliance with any pre-notification requirement, the Court considers that these would run the risk of being incompatible with the requirements of art.10 of the Convention. It reiterates in this regard the need to take particular care when examining restraints which might operate as a form of censorship prior to publication. It is satisfied that the threat of criminal sanctions or punitive fines would create a chilling effect which would be felt in the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the Convention.

(iii) Conclusion

130. As noted above, the conduct of the newspaper in the applicant's case is open to severe criticism. Aside from publication of the articles detailing the applicant's sexual activities, the News of the World published photographs and video footage, obtained through clandestine recording, which undoubtedly had a far greater impact than the articles themselves. Despite the applicant's efforts in a number of jurisdictions, these images are still available on the Internet. The Court can see no possible additional contribution made by the audiovisual material, which appears to have been included in the News of the World's coverage merely to titillate the public and increase the embarrassment of the applicant.

131. The Court, like the Parliamentary Assembly, recognises that the private lives of those in the public eye have become a highly lucrative commodity for certain sectors of the media. The publication of news about such persons contributes to the

> *variety of information available to the public and, although generally for the purposes of entertainment rather than education, undoubtedly benefits from the protection of art.10. However, as noted above, such protection may cede to the requirements of art.8 where the information at stake is of a private and intimate nature and there is no public interest in its dissemination. In this regard the Court takes note of the recommendation of the Select Committee that the Editors' Code be amended to include a requirement that journalists should normally notify the subject of their articles prior to publication, subject to a "public interest" exception*
>
> *[132] However, the Court has consistently emphasised the need to look beyond the facts of the present case and to consider the broader impact of a pre-notification requirement. The limited scope under art.10 for restrictions on the freedom of the press to publish material which contributes to debate on matters of general public interest must be borne in mind. Thus, having regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of appreciation in this area, the Court is of the view that art.8 does not require a legally binding pre-notification requirement. Accordingly, the Court concludes that there has been no violation of art.8 of the Convention by the absence of such a requirement in domestic law.*

[45] In earlier passages, at [106] ff, the court reflected on the positive obligation under Article 8 ECHR to which the State may sometimes be subjected. It emphasised *inter alia* "*the importance of a prudent approach to the State's positive obligations to protect private life in general and of the need to recognise the diversity of possible methods to/ secure its respect*", adding:

> "*The choice of measures designed to secure compliance with that obligation in the sphere of the relations of individuals between themselves in principle falls within the Contracting States margin of appreciation.*"

In the next sentence the court used the term "*discretion*", simultaneously recording its earlier decision in *X and Y v The Netherlands*: see [107]. The court developed this theme at [108]:

> *"The Court recalls that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be accorded to the state in a case in which art.8 of the Convention is engaged. First, the Court reiterates that the notion of "respect" in art.8 is not clear-cut,*

> *especially as far as the positive obligations inherent in that concept are concerned: bearing in mind the diversity of the practices followed and the situations obtaining in the contracting states, the notion's requirements will vary considerably from case to case. Thus Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. In this regard, the Court recalls that by reason of their direct and continuous contact with the vital forces of their countries, the state authorities are, in principle, in a better position than the international judge to give an opinion on how best to secure the right to respect for private life within the domestic legal order.*

At [109] the court adverted to the attenuation of the State's margin of appreciation where the interference with private life is particularly serious, for example where it concerns something especially intimate, as in *Dudgeon v United Kingdom* [1981] EHRR.

[46] Continuing, at [110] the court reasoned that the extent of the State's margin of appreciation where positive Article 8 obligations are canvassed is further measured where there is an absence of consensus among Contracting Parties either about the relative importance of the interest at stake or the best means of protecting it, stating that "*… where no consensus exists, the margin of appreciation afforded to States is generally a wide one …*". Next the court highlighted its (well established) willingness to take into account "*any standards set out in applicable international instruments and reports*".

[47] The court then turned its focus to Article 10 ECHR, first identifying the familiar balance principle at [111]:

> "*In cases where measures which an applicant claims are required pursuant to positive obligations under Article 8 would have an impact on freedom of expression, regard must be had to the fair balance that has to be struck between the competing rights and interests under Article 8 and Article 10 …* ***rights which merit, in principle, equal respect ….***"
>
> [Emphasis added.]

In the ensuing passages the judgment emphasises the pre-eminent role of the press in informing the public and imparting information and ideas on matters of public interest and notes that methods of objective and balanced reporting may vary considerably, thereby limiting the adjudicative role of the court.

[48] In what follows the judgment highlights the distinction between reporting facts, including controversial facts, capable of contributing to a debate of general public interest in a democratic society (on the one hand) and making tawdry

allegations about an individual's private life (on the other); makes a distinction between the more powerful audio visual media and the less potent print media; recalls that the balancing of competing interests would take into account whether the publication of a person's photograph made any additional contribution to a debate of general interest; highlights the importance of taking into account also the nature and severity of any sanction imposed on the press in respect of a given publication, emphasising once again the importance of "*matters of legitimate public concern*"; and, finally, states at [117]:

> *"Finally, the Court has emphasised that while art.10 does not prohibit the imposition of prior restraints on publication, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. 58 The Court would, however, observe that prior restraints may be more readily justified in cases which demonstrate no pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest."*

[49] The decision of the ECtHR in *Von Hannover v Germany* [2004] EHRR [2005] 40 EHRR 1 is an illustration of the court finding that the domestic laws of the Contracting State concerned failed to strike a fair balance between the applicant's right to respect for private life and the competing right to freedom of expression of media publishers. In a nutshell, Princess Caroline, a well-known public figure internationally, had litigated in the German courts for a period of some ten years attempting to secure effective domestic remedies against the repeated publication of photographs of a male associate, her children and the Princess, coupled with articles, publishing details of her private life. The determinative consideration for the court was that the publications made no contribution to a debate of general interest, given that the Princess exercised no official function and the published materials related exclusively to details of her private life, there being no legitimate public interest in knowing where she was and how she behaved in her private life: see [76] – [77]. In a sentence, the State's margin of appreciation did not come to its rescue because its laws and courts had failed to strike a fair balance between the competing interests.

[50] In *Richard v BBC and Another* [2019] Ch 169 the claimant, a high-profile entertainer, was the subject of a police investigation into an allegation of a historical sexual offence, in the course whereof the police gave advance notice to a broadcaster of a search of the claimant's home. Prominent television coverage followed. In the event no charges were brought. The court ruled that *prima facie* a suspect has a reasonable expectation of privacy in relation to a police investigation. This was based on what the court considered to be a general rule that third parties had no need to know of police investigations, coupled with the pragmatic consideration that

wider knowledge could have potentially damaging consequences. The claimant was considered to have a reasonable expectation of privacy vis-à-vis both the police force and the broadcaster. As a result his right to respect for private life under Article 8 ECHR was engaged.

[51] The balancing exercise which the court then conducted under Article 8(2) ECHR was resolved in favour of the claimant by reference to three particular considerations: first, there was no public interest in identifying the claimant as the subject of the investigation; second, very serious consequences for the claimant, magnified by the dramatic and sensationalist style of the broadcaster's publications, had ensued; and, third, there had been no engagement by the broadcaster with the claimant in advance of publication. In these circumstances the claimant's rights under Article 8 were considered to outweigh the broadcaster's rights under Article 10. The proceedings involved the claimant and the broadcaster only, the police having accepted liability, having apologised and having paid the claimant damages and costs.

[52] The heart of the reasoning of the trial judge, Mann J, can be ascertained from [248] – [251] of his judgment:

> *"[248] It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation, and I so rule. As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached. It is, as a general rule, not necessary for anyone outside the investigating force to know, and the consequences of wider knowledge have been made apparent in many cases: see above. If the presumption of innocence were perfectly understood and given effect to, and if the general public were universally capable of adopting a completely open and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not. This was acknowledged in Khuja v Times Newspapers Ltd [2019] AC 161 (the PNM case renamed in the Supreme Court). The trial judge had acknowledged that some members of the public would equate suspicion with guilt, but he considered that members of the public generally would know the difference between those two things: see para 32. Lord Sumption JSC was not so hopeful. He observed, at para 34: "Left to myself, I might have been less sanguine than he was about the reaction of the public to the way PNM featured in the trial."*

[249] In the same case the minority justices (Lord Kerr of Tonaghmore and Lord Wilson JJSC) quoted, at para 52, from Cobb J's observations in ***Rotherham Metropolitan Borough Council v M*** *[2016] 4 WLR 177 with approval.*

> *'Then Cobb J quoted from a leading article in The Times on 19 October 2016 as follows: 'False rape and abuse accusations can inflict terrible damage on the reputations, prospects and health of those accused. For all the presumption of innocence, mud sticks.' In the end Cobb J concluded that the restriction orders against identification of the men should be continued indefinitely. He said, at para 46: 'I have reached the firm conclusion that there is no true public interest in naming the four associated males, against whom, in the end, no findings have been sought or made. [Their] article 8 rights … would be in my judgment significantly violated were they to be publicly exposed in the media as having been implicated to a greater or lesser degree, but not proved to be engaged, in this type of offending.' These observations seem to us to show great insight and to resonate strongly with the facts of the present case.'*

[250] These judicial remarks demonstrate at least some of the reasons why an accused should at least prima facie have a reasonable expectation of privacy in respect of an investigation. They are particularly appropriate to the type of case referred to there (of which, of course, the present case is an instance) but they are generally applicable, to varying extents, to other types of cases.

[251] That is not to say, and I do not find, that there is an invariable right to privacy. There may be all sorts of reasons why, in a given case, there is no reasonable expectation of privacy, or why an original reasonable expectation is displaced. An example was given by Sir Brian Leveson in the extract quoted above, and others can be readily thought of. But in my view the legitimate expectation is the starting point. I consider that the reasonable person would objectively consider that to be the case."

[53] *Mosley* contains extensive guidance on how the appellant's Article 8 ECHR challenge should be resolved. The starting point in the analysis, as already noted, is the uncontroversial one that the offending information about the appellant which was published by the media belongs to the realm of his private life, thus qualifying for protection under Article 8(1) ECHR. The second step in the analysis, again uncontroversial, is that while the media publications interfered with the appellant's enjoyment of this right this interference was not perpetrated by the public authority DOJ, against whom the appellant's case is brought. Rather the *interference* attributed to DOJ is a failure to have acted in a manner which could – not would – (our characterisation) have protected the Appellant against the offending publications. As already noted, this broad formulation telescopes to the narrower specific complaint that DOJ has interfered with the appellant's right to respect for his private life by failing to commence section 44 of the 1999 Act (*supra*). As the responsibility for taking this step rests by statute exclusively on DOJ by virtue of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, DOJ is the appropriate respondent in these proceedings.

[54] DOJ's response to the appellant's case, in a sentence, is that the non-commencement of section 44 of the 1999 Act lies within its margin of appreciation (in Strasbourg terms), or discretionary area of judgement (in domestic law terms), and, therefore, does not constitute an interference by omission with the appellant's right to respect for private life. The evidential foundation of the DOJ case is summarised in [18] – [19] above. In short, Parliament (initially) and DOJ (latterly) have been engaged in a balancing exercise. The ingredients of the equation, in addition to Article 8 and Article 10 ECHR, have included the potential for media reporting to protect children in certain instances – see [17](ii) above – the desirability of responsible self-regulation by the media, the willingness of the latter to fortify this mechanism, the availability of civil law remedies, the absence of concerns expressed by relevant agencies and persons and, finally, that in the experience of DOJ post-devolution since April 2010, viz in a ten year period, the appellant's case is the only one of its kind to have materialised.

[55] The various facts and factors summarised immediately above bear on the reach of the margin of appreciation available to the respondent, DOJ. In its evaluation of the scope of DOJ's margin of appreciation, this court further takes into account that the offending publications did not involve the dissemination of something belonging to the inner sanctum of the intimate aspects of the appellant's private life; the criminality stimulating the appellant's arrest and interview and the ensuing publications was a matter of legitimate public interest; the subject matter of the publications was not of the lurid or salacious variety; the measures adopted to secure a person's right to respect for private life are not the subject of broad consensus among Council of Europe Contracting Parties; the two rights lying at the heart of the balancing exercise – Article 8 and Article 10 – are in principle are worthy of equal respect; the offending publication was effected by the print media and not the audio visual media; and the restraints for which the appellant contends would have been operative at the pre-publication stage, thereby imposing a blanket

prohibition on dissemination of the information under scrutiny. The legitimacy of the court taking into account all of the foregoing facts and considerations derives from the decided cases, in particular *Mosley*, considered above.

[56] In addition to the foregoing, it has been a constant theme of the ECtHR jurisprudence that State agencies rather than courts are, in principle, better equipped to undertake the kind of evaluative judgements involved in determining how best to secure the right to respect for private life within the domestic legal order and in weighing the panoply of considerations bearing on the balance to be struck between the competing Article 8 and Article 10 rights.

[57] Mr Lavery QC understandably points out that self-regulation by the press and the availability of civil remedies were not efficacious to prevent the publications of which the appellant complains. Furthermore we accept that the COP, considered in [19] above, contains no specific provision either exhorting against or prohibiting the offending publications. On the other hand, the correspondence considered in [48] *infra* is indicative of a general inclination towards self-restraint by the media in the matter of publishing information concerning "pre-charge children". This serves as a reminder that Article 8(1) ECHR does not establish rights of an absolute nature.

[58] The evidence before the court includes a letter dated 15 December 2015 written by the Managing Editor of Guardian News and Media Limited to the Standing Committee for Youth Justice. This contains the statement:

> "*There is no specific legal impediment to naming children (by which I mean those aged 17 or under) who are suspected of criminal activities before charge.*"

Narrowly construed, this statement may be correct. However it overlooks the very issue raised by the present challenge namely that in certain circumstances a publication of this kind could violate a child's right to respect for private life protected by Art 8(1) ECHR, subject to the machinery of the Human Rights Act applying. The author, correctly, acknowledges in the ensuing passage the influence of the torts of defamation and misuse of private information. However, in what follows, one finds the terminology "*a child accused of crime pre-charge*". This phraseology suffers from palpable confusion. Unless and until a charge is formally levelled against a person there is no accusation of a criminal offence under UK law. Rather, the scenario is one of suspicion. The Managing Editor's letter blurs this important distinction. Subject to those observations, one can readily identify within this letter, coupled with the voluntary withdrawals from publication which followed, indications of the responsible self-regulation of the media forming one of the pillars of DOJ's response to this challenge.

[59] The relevant factual matrix contains a multiplicity of ingredients which do not unremittingly point in the same direction. It is incumbent on the court to stand back and view these as a whole, while giving effect to the principles derived from the

ECtHR jurisprudence. This requires the formation of a judicial evaluative judgment which is alert to the operation of certain constraints on the judicial role in this kind of case. One aspect of this is that this court should exercise "*caution*" (in the language of the Strasbourg Court) given the wide margin of appreciation available to the State in this discrete litigation context.

[60] Weighing all of the foregoing, had it been necessary to resolve the appellant's primary human rights case we would have concluded that the failure of DOJ to act in the manner of which the appellant complains, namely its non-commencement of section 44 of the 1999 Act, did not as regards the offending publications by non-State actors interfere with the appellant's right to respect for his private life. In short, DOJ has not exceeded its margin of appreciation.

[61] We would add that as decisions such as *Von Hannover* make clear, the appellant's Art 8 case has been played out, and determined, by the court within the framework of Article 8(1). For the reasons given, no interference by DOJ with the appellant's right to respect for private life has been established. Therefore the court's enquiry does not progress to Article 8(2).

[62] In passing, if and insofar as the appellant's legal challenge has highlighted any possible *lacuna* in the COP, the response to this will be a matter for the agencies concerned.

[63] We would add the following, bearing in mind that courts conducting criminal proceedings to which Article 22(1) and (2) of the 1998 Order apply, will benefit from a little guidance on how they should exercise the judicial discretion created by these statutory provisions. We refer to the analysis in [9] – [15] above. As noted in [47], the Strasbourg Court has described the rights guaranteed by Article 8 and Article 10 ECHR as deserving of "*equal respect*". This requires some analysis. In cases where it falls to the court to balance these rights the context will of course be all important. Thus in cases to which Article 22(1) and (2) apply the age of the defendant will be a matter of unmistakable significance. The open justice principle is at its strongest in respect of the right of the press to publish a fair and accurate account of court proceedings. Even here, however, the legislative steer is towards the anonymisation of children and young people charged with offences. The court concerned will be obliged to act compatibly with the defendant's right to respect for private life under Article 8 ECHR. This exercise will entail balancing the principle of open justice and the freedom of expression rights enjoyed by media organisations under Article 10 ECHR. We consider that in such cases the international standards rehearsed in [21] – [25] above will be of particular importance. As a matter of legal doctrine, these standards influence how Article 8 is to be applied in any given case and how balancing exercises involving *inter alia* Article 8 are to be resolved. The clear and consistent orientation of these standards is to allocate to an elevated plane the importance of protecting the privacy of children involved in the criminal justice system. This is expressed in the terms of an imperative, with a clearly explained

rationale. Thus it is to be expected that the Article 8 rights of children involved in criminal proceedings will prevail in all but the most exceptional circumstances.

[64] Logically, the aims and objectives of the international standards and the protection provided by Article 8(1) ECHR must apply with equal force to children whose encounter with and involvement in the criminal justice system is at a preliminary stage (as in this case) falling outwith the framework of Article 22(1) and (2) of the 1998 Order. The express terms of the UNCRC provisions considered above, in tandem with the open textured language of the other international standards highlighted, strongly support this analysis. Thus cases in which a public authority can lawfully depart from this norm – such as *Re JR 38* [2015] UKSC 42 – will be rare. It follows that if a public authority such as the PSNI or the DPP had made the publications impugned by the appellant it is highly unlikely that justification could have been established.

[65] We consider the foregoing to be harmonious with what the Supreme Court stated in *Re S (Children)* [2004] UKSC 47 at [16] – [17], per Lord Steyn:

> *"It is, however, the interaction between articles 8 and 10 which lies at the heart of this appeal. They provide as follows:*
>
> *"Article 8*
>
> *Right to respect for private and family life*
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*
>
> *"Article 10*
>
> *Freedom of expression*
>
> *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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

> *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."*
>
> *By section 12(4) of the Human Rights Act 1998 Parliament made special provision regarding freedom of expression. It provides that when considering whether to grant relief which, if granted, might affect the exercise of the Convention right to freedom of expression the court must have particular regard to the importance of the right. …*
>
> *The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."*

Reflections on the appellant's alternative case: Articles 6 and 8 ECHR in tandem with Article 14

[66] The late emergence of this alternative case when the appeal was first listed before this court gave rise to the remittal order pursuant to which Colton J delivered a second judgment. At the same time this court permitted amendment of the appellant's pleading. Whereas the appellant's primary case is founded on an asserted breach of his right to respect for private life protected by Article 8(1) ECHR his alternative case, invoking Article 14 ECHR, entails the contention that he was the victim of discriminatory treatment *within the ambit of* not only Article 8 but also Article 6. This is reflected in the corresponding relief now pursued:

> *"A declaration that the failure to provide the* [appellant] *with pre-charge anonymity created unlawful discrimination*

contrary to [his] *rights under Article 14* [ECHR] *in conjunction with Article 6 and/or Article 8.*"

[67] In the final incarnation of the appellant's Order 53 pleading, his Article 14 ECHR case was formulated in the following terms:

> "*Unless read in a Convention compliant manner under section 3 of the Human Rights Act 1998, Article 22 of the [1998 Order] is necessarily inconsistent with, and in violation of, the rights of the Appellant under ……. Article 14, in conjunction with Article 6 and Article 8 ECHR by virtue of representing infringements of those rights which are neither proportionate nor necessary in a democratic society.*
>
> *Particulars*
>
> *(i) [Article 22] unlawfully discriminates against the Appellant contrary to Article 14 in conjunction with Articles 6 and 8 ECHR by disadvantaging him on the basis of his status when compared to comparable persons in analogous situations without reasonable justification.*
>
> *(ii) The Appellant has suffered discrimination on the basis of the following statuses as created by the provisions of Article 22:*
>
> *(a) A minor concerned in criminal proceedings not protected by Article 22(2).*
>
> *(b) A minor concerned in criminal proceedings including a criminal investigation where no court proceedings have been commenced.*
>
> *(c) A minor concerned in criminal proceedings where no court hearing has taken place.*
>
> *(iii) When one compares the Appellant with those persons who are protected by the reporting restrictions set out in Article 22(2) he has been treated less favourably with no reasonable justification.*
>
> *(iv) The Appellant has also suffered indirect discrimination by the operation of Article 22 on the basis of his age by making no distinction between the treatment of him as a child and an adult in equivalent circumstances, namely:*

(a) An adult concerned in criminal proceedings where no criminal proceedings have been commenced, or

(b) Where proceedings have been commenced but no court hearing has taken place."

[68] Every Article 14 case requires the court to pose and answer in a disciplined way a series of questions:

(i) Does the case fall within the ambit of any of the substantive Convention rights invoked?

(ii) Does the claimant possess either a status expressly specified in Article 14 or some "*other status*" falling within its embrace?

(iii) Is the claimant the victim of differential treatment when compared with others in analogous situation?

(iv) Is such differential treatment on the ground of the claimant's Article 14 protected status?

(v) Applying the *relevant test*, has the public authority concerned discharged its burden of establishing justification for the differential treatment, by the demonstration of one of the specified legitimate aims and a proportionate means of achieving this?

We shall elaborate *infra* on the *relevant test* applicable to (v).

[69] The Article 14 tests operate in a cumulative way. Thus each of the questions must be answered in a manner favourable to the claimant before proceeding to the next. If the resolution of any of the questions is unfavourable to the claimant, the Article 14 claim must fail.

[70] It is not contested on behalf of DOJ that the appellant's case satisfies the ambit test vis-à-vis both Article 6 and Article 8. There are two features in particular of Article 6 which resonate in the case of this appellant. First, the autonomous concept of a "*charge*" within the Article 6(1) framework materialises when the situation of the person concerned is *substantially affected*: see *Ambrose v Harris* [2011] UKSC 35, at [62] and *O'Neill v HM Advocate (No 2)* [2013] UKSC 36, together with the recent review of the leading authorities in the decision of this court in *R v Dunlop* [2019] NICA 72 at [25] – [26]. In the present case, while the information available is not particularly detailed, we are disposed to accept the agreement between the parties that this test was satisfied in the relevant circumstances, namely the arrest of the appellant on suspicion of having committed the relevant offence, ensuing interviews by the police

and his release from custody without any withdrawal of the suspicion of his criminality. In Article 6 terms the criminal process involving the appellant had begun.

[71] The second resonant feature of Article 6(1) on the facts of the appellant's case concerns the protections against publicity which Article 6 is capable of providing. Article 6 specifically permits derogation from the general principle of publicity where *inter alia* the interests of juveniles or the protection of a party's private life so require. The submissions of Mr Lavery QC and Mr Mullan reminded the court of the importance which the ECtHR attributed to this derogation in the high profile case of *T and V v United Kingdom* [2000] 30 EHRR 121. Given the two features noted we are prepared to accept the parties' joint position that the ambit test is satisfied in this case.

[72] Progressing to the second test, the starting point is that the appellant cannot lay claim to any express status in the Article 14 "list". The question therefore becomes whether he possesses an "*other status*". Having taken account of the elaborate pleading reproduced above, we consider that the "*status*" of the appellant at the material time was that of a child suspected of, but not charged with, a criminal offence in the context of a continuing police investigation. Counsels' submissions invoked the decision of the Supreme Court in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59. The issue in that case was the lawfulness of the different treatment in the matter of early release from prison of extended determinate sentence prisoners and that of other sentenced prisoners. The Supreme Court, by a majority of 4/1, held that this was an "*other status*" within the framework of Article 14. By a different majority of 3/2 the substantive Article 14 case was rejected. The aAppellant's "*other status*" case in the present appeal rests on a single passage in the leading majority judgment, that of Lady Black JSC, at [81]:

> "*Bearing in mind that, although not open-ended, the grounds within Article 14 are to be given a generous meaning, bearing in mind the warning of the ECtHR that there is a need for careful scrutiny of differential early release schemes, less they run counter to the very purpose of Article 5 and considering all of the case law I would conclude that the difference in the treatment of extended determinate sentenced prisoners in relation to early release is a difference within the scope of Article 14, being on the ground of* ***other status***."

[73] As Lady Black noted at [14], within the jurisprudence of the ECtHR on Article 14 cases there is one particular passage which arises with notable frequency. In *Kjeldsen and Others v Denmark* [1976] 1 EHRR 711 the court stated at [56]:

> "*The court first points out that Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic*

> *('status') by which persons or groups of persons are distinguishable from each other.*"

It is the adjective "*personal*" which has assumed most prominence in later cases.

[74] In *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 44 the appellant, unable to lay claim to any of the expressed Article 14 grounds, invoked the "*other status*" of a prisoner sentenced to a determinate term of 15 years or more. The House of Lords rejected this contention. The ECtHR disagreed: see *Clift v United Kingdom (*Application no. 7205/07). In its judgment it stated that Article 14 –

> "*… does not prohibit all differences in treatment but only those differences based on* ***an identifiable, objective or personal characteristic****, or 'status', by which persons or groups of persons are distinguishable from one another …*"
>
> (At [55])

The court noted at [56] that the words "*other status*" have generally been given a wide meaning. Decisions such as *James v United Kingdom* [1986] EHRR 123 and *Chassagnou v France* [1999] 29 EHRR 615 demonstrated that the specified ground of "*property*" could not be considered an innate characteristic or inherently linked to the identity or personality of the individual. The court rejected arguments that the treatment of which the claimant complains must exist independently of the "*other status*" asserted. The court concluded that the "*other status*" advanced by the appellant fell within the embrace of Article 14.

[75] *Clift* was decided by the House of Lords in 2007. The advent of the Strasbourg Court's decision occurred in 2010. Between these two events the House found itself seized of the "*other status*" conundrum again, in the case of *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311. It was held that the homelessness of the claimant was an "*other status*" within the scheme of Article 14. Lord Neuberger of Abbotsbury, delivering the leading judgment, specifically espoused the "*personal characteristic*" formulation of *Kjeldesen* – at [41] – simultaneously accepting that the words "*other status*" should adopt a generous meaning, taking into account the context of enforcing anti-discrimination legislation in a democratic state in the 21st century: see [42]. He added at [45]:

> "*Further, while reformulations are dangerous, I consider that the concept of* ***personal*** *characteristic (not surprisingly, like the concept of status) generally requires one to concentrate on what somebody is, rather than what he is doing or what is being done to him.*"

(The qualifying word "*generally*" will be noted.) Finally, Lord Neuberger drew on the decision of the House in *Clift*.

[76] Lord Walker of Gestingthorpe, in a short judgment, added a notable contribution to this subject at [5]:

> "*The other point on which I would comment is the expression "personal characteristics" used by the European Court of Human Rights in Kjeldsen, Busk, Madsen and Pedersen v Denmark (1976) 1 EHRR 711, and repeated in some later cases. "Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14*".

Lord Walker, notably, identified a nexus between the more remote kinds of status and justification:

> "*The more peripheral or debatable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify.*"

The other four members of the judicial panel expressly agreed with Lord Walker: see [1], [2], [7] and [41].

[77] The status asserted by the appellant is neither an innate characteristic nor something personal to him. It is, rather, something which he has acquired by conduct attributed to him (which, in passing, he eventually admitted). In this way he became a person suspected of the commission of a criminal offence. In *Clift* the Strasbourg Court stated at [60]:

> "*The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of*

the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective."

The terminology of this passage is consistent with the elasticity which has characterised the approach to "*other status*" in some of the decided cases. In jurisprudential terms one searches in vain for a bright line test. Arguably the clearest guidance in the decided cases is that contained in the judgment of Lord Walker in *RJM* (*supra*). Yet even this is not framed in doctrinaire terms as the qualifying words at the end of the passage reproduced above ("*but they may still come within Article 14*").

[78] The requirement to have regard to all the circumstances includes, in the present case, the direct connection between the status which the appellant asserts and the offending treatment which occurred. His asserted status was the only reason for this treatment. The same is true of the claimants who made good their "*other status*" claims in *Clift*, *RJM*, *Stott* and other cases in this field. We further take into account that while both the ECtHR and the Supreme Court have had ample opportunity to declare that this sometimes troublesome phrase should be construed by the implication of the word "*comparable*" between "*other*" and "*status*" neither has done so. The single principle which probably emerges most clearly from the fog is that the judicial determination of "*other status*" in a given case should incline towards the expansive and not the restrictive.

[79] As the deliberations in the preceding paragraphs demonstrate the answer to the Article 14 "*other status*" question in this case has not emerged as obvious. Our conclusion, not without reservations, is that the status asserted by the appellant namely, in his short hand, that of *pre-charge suspect,* ranks as an "*other status*" within the embrace of Article 14 ECHR.

[80] The first two of the sequential and cumulative Article 14 tests having been resolved in the appellant's favour, we come to the third, namely (in shorthand) that of comparator. Having regard to the treatment of which the appellant complains, is the situation of the members of the group with which he seeks to compare himself analogous? The appellant's chosen comparator group is, per his latest amended Order 53 pleading, children who have been charged with a criminal offence and are *ipso facto* the subject of a prosecution – thereby qualifying for the exercise of the discretionary judicial non-publicity prohibition order under Art 22(1) of the 1999 Order. For the purpose of answering the "comparator" question, the relevant characteristics of the appellant are that he was suspected of having committed a criminal offence, arrested by the police, questioned and then released without charge.

[81] The key characteristic of the members of the appellant's chosen comparator group is that they have been charged with a criminal offence and are the subject of a prosecution and, thereby, engaged in a court process. As such they can lay claim to all of the statutory and common law rights enjoyed by an accused person. These

rights are mainly, though not exhaustively, laid out in legislation via the Police and Criminal Evidence (NI) Order 1989 and the Codes of Practice made thereunder. Viewed through the prism of section 6 of the Human Rights Act and Article 6 ECHR the following panoply of rights arises:

- A fair and public hearing.
- Trial within a reasonable time.
- Trial by an independent and impartial tribunal established by law.
- The pronouncement of judgment in public.
- The presumption of innocence.
- To be informed promptly in a language which the accused person understands and in detail of the nature and cause of the accusation against him.
- To have adequate time and facilities for the preparation of his defence.
- To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
- To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
- To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[82] The trigger for this series of rights is that the person concerned be the subject of a "*criminal charge*". There must be an "*accusation*". There must further be extant legal proceedings. There must be an adversarial process. At most, the presumption of innocence, specifically protected by Article 6(2), applied to the appellant in his pre-charge situation. However, none of the menu of other specific rights specified in Article 6(1) and Article 6(3) had any meaningful application to him. Having been released from custody unconditionally (subject at most to some modest bail requirement), he was a free person, subject to no compulsion or restriction of any kind. This analysis applies both through the prism of Article 6 ECHR and the other familiar provisions of domestic law.

[83] In determining whether, in an Article 14 challenge, groups are in a relevantly analogous situation it is incumbent upon the court to have regard to the particular

nature of the complaint being advanced: see, for example *Clift v United Kingdom* at [66]. We are mindful that satisfaction of this test does not require the demonstration of exact equivalence. Rather the requirement is the less exacting one of sufficient similarity: *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 at [25] per Baroness Hale.

[84] In his consideration of this issue Colton J, in his second judgment, drew attention to the distinction between the investigatory stages of a criminal process and the post-charge phase: see [59] – [61]. We consider that he was correct to do so. As our analysis above amply demonstrates, there are multiple distinctions between the situation of a person (merely) suspected of an offence and that of a person charged with (or accused of) an offence. The factors common to these two situations are few. While each falls within the realm of criminal justice, or the criminal process, and each typically involves the police agency, with lawyers usually involved, this in substance is the extent of the comparison. The differences between the two situations, both practical and legal, are material and extensive. The analogy between the two situations is in our view vague and flimsy. We consider that the members of the comparator group chosen by the appellant differ from him so substantially that, within the Article 14 framework, they cannot be considered to be in a relevantly analogous situation.

[85] Having regard to the analysis and conclusion in the immediately foregoing paragraphs, had it been necessary to determine the appellant's alternative Article 14 case we would have rejected it. If and insofar as we would have been wrong to do so we turn to consider the last of the Article 14 tests, namely justification in shorthand and, more precisely, legitimate aim and proportionality. This requires us to consider in particular the decision of the Supreme Court in *R (DA and Others) v Secretary of State for Work and Pensions* [2019] UKSC 21, a path traversed recently in the decision of this court **in *Re Stach*** [2020] NICA 4:

> "*[72] DA represents the most comprehensive recent exposition by the Supreme Court of the correct approach to Art 14 ECHR cases, providing welcome clarity on certain important issues. In the context of the instant proceedings its most arresting feature is the unequivocal espousal by the majority of the "manifestly without reasonable foundation" test in the determination of the issue of justification in Art 14 cases. The decision also makes a contribution to the frequently challenging issues of "other status" and comparators. There is much learning in the five judgments delivered.*
>
> *[73] Lord Wilson, delivering the main judgment of the majority, suggested that where the court, in a Convention context, enquires into the justification of the effect of a measure of economic or social policy and, more specifically, the question of fair balance there are two possible approaches, namely the*

court answers the question for itself or applies the test of manifestly without reasonable foundation: see [64]. Lord Wilson's espousal of the second of these approaches was expressed in trenchant terms: see [65]. This is followed by an important passage in [66]:

> *'When the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular, to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable.'*

[74] Lords Carnwath and Hodge, in separate majority judgments, concurred with Lord Wilson's endorsement of the test of manifestly without reasonable foundation. As Lords Reed and Hughes agreed with Lord Carnwath, it follows that this test was endorsed by five of the seven members of the Court. In passing, the very recent consideration of this issue by a Chamber of the ECtHR, in JD & A v The United Kingdom (Applications Nos 32949/17 and 34614/17), a 5/2 majority decision, did not feature in the parties' arguments. The majority confined the "manifestly without reasonable foundation" test to contexts where "... an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality" (at [88]). As the robust joint dissenting judgment demonstrates this may prove controversial and will, predictably, feature in future decisions of the UKSC and the Grand Chamber. Our decision in this case is made in a context shaped by s 3(1) of the Human Rights Act and the doctrine of precedent whereby this court is bound by the decision in DA.

[75] The dissenting judgments of Lady Hale and Lord Kerr are described by Lord Wilson as "powerful". Both espouse a more expansive constitutional role for the court in cases where alleged discriminatory treatment arises in the field of

> *government economic policy. They highlighted in particular that the ECtHR's adoption of the margin of appreciation in cases of this kind need not necessarily be replicated at the level of the domestic court. This is expressed with particular clarity at paragraphs [167]-[171] of the judgment of Lord Kerr. In holding that the statutory measures under challenge constituted an unjustifiable interference with the Appellant's rights under Art 8 ECHR and Art 1 of The First Protocol, the dissenting judges concluded, in the words of Lady Hale at [157], that:*
>
> > *'…the weight of the evidence shows that a fair balance has not been struck between the interests of the community and the interests of the children concerned and their parents …'."*

[86] Mr McGleenan QC accepted realistically that there is some continuing debate about whether the *DA* test of "*manifestly without reasonable foundation*" extends beyond the realm of socio/economic policy cases. In *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271, the central issue was the appellant's entitlement to benefit under the Armed Forces (Compensation Scheme) Order 2001 following the death in service of her long-standing partner. The Minister's decision refusing to pay her benefit was based upon her enduring marriage to an estranged husband. The thrust of her case was that the impugned decision discriminated against her unlawfully. The Court of Appeal, applying the "manifestly without reasonable foundation" test allowed her appeal. The single judgment, that of McCombe LJ contains a valuable review of the relevant UKSC jurisprudence at [29] – [56]. The differential treatment of the appellant was found to be manifestly without reasonable foundation. This was, patently so, a case belonging to the broad socio-economic realm.

[87] In a different context, which involved issues of immigration policy, landlord and tenant law, race discrimination and Article 8 ECHR the English Court of Appeal considered *obiter* that the test is not thus confined: see *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542 at [133] – [135].

[88] Most recently, in *R (Drexler) v Leicestershire County Court* [2020] EWCA Civ 02 the matter under challenge was the Council's decision to amend its policy regulating home to school transport for pupils with special educational needs, which operated to the detriment of the appellant. The Court of Appeal highlighted that the challenge was to the Council's amended policy, rather than any specific decision taken pursuant thereto: see [99]. It was contended on behalf of the appellant that the "*manifestly without reasonable foundation*" test is confined to cases belonging to the field of welfare benefits: see [59]. The court rejected this argument, nothing that in

its original incarnation this test was devised by the ECtHR in a case involving interference by the State with property rights under Article 1 of Protocol No 1, unconnected with Article 14 equal treatment. The court held that this test is of broad application. It further decided that in the particular context the application of this test and that of the "*conventional proportionality test*" yielded the same outcome: see [75] – [77].

[89] In *Re Stach (ante)* this court applied the *DA* test in the context of a measure of economic and social policy. This court further observed at [92] that the question of burden of proof may require more detailed consideration in a suitable future case. The decision of the English Court of Appeal in *Drexler* draws attention to a dichotomy, or twin track, of proportionality tests namely that of "*manifestly without reasonable foundation*" (on the one hand) and the so-called "*conventional proportionality test*" on the other. Through a series of decisions of the UKSC the contours of the latter test are well settled. In *Brewster v Northern Ireland Local Government Officers Superannuation Committee* [2017] UKSC 8 Lord Kerr, having noted earlier decisions of the court, quoted from *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at [74]:

> "*It is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective and (4) whether, balancing the severity of the measures effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter …*"

[90] We would express the following views. There are evident parallels between the correct approach to the inter-related issues of legitimate aim and proportionality (or the single issue of justification, in shorthand) and our consideration of the margin of appreciation issue at the forefront of our views on the appellant's primary case under Article 8(1) ECHR. The evidential matrix for each of these challenges is the same.

[91] In our consideration of that challenge we have expressed the view that the State agency concerned, DOJ, did not, by the omission under scrutiny, violate the appellant's Article 8(1) right to respect for his private life as it had carried out a legitimate exercise of balancing this right with the competing right to freedom of expression enjoyed by media organisations under Article 10(1) ECHR in an equation involving two qualified Convention rights of equal importance. We have rehearsed the essential elements of this exercise in [53] – [61] above. They include, but are far from limited to, the fact that the appellant's case is the only one of its kind in this jurisdiction.

[92] The application of the conventional proportionality template to the present context yields the following analysis. By s 12 (4) of the Human Rights Act the court is enjoined to have "*particular regard*" to the Convention right to freedom of expression. The objective in play is that of respecting the right to freedom of expression; there is an indisputably rational nexus between the non-commencement of section 44 of the 1999 Act and this objective; there is no suggestion of the availability of a less intrusive measure which would not have unacceptably compromised achievement of the objective – this being, as Mr McGleenan highlighted, a "bright line" matter; and the admittedly unpleasant and unwelcome time limited intrusion on the appellant's private life was comfortably outweighed by the strength of the competing interest in play, namely the right to freedom of expression enjoyed by several media agencies.

[93] While we recognise the discretionary area of judgement available to DOJ, which finds expression in its affidavit evidence, we view this as a factor of some, but not undue, weight in the present context. We also bear in mind Lord Walker's analysis in *RJM* – [58] *supra* – that the "*other status*" on which the appellant relies lies outwith "*… the most sensitive area where discrimination is particularly difficult to justify*" viz cases involving immutable personal characteristics.

[94] To summarise, DOJ made a choice in the exercise of its discretion. This occurred in a context of competing qualified Convention rights which the ECtHR has described as of equal stature and importance. There is no indication that in making its choice it left anything material out of account or permitted the intrusion of anything immaterial or extraneous. Nor is there any suggestion of the careless or capricious. The fact that this measured choice had unwelcome and unpleasant, though short lived, consequences for the appellant – and only him – does not warrant the conclusion that a proper and fair balance between the two competing Convention rights was not struck. In *DA* terms, the balance has to be merely tenable. In non-*DA* terms, the balance must withstand somewhat more rigorous judicial scrutiny. We consider that the application of both standards of review yields the same result.

[95] Thus on the assumption that our rejection of the appellant's "comparator" case – [84] above – is erroneous, had it been necessary to do so we would have held that his Article 14 challenge must fail in any event.

Omnibus Conclusion

[96] Given our conclusion in [35] and [38] of this judgment, namely that the appellant has no sustainable case against DOJ under the Human Rights Act we dismiss the appeal. As appears from [40] – [95] we would have dismissed the appeal on its merits in any event, for reasons differing somewhat from those of the trial judge.