

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JR 38 FOR JUDICIAL REVIEW

Before: MORGAN LCJ, HIGGINS LJ AND COGHLIN LJ

MORGAN LCJ

[1] This is an application for judicial review of a decision by the PSNI to release to local newspapers for publication images of persons suspected of being involved in sectarian rioting and violent offending at an interface area at Fountain Street/Bishop Street Londonderry in May, June and July 2010. The applicant, a child who was born in July 1996, claims one of the images released by the PSNI and published in two local newspapers is an image of him. He seeks judicial review on the single ground that "the use of the operation known as Operation Exposure to identify and highlight children and young persons involved in criminal activity as part of a name and shame policy without due process is in breach of the applicant's rights pursuant to Article 8 of the European Convention on Human Rights". Ms Higgins QC and Mr Ronan Lavery QC appeared for the applicant and Mr McGleenan QC for the respondent. We are grateful to counsel for their helpful written and oral submissions.

Background

[2] During the summer of 2009 there was serious public disorder with a sectarian background at the Fountain Street/Bishop Street interface. The violence included the throwing of petrol bombs. There were injuries to police officers and particular impacts on elderly residents of Alexander House nursing home. The area had until then been patrolled with the assistance of community volunteers but they withdrew in May 2009 because the volunteers had been threatened and the threats had become more sinister.

[3] The policing of the disorder posed considerable problems. The topography of the area made on the spot arrests very difficult. As soon as police officers attempted to make arrests the young people involved in the rioting from the nationalist side ran down a grassy slope into the Bogside. Pursuing young people into the Bogside to effect arrests carried a high risk of instigating more disorder and adversely affecting community relations.

[4] In order to detect those involved in the rioting police made extensive use of their access to CCTV. Police officers also generated evidence through handheld video recording equipment, vehicle roof mounted video recording equipment and video recording equipment on the Air Support Unit's helicopters. Unidentified images of suspects were shared with colleagues and circulated on the electronic briefing pages on the police computer system. Where the images remained unidentified internally the associated crimes largely remained unsolved.

[5] Inspector Burrows had extensive experience in policing large public order incidents and demonstrations. He transferred to the PSNI from the Metropolitan Police Service in July 2005 and was thereafter involved in the management of parades and demonstrations in the Londonderry area. He concluded that it was necessary to involve the community in the identification of those who had not been identified internally in order to satisfy the police service's duty under section 32 of the Police (Northern Ireland) Act 2000 to investigate crime and to take measures to bring offenders to justice. In August 2009 he reached agreement with the three main local newspapers to publish CCTV unidentified images of suspects and to appeal to the public for assistance in identifying the suspects.

[6] Following concerns raised by some members of the Derry District Policing Partnership he agreed with the District Commander to postpone the publication so that it could be reviewed in conjunction with the Human Rights Legal Adviser and the Inspector from the Community Safety Department. He subsequently drafted an Operation Exposure guidance document which was approved by the Human Rights Legal Adviser, the District Commander and the Assistant Chief Constable responsible for the area.

[7] The guidance included specific safeguards:

- (i) Any decision to release an image to the media must be supported by written decision making which must be retained;
- (ii) The decision to release an image must be approved by an officer in the District of at least the rank of Superintendent;
- (iii) The release to the media must be judged necessary;

- (iv) Reasonable other means of identifying and tracing the suspect must be exhausted including the circulation of the image internally within the policing area;
- (v) The editor of each newspaper participating in the initiative must agree in writing that the images will be used only once;
- (vi) The caption accompanying each image must reflect the presumption of innocence;
- (vii) Only images of suspects in relation to imprisonable offences could be considered for inclusion.

[8] In relation to juveniles there was an acknowledgement that the test for disclosure was higher with the presumption against release. There was a requirement for a risk assessment to be conducted prior to release. The respondent contended that these safeguards were in addition to those included in the ACPO guidance and the guidance as a whole fell within the terms of the respondent's Policy Directive 13/06 entitled PSNI Policing with Children and Young People. On 22 March 2010 Inspector Burrows briefed the District Policing Partnership at a public meeting about the relaunch of Operation Exposure with the additional safeguards. He also conducted several radio and newspaper interviews on the topic. He received no public or private criticism.

[9] In April, May, June and July 2010 there was significant and sustained sectarian crime and disorder at the Fountain Street/Bishop Street interface. At least 46 sectarian incidents took place that involved the commission of over 100 offences. Around 75 young people were involved in the sectarian crime and disorder which took the form of stones, missiles, paint bombs and petrol bombs being thrown. The violence in the summer of 2010 was considerably more serious in terms of frequency and severity than that in 2009. Throughout the summer of 2010 residents of Alexander House reported to the police that they were frightened to leave the nursing home and community leaders reported to the police that they had lost any control over the children involved.

[10] Police engaged with community groups through the summer of 2010 and on 9 June 2010 issued a press release indicating that there was excellent CCTV coverage of the Fountain interface areas and that those engaged in sectarian disorder there could expect to be identified. Diversionary projects for young people in the local area were agreed with community leaders. Police met with representatives from Bogside and Brandywell Initiative and Community Restorative Justice on 23 June 2010 and invited them to assist in identifying suspects. Police informed the group that they were considering putting unidentified images in the local newspapers because they had failed to identify the images internally and the violence was still going on.

[11] By mid-July 2010 police still had approximately 50 unidentified images of young people despite extensive internal distribution. The sectarian crime and disorder was still continuing. There was concern about the possibility of serious injury and further disorder at the interface leading up to the Apprentice Boys of Derry Parade the following month. Previous releases of photographs of adult suspects had resulted in 70% of the suspects being identified.

[12] Images of those suspected of involvement in the disorder at the interface were released to local newspapers in the series of phased releases commencing on 16 July 2010. In early August 2010 a leaflet containing unidentified images was also released. After the release of the images there was a dramatic reduction in sectarian crime and disorder at the interface. A total of 37 children and young people were identified and five were charged, being those with previous convictions or who had committed very serious crimes. The remainder were entered into youth diversion or youth conferencing.

[13] The applicant was arrested on 6 August 2009 in relation to public order offences on 13 July 2009 during the main orange order parade in the city. He was a few days short of his thirteenth birthday at the time of the alleged offences. He admitted his involvement at interview and was cautioned for riotous behaviour. His father says that he has no recollection of the caution being administered but it is common case that he admitted his involvement.

[14] As a result of the internal circulation of the images obtained by police of those at the scene of the incidents at the interface in May and June 2010 the applicant was arrested on 1 July 2010 for public order offences on 6 and 8 June 2010. He was shown CCTV images of the events on both nights which included images of his alleged activity. During the interview he admitted throwing bottles on both occasions. The interviewing officer noted a similarity between the hoodie worn by the applicant at interview and an image of a person taken on 24 May. She arrested the applicant in relation to that matter. The applicant accepted that the CCTV showed him at the interface but did not show him engaged in any criminal activity. During the interview he was shown the booklet of unidentified images. He did not identify anyone in the booklet.

[15] When these proceedings commenced in September 2010 the complaint related to an image published in the Derry Journal on 14 July 2010 and contained in a leaflet published in August 2010. It is now accepted that the image was not that of the applicant but that an image of him was published in the Derry Journal of 23 July 2010 and the Derry News of 26 July 2010. It is not clear when the applicant discovered that the image related to him but this was confirmed at a viewing arranged for 11 May 2011 when CCTV of the 5 June 2010 was inspected. In this image the applicant has his hood up and the neighbourhood officer who knows the applicant and identified his other images in controlled viewings failed to recognise him. The respondent maintains that this image was contained in the booklet of

images shown to JR 38 on 1 July 2010 but was not identified by him. Since there was no material to suggest that he had been involved in criminal activity on 5 June no CCTV from that evening was shown to him during that interview.

The submissions of the parties

[16] Ms Higgins submitted that the publication of the photographs constituted a breach of the applicant's rights under Article 8 of the ECHR. In interpreting that right it was necessary to have regard to the protections for children contained in the United Nations Convention on the Rights of the Child (UNCRC) and the requirements of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) adopted in 1985.

[17] In particular the respondent failed to obtain the prior consent of the applicant's parents to the taking or retention or distribution or publication of the applicant's image and this consent was indispensable. The publication of the applicant's image and the images thought to be of the applicant in the context of Operation Exposure stigmatised him and denied him his right to be presumed innocent which meant, inter alia, that the State should treat him as innocent of any crime and not publicly express any suspicion regarding his involvement in criminal activity except in accordance with due process.

[18] The interference with the applicant's Article 8 rights caused by the publication of the photograph of him and the two photographs believed to be him was not necessary in the interests of any of the grounds set out in Article 8(2) and specifically not for the prevention of disorder or crime or for the protection of the rights and freedoms of others or for the purpose the police publicly gave for their release and publication. The selection by the respondent of images from CCTV footage where the police were well aware that those images had led to the young people concerned being identified and interviewed and, in the applicant's case, being charged compel the conclusion that Operation Exposure was aptly named and was, in fact, a deliberate exercise by the respondent in naming and shaming young people.

[19] Finally it was submitted that the interference with the applicant's rights was not in accordance with the law, in that it was in clear breach of the respondent's own stated policies and in breach of the respondent's obligations under s.75 of the Northern Ireland Act 1998 and the Data Protection Act 1998 and the Data Protection Directive 95/46/EC, and was in breach of the rule of law.

[20] Mr McGleenan for the respondent submitted that Article 8 was not engaged at all. The applicant did not have a reasonable expectation of privacy given that he admitted that at the time the images in question were taken he was engaged in a public riot in a public place. The images of the applicant were captured by police video cameras operated by uniformed police officers. The images were captured for

the purpose of the identification of persons involved in criminal activity and the images were not publicly disseminated for any purpose other than the legitimate policing purpose of the prevention and detection of crime.

[21] If Article 8 was engaged the respondent argued that the publication was in pursuit of the legislative obligation contained in section 32 of the Police (Northern Ireland) Act 2000 and was underpinned by Policy Directive PD13/06 upon which the applicant relied as it contained a reference to compliance with the UNCRC. The publication was in pursuit of the prevention of disorder or crime and sufficient safeguards were put in place to ensure that the rights of the child were properly balanced with the interests of society. Neither section 75 of the Northern Ireland Act 1998 nor data protection law added anything to the issues.

Discussion

[22] This application is not concerned with the taking of photographs of the riotous and disorderly activity or the retention and distribution of those photographs internally to police officers for the purpose of identifying offenders. I do, however, wish to acknowledge the careful analysis of the cases dealing with that situation in the judgment of Higgins LJ of which I have seen a draft. The complaint is focused on the provision of those photographs to the media and solely concerns the decision to do so in circumstances where it was apparent that some of the photographs were images of children.

[23] The criminal justice system recognises the need to treat children differently and it is apparent from section 53 of the Justice (Northern Ireland) Act 2002 that there is a focus on welfare and rehabilitation.

“53 Aims of youth justice system

(1) The principal aim of the youth justice system is to protect the public by preventing offending by children.

(2) All persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim in exercising their functions, with a view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions.

(3) But all such persons and bodies must also have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is

likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development.”

[24] The specific need to protect the identity of children in criminal proceedings is provided for in Article 22 of the Criminal Justice (Children) (Northern Ireland) Order 1998.

“22. - (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”

Although this provision gives protection from the publication of the identity of those children appearing in criminal proceedings it is apparent that the protection is qualified. The distinction between Article 22(1) and the next two subsections also indicates that although the protection of identity is the default position in the Youth Court the reverse is the position in the Crown Court. That suggests that requirements of open justice carry greater weight where the criminal activity is serious.

[25] Neither the UNCRC nor the Beijing Rules are justiciable as a matter of domestic law but it is common case that both inform the rights and values protected by Article 8 ECHR. Article 3 UNCRC provides that in all actions concerning children the best interests of the child shall be the primary consideration. Article 40 UNCRC recognises the desirability of reintegrating into society every child alleged to have infringed the criminal law and specifically guarantees the right to have the child's privacy fully respected at all stages of the proceedings.

[26] Paragraph 8 of the Beijing Rules deals with the protection 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.

Commentary

Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. 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 interest of the individual should be protected and upheld, at least in principle."

[27] The applicant maintains that the publication of the photographs constituted an interference with his private life. Private life is a broad concept not susceptible to exhaustive definition but includes the protection of identity and personal development (see PG and JH v UK (2008) 34 EHRR 1272). The issue is whether the applicant had a reasonable expectation of privacy in relation to the publication of photographs indicating that police wished to identify him in connection with the recent public disturbances. The manner in which the photographs of the applicant and others were arranged would have left little doubt that the persons depicted were sought because of their possible involvement.

[28] I accept that the determination of whether the retention and use of photographs constitutes an interference with Article 8 requires a fact specific consideration in every case. These photographs were taken in the public street of those who were apparently participating in serious public disorder. The purpose of the photographs was to assist with the identification of those involved. The retention of the photographs within police files for the purpose of ensuring that they could be used to identify the perpetrators and distribution internally by police for that purpose did not, for the reasons given by Higgins LJ, constitute an interference which engaged Article 8 (see also Lupker v Netherlands, 7 December 1992).

[29] Dissemination of photographs identifying a person's activities in the public street can, however, engage Article 8. In Campbell v MGN [2004] UKHL 22 the publication of photographs taken on the public street connected to the treatment she was receiving for drug addiction invaded her privacy. In Peck v UK (2003) 36 EHRR 719 the publication of still photographs and CCTV footage of the applicant just after he had attempted suicide by cutting his wrists again constituted such an interference. In each case the issue was whether the publication intruded into the applicant's private life.

[30] In this case the photograph is not just an image of the child. It is part of a context which discloses to the public that the child in the image is at least wanted for interview in connection with possible involvement in serious public disturbances. At the time of publication it had not been established that the child had participated in any offence. The domestic and international provisions set out at paragraphs 23 to 26 above indicate the importance of respecting the privacy of children in the criminal justice system because of the risk that they will become stigmatised with a consequent effect on their reputation and standing within the community. If participation in criminal activity is established their rehabilitation may thereafter be impaired. Given the breadth of the concept of private life the publication of photographs suggesting that police wished to identify this child in connection with these serious offences was an intrusion into his private life. The issue, therefore, is whether it was justified.

[31] We accept that the approach to this issue should be structured in the manner suggested by Baroness Hale in H (H) and others v Deputy Prosecutor of the Italian Republic of Genoa and others [2010] UKSC 25 at paragraph 30.

“...the court would be well advised to adopt the same structured approach to an article 8 case as would be applied by the Strasbourg court. First, it asks whether there is or will be an interference with the right to respect for private and family life. Second, it asks whether that interference is in accordance with the law and pursues one or more of the legitimate aims within those listed in article 8.2. Third, it asks whether the interference is ‘necessary in a democratic society’ in the sense of being a proportionate response to that legitimate aim. In answering that all-important question it will weigh the nature and gravity of the interference against the importance of the aims pursued. In other words, the balancing exercise is the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale.”

[32] By virtue of section 32 of the Police (Northern Ireland) Act 2000 it is the general duty of police officers to prevent the commission of offences and, where an offence has been committed, to take measures to bring the offender to justice. In furtherance of its responsibilities to children the PSNI has devised Policy Directive 13/06 entitled PSNI Policing with Children and Young People. It was proofed for compliance with section 75 of the Northern Ireland Act 1998. The policy shares the aims and objectives of ACPO at national level. One of its aims is to identify children and young people at risk of becoming involved in offending and work with partner agencies in the provision of support and intervention. There is a specific commitment to adhere to ECHR rights as well as the international standards in the UNCRC and the Beijing Rules.

[33] The operation to establish the identity of those who remained unidentified by the publication of images in the local press was named Operation Exposure. This did not in our view constitute a new policy devised by the PSNI but was an operation which was to be carried out under the policy umbrella of PD 13/06. It is common case that the overarching policy asserted the need to comply with those standards requiring respect for the privacy of the child. None of those instruments gave rise to a prohibition on publication but they indicate the high degree of scrutiny that the court must employ when balancing the factors for and against publication. That exercise will also be influenced by the provisions of the Data Protection Act 1998.

[34] Ms Higgins took issue with the adequacy of the written justification for publication made on 14 July 2010. The document noted the extensive disorder that had taken place, the efforts to prevent further disorder and divert children, the prejudicial impact on community confidence, the risk of serious injury to the young people involved and the extensive efforts to identify them. It was then recorded that in each photograph the person remained unidentified. I consider that the justification has to be seen against the background of the substantial efforts by police to address offending behaviour by way of diversionary disposal where possible. I also consider that the activity with which this decision was concerned involved groups of individuals and it could not be said that there was anything indiscriminate in treating the group as a whole.

[35] I am satisfied that the decision to proceed with publication was in accordance with law and was for the legitimate purpose under Article 8(2) ECHR of preventing disorder or crime and protecting the rights and freedoms of others. The remaining issue is whether the interference is necessary in a democratic society in the sense of being a proportionate response to the legitimate aim.

[36] There is no doubt about the importance of the interests and welfare of the child when children come into contact with the criminal justice system. There are many statements which demonstrate the extent to which children must be treated differently and one of the most helpful is at paragraph 124 of S and Marper v UK (Grand Chamber 4 December 2008).

“124. The Court further considers that the retention of the unconvicted persons' data may be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. The Court has already emphasised, drawing on the provisions of Article 40 of the UN Convention on the Rights of the Child of 1989, the special position of minors in the criminal-justice sphere and has noted in particular the need for the protection of their privacy at criminal trials (see *T. v. the United Kingdom* [GC], no. 24724/94, §§ 75 and 85, 16 December 1999). In the same way, the Court considers that particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals of a criminal offence.”

The particular importance of this passage is that it addresses the adverse risks to the child if disclosure is made of the suspicion of offending prior to any finding of guilt.

The publication of such photographs is, therefore, a weighty matter to be placed in the scales.

[37] I am satisfied, however, that in this case the balance came down firmly in favour of the publication of the photographs. I set out below the principal reasons for that conclusion.

- (i) The violence at this interface was persistent, extending over a period of months, and was exposing vulnerable people to fear and the risk of injury.
- (ii) There was, therefore, a pressing need to take steps to bring it to an end by identifying and dealing with those responsible.
- (iii) Detection by arresting those at the scene was not feasible so use of photographic images was necessary.
- (iv) All reasonably practicable methods of identifying those involved short of publication of the photographs had been tried. The applicant had been shown but had failed to identify the photograph of himself which was published.
- (v) The participation of children in groups engaged in public disorder inevitably corrodes the child's sense of proper respect for the rights and freedoms of others.
- (vi) That is particularly the case where the public disorder has a sectarian overtone.
- (vii) Where a child has become involved in such a group it is in the child's interests that his participation should be identified so that the child can be provided with the support necessary to prevent offending.
- (viii) Early identification of the participation of the child can help to ensure that the child benefits from those supports before he engages in very serious offending.
- (ix) The specific safeguards set out at paragraph 7 above ensured a rigorous approach to the need to publish.
- (x) The publication of the images was likely to lead to the identification of a high proportion of those involved and therefore ensure the referral to appropriate diversionary services.

[38] I consider that the publication was necessary for the administration of justice and was not excessive in the circumstances. This case is only concerned with the publication of the photographs so some of the complaints under the Data Protection Act 1998 do not arise. I do not accept the characterisation of this operation as a name and shame policy. This was a process which was designed to protect the public by preventing reoffending and ensuring that the children involved were diverted if at all possible. That reflected the need to protect the children and address their welfare in circumstances where they were exposed to sectarian public disorder. The risk of stigmatisation could not outweigh those factors.

[39] For the reasons given I would dismiss the application.

[40] Coghlin LJ; I agree.

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[41] This is an application for judicial review of decisions by the PSNI to release photographic images of a person suspected of involvement in serious public order offences in Londonderry in May, June and July 2010. At the relevant time the applicant in these proceedings was fourteen years of age and therefore a child. In his Order 53 statement he seeks the following relief –

“6. The Applicant seeks the following relief:

- a) A declaration that the decision made in August 2010 to release an image of the Applicant to the press for publication is unlawful.
- b) A declaration that the decision made in August 2010 to release an image of the Applicant for publication by way of distribution of leaflets was unlawful.
- c) A declaration that the policy of publication of images of children and young persons through ‘Operation Exposure’ is unlawful.
- d) An Order of Certiorari quashing the said decisions.
- (e) An injunction and an interim injunction to restrain the respondent from publishing or from causing to be published any images:
 - (a) of the Applicant; or
 - (b) of any other young people who could be mistaken for the applicant; or
 - (c) of any young people at all,

without obtaining the prior informed consent of their parents

- (f) An Order of Mandamus compelling the Respondent to:
- (i) take all appropriate steps to destroy or to cause to be destroyed all images and copies of those images of the applicant or other young people that formed part of Operation Exposure whether in the possession of the respondent or of the media organisations to which the respondent provided them for publication;
 - (ii) cease its policy of 'Operation Exposure' and to desist from introducing any other similar operation or policy which involves the publication of Images of children or young people as part of criminal investigations or a policy of deterrence.
 - (iii) alert the media to the respondent's mistake in providing the media with and causing them to publish the applicant's image;
 - (iv) issue a press release for publication explaining that the PSNI made a mistake in releasing the image in question."

[42] The background and relevant facts are already set out in the judgment of Morgan LCJ and I need not repeat all of them in this judgment which considers essentially whether Article 8 ECHR is engaged.

[43] Serious rioting and public disorder was taking place at regular intervals in a specific area in Londonderry. Many of those taking part in this disorder were young people. The local police identified this as a particular problem and according to them they sought a means to identify the young people and to divert those engaged in the less serious offences to Youth Conferencing rather than prosecution within the criminal justice system. Conscious of the fact that they were dealing with young people they sought advice on how they should proceed cognisant of the rights of young people under the ECHR and other international Conventions and Rules relating to children. In line with this approach they engaged with local community groupings and made known their intention to seek identification of those involved including by publication of certain images in the local media.

[44] The thrust of the case made on behalf of the applicant was that the publication of the images of the applicant (a child) was contrary to Article 8 of the ECHR particularly when read along with other International Conventions and Rules relating to children. In addition Miss Higgins QC (who appeared on behalf of the applicant along with Mr Lavery QC) identified three other issues.

- The need to protect the welfare of children within the juvenile justice system;

- The extent to which a public authority (the police) could disregard its own policy for protecting children by ignoring its policy of complying with international obligations; and
- The extent to which a public authority could disregard statutory requirements imposed upon it under Section 75 of the Northern Ireland Act 1978 and Section 29 of the Data Protection Act 1998.

[45] Miss Higgins QC submitted that the underlying motive of the police was not the welfare of children or to divert them from criminal conduct, but to 'name and shame' them within their community and that this court should draw that inference. A fair reading of all the material compiled by the police demonstrates clearly that their motive was far from 'naming and shaming' but was in reality to divert young people from what has been, somewhat inappropriately, referred to as 'recreational rioting'. The papers suggest a real concern for the welfare of children and a conscious need to divert them from involvement in public disorder. In addition, rather than ignore International Conventions they sought to comply with them. Section 75 of the Northern Ireland Act 1978 applies to the examination of any policy which might undermine equality of opportunity. The exercise the police were involved in (Operation Exposure) did not involve devising a policy rather it was a law and order operation. Furthermore issues under Section 75 are matters for the Equality Commission rather than this application for judicial review. So far as the Data Protection Act is concerned the processing of information involving the administration of justice and in particular the prevention or detection of crime is exempt. Therefore I am satisfied that the three other issues to which Miss Higgins referred do not arise.

[46] Miss Higgins QC made no complaint about the taking of the photographs but about the use that was made of them. She argued that the applicant's private life, protected by Article 8(1), was interfered with and that the interference could not be justified under Article 8(2). Her submission assumed that Article 8(1) was clearly engaged but it was submitted specifically that the photographs were taken unlawfully and without the prior consent of the applicant's parents. Much of the argument on behalf of the applicant centred on whether the publication of the images was in accordance with the law, and necessary and proportionate in a democratic society, in accordance with Article 8(2). The aspect of private life which was said to be interfered with was neither identified nor isolated from the many aspects of private life that exist.

[47] Mr McGleenan QC, who appeared on behalf of the Respondent, submitted that Article 8 is not engaged. The applicant could have no expectation of privacy in respect of images captured when he was participating in riotous conduct in a public place.

[48] Article 8 ECHR provides –

“Everyone has the right to respect for his private and family life, his home and his correspondence.

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 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.”

[49] Article 8(1) defines the right which is protected, namely respect for private life. Everyone has this right as against every other person or authority that their private life should be respected. Article 8(2) protects a person from interference by a public authority with the exercise of their private life, except in certain defined circumstances. Thus it is important to identify (if possible) the aspect of private life which the applicant complains has been violated. The aspect of private life must be one which is being exercised, in the sense of being used, employed or enjoyed. Article 8(2) limits a public authority from interfering with the exercise of that right except in certain circumstances. Therefore Article 8(2) requires the exercise of a right and an interference with the exercise of it. Thus it is critical to identify the right in question. The critical words are ‘respect for private life’. ‘Respect’ in this context means no more than to pay attention to (*respicere*), to show consideration for, to defer to or not to violate, though its association with interference in Article 8(2) suggests that in reality it means no more than not to interfere with. The right to be respected is not a right of privacy per se, but a right to private life. Thus it protects the way a person lives his life and the word ‘life’ must greatly influence the breadth of the term ‘private life and the nature of the right to be protected. Equally the fact that it must be capable of being exercised adds a further dimension to what it is that is being protected. Thus foremost the privacy of the home and home life is to be respected and protected against interference, but this not the only aspect of private life which is identified within Article 8. What is meant by or included in the term ‘private life’ has undergone some revision and expansion over the years. The European Court of Human Rights has said that the concept of ‘private life’ is a broad term not susceptible of exhaustive definition – S v UK 2008 48 EHRR 1169 at paragraph 66. It has been considered to include a person’s moral and physical integrity, his personal space, his personal identity and autonomy as well as his sexual orientation and his relations or relationships with other persons. A public dimension will not exclude Article 8. Thus once a person steps outside his home what is guaranteed under Article 8 depends on the circumstances relied on and the context in which they arise. The protection afforded by Article 8 has been considered in straightforward proceedings for breach of Article 8 and in the context of actions

based on a breach of privacy or confidence. Reference to some of them exposes the different aspects of private life identified through them.

[50] One of the leading European cases is Von Hannover v Germany [2004] 40 EHRR 1 in which Princess Caroline of Monaco claimed that photographs of her engaged in everyday ordinary activities breached Article 8. The Court dwelt on the breadth of the concept of private life at paragraphs 50–53.

“50. The court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name, or a person's picture. Furthermore, private life, in the court's view, includes a person's physical and psychological integrity; the guarantee afforded by article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of ‘private life’.

51. The court has also indicated that, in certain circumstances, a person has a ‘legitimate expectation’ of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant ‘would have had a reasonable expectation of privacy for such calls’.

52. As regards photos, with a view to defining the scope of the protection afforded by article 8 against arbitrary interference by public authorities, the commission had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public.

53. In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life ...”

[51] In PG v UK [2008] 46 EHRR 51 the Court had to consider various instances of covert surveillance conducted against several individuals suspected of conspiring to commit robbery. Although the taking of photographs was not directly involved the Court, at paragraphs 56–58, offered some observations on the meaning of ‘private life’.

“The existence of an interference with private life

56. ‘Private life’ is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Art.8. Article 8 also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. It may include activities of a professional or business nature. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of ‘private life.’

57. There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private-life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Art.8, even where the information has not been gathered by any intrusive or covert method.

.....

58. In the case of photographs, the Commission previously had regard, for the purpose of delimiting the scope of protection afforded by Art.8 against arbitrary interference by public authorities, to whether the taking of the photographs amounted to an intrusion into the individual's privacy, whether the photographs related to private matters or public incidents and whether the material obtained was envisaged for a limited use or was likely to be made available to the general public. Where photographs were taken of an applicant at a public demonstration in a public place and retained by the police in a file, the Commission found no interference with private life, giving weight to the fact that the photograph was taken and retained as a record of the demonstration and no action had been taken to identify the persons photographed on that occasion by means of data processing."

[52] In Friedl v Austria [1996] 21 EHRR 83 the Court was concerned with photographs taken of the applicant by the police whilst he was involved in a public demonstration drawing attention to the plight of the homeless. The case was declared admissible by the Commission who noted the following in relation to the extent of private life in Article 8(1) and the taking of photographs.

"49. In the present case, the Commission has noted the following elements: first, there was no intrusion into the "inner circle" of the applicant's private life in the sense that the authorities entered his home and took the photographs there; secondly, the photographs related to a public incident, namely a manifestation of several persons in a public place, in which the applicant was voluntarily taking part; and thirdly, they were solely taken for the purposes, on 17 February 1988, of recording the character of the manifestation and the actual situation at the place in question, e.g. the sanitary conditions, and, on 19 February 1988, of recording the conduct of the participants in the manifestation in view of ensuing investigation proceedings for offences against the Road Traffic Regulations.

50. In this context, the Commission attaches weight to the assurances given by the respondent Government according to which the individual

persons on the photographs taken remained anonymous in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system, and no action was taken to identify the persons photographed on that occasion by means of data processing.

51. Bearing these factors in mind, the Commission finds that the taking of photographs of the applicant and their retention do not amount to an interference with his right to respect for his private life within the meaning of Article 8(1) of the Convention."

[53] This case was subsequently settled between the parties before it was heard by the Court. Further helpful observations were made in X v UK (Application No 5877/72) in which photographs were taken of the applicant when arrested following protests against a rugby match between England and South Africa. The applicant was told her photographs would be retained in case she made trouble at future matches during the South African team's tour. In declaring the applicant's claim as inadmissible the Commission stated –

"The commission has noted here the following elements in the case as it has been presented: first, that there was no invasion of the applicant's privacy in the sense that the authorities entered her home and took photographs of her there; secondly, that the photographs related to a public incident in which she was voluntarily taking part; and thirdly, that they were taken solely for the purpose of her future identification on similar public occasions and there is no suggestion that they have been made available to the general public or used for any other purpose. Bearing these factors in mind, the commission finds that the taking and retention of the photographs of the applicant could not be considered to amount to an interference with her private life within the meaning of article 8. An examination by the commission of the applicant's complaint ... shows that the taking of her photographs was part of and solely related to her voluntary public activities and does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention and in particular in the two articles just considered."

[54] Where there is a public element to the private life aspect or certain events occur in a public place then a central question is often whether the occasion is one in respect of which the person has a reasonable expectation of privacy. In Campbell v MGN Ltd [2004] 2 AC 457 a well-known model brought proceedings against a newspaper group alleging breach of confidence in relation to photographs taken of her leaving a treatment clinic. In his speech Lord Nicholls touched on the breadth of a person's private life at paragraph 21.

"21..... Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

[55] At paragraph 154 Baroness Hale said –

"We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint."

[56] Murray v Express Newspapers Plc [2009] Ch 481 concerned photographs taken in a public place of the child of a well-known writer in circumstances in which it was claimed that the writer and her child were entitled to a reasonable expectation of privacy. At paragraphs 35 and 36 Lord Clarke MR stated –

"35. ... so far as the relevant principles to be derived from Campbell v MGN Ltd [2004] 2 AC 457 are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question ...

36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which

the information came into the hands of the publisher.”

[57] Murray and Campbell were cases concerned with issues of privacy between individuals and newspapers and can give rise to different issues from those arising between a citizen and a public authority.

[58] The taking of photographs by police was considered in Regina (Wood) v Commissioner of Police of the Metropolis [2010] 1 WLR 123. The claimant sought a declaration by way of judicial review that the taking of photographs of him leaving a hotel following a meeting of a company concerned in the arms trade, was unlawful. The claimant was employed by an association which campaigned against the arms trade and the police were deployed at the hotel due to concerns that there might be demonstrations. It was held by the Court that Article 8(1) was engaged and by a majority that the police had failed to justify the taking of the photographs under Article 8(2). The mere taking of photographs of a person in a public place was not capable of engaging the claimant’s rights under Article 8. However the taking of photographs by the police, a public authority, with no obvious cause, of a person going about his lawful business in the public street was a sufficient intrusion into his privacy to amount to a prima facie violation of his rights under Article 8 (my emphasis). In the circumstances of that case it was not feasible to separate the Article 8(1) issue from the Article 8(2) issue. In a comprehensive judgment Laws LJ reviewed the interpretation given to Article 8 in various European and UK cases and identified the principal issue in the case as whether the claimant’s right to respect for his private life was violated by the police taking and retaining photographs of him in a public place when he was doing nothing other than conversing for a short period with another person. At paragraph 16 he commented on the elusive nature of the private life aspect said to be infringed as well as the claimed interference with it.

“16. Article 8 is one of the provisions of the European Convention most frequently resorted to in our courts since the Human Rights Act 1998 came into force. It falls to be considered most often in immigration cases, where the nature of the actual or putative interference with private and family life is plain enough: the claimant complains that if he is removed or deported he will be separated from family members, often a spouse and children, settled in the United Kingdom. In this present case, however, the nature of the claimed interference is more elusive. So is the nature of the private or family life interest which is said to be assaulted. It is useful therefore to have in mind the many facets of the article 8 right acknowledged by the European Court of Human

Rights, and—if it can be ascertained—what it is that links them.”

[59] Later he said at paragraph 19–22 and 25:

“19. These and other cases show that the content of the phrase ‘private and family life’ is very broad indeed. Looking only at the words of the article, one might have supposed that the essence of the right was the protection of close personal relationships. While that remains a core instance, and perhaps the paradigm case of the right, the jurisprudence has accepted many other facets; so many that any attempt to encapsulate the right's scope in a single idea can only be undertaken at a level of considerable abstraction. But it is an endeavour worth pursuing, since we need if possible to be armed at least with a sense of direction when it comes to disputed cases at the margin.

20. The phrase ‘physical and psychological integrity’ of a person (the Von Hannover case 40 EHRR 1, para 50; *S v United Kingdom* 48 EHRR 1169, para 66) is with respect helpful. So is the person's ‘physical and social identity’: *S v United Kingdom*, para 66 and other references there given). These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual. I claim no originality for this description. In *Murray v Express Newspapers plc* [2009] Ch 481, para 31, Sir Anthony Clarke MR, giving the judgment of the court, referred to Lord Hoffmann's emphasis in *Campbell v MGN Ltd* [2004] 2 AC 457, para 51 upon the fact that

‘the law now focuses upon the protection of human autonomy and dignity—“the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people”.’

21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the

freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him—should make him—master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the 'zone of interaction' (the Von Hannover case 40 EHRR 1, para 50) between himself and others. He is the presumed owner of these aspects of his own self; his control of them can *136 only be loosened, abrogated, if the state shows an objective justification for doing so.

22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if article 8 is to be engaged) attain "a certain level of seriousness". Secondly, the touchstone for article 8(1)'s engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy' (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to article 8(2). I shall say a little in turn about these three antidotes to the overblown use of article 8.

25. We can see, then, that while an individual's personal autonomy makes him the master of all those facts about his own identity of which the cases speak, his ownership of them depends by law on there being a reasonable expectation in the particular case that his

privacy will be respected. This may operate as a factor limiting the scope of the article 8 right. As I will shortly explain, it is a major dimension of Mr Grodzinski's case on behalf of the defendant commissioner that what happened here took place in a public street, where people may take photographs at any time; there was, he says, no reasonable expectation that the claimant would not be photographed."

[60] Kinloch v Her Majesty's Advocate [2012] UKSC 62, was an appeal to the Supreme Court from the High Court of Justiciary in Scotland against a determination of a devolution issue. As Lord Hope observed the route to the Supreme Court was an unusual one. The appellant was found guilty on indictment before a Sheriff's Court in Glasgow of 'laundering' vast sums of money contrary to the Proceeds of Crime Act 2002. The evidence comprised, inter alia, covert surveillance by the police of the movements of the appellant between 0835 and 1200 on 6 February 2007. In summary the appellant was observed leaving his car and entering the block of flats in which he lived, leaving the block carrying a bag and entering a car which then drove off. He was observed leaving various other locations and cars in Glasgow and then entering a taxi carrying a bag which appeared to be heavy which was later seen parked outside his brother's home. The police approached the taxi, and the appellant and his brother were detained. Various searches were carried out and large sums of money were recovered by the police. A preliminary point was taken at a pre-trial hearing that the police had acted unlawfully when they conducted the surveillance as they had failed to obtain authorisation under the Regulations of Investigatory Powers (Scotland) Act 2000 to conduct the surveillance. The case was appealed to the Supreme Court and two issues were identified for decision –

"i. whether the observations by the police, not having been authorised under the Regulations of Investigatory Powers (Scotland) Act 2000 breached the appellant's rights under Article 8(1).

ii. whether the act of leading the evidence derived from that surveillance was incompatible with the appellant's rights under Article 8(1) et separatism Article 6(1) and thus ultra vires in terms of Section 57(2) of the Scotland Act 1998 ECHR."

[61] It was held that no devolution issue arose on the first issue but the Court decided to hear argument on the second issue for several reasons one of which was that it provided the opportunity to re-examine the decision of the High Court of Justiciary in Gilchrist v HM Advocate [2005] (1) JC 34 in which it was held that

leading surveillance evidence under an invalid authorisation did not infringe Article 6 or Article 8 ECHR. In giving the judgment of the Court Lord Hope stated that the starting point was whether there was a breach of the appellant's right to respect for his private life under Article 8. He continued at paragraphs 18 and following -

"[18] Decisions of the Strasbourg court on the question whether there has been an interference with the right to respect for a person's private life indicate that the answer to it will depend in each case on its own facts and circumstances. Private life is regarded by that court as a broad term not susceptible to exhaustive definition: *PG and JH v United Kingdom* (2001) 46 EHRR 1272, para 56. The extent of the intrusion into the individual's private space will always be relevant, as will the use that is made of any evidence that results from it. The use of covert listening devices installed in the person's home or other premises where he has a reasonable expectation of privacy will require to have a clear basis in domestic law if it is to be held not to amount to an interference in breach of article 8: *Malone v United Kingdom* (1984) 7 EHRR 14, para 67; *Khan v United Kingdom* (2000) 31 EHRR 1016, para 27. There may also be a violation if the information that has been gathered by covert methods about a person's private life is systematically collected and stored in a file held by agents of the state: *Amann v Switzerland* (2000) 20 EHRR 843, paras 65-67; *Rotaru v Romania* (2000) 8 BHRC 449, paras 43-44. This case is not concerned with interferences of that kind.

[19] There is a zone of interaction with others, even in a public context, which may fall within the scope of private life: *PG and JH v United Kingdom* (2001) 46 EHRR 1272, para 56. But measures effected in a public place outside the person's home or private premises will not, without more, be regarded as interfering with his right to respect for his private life. Occasions when a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy, will fall into that category: *PG and JH v United Kingdom*, para 57. A person who walks down a street has to expect that he will be visible to any member of the

public who happens also to be present. So too if he crosses a pavement and gets into a motor car. He can also expect to be the subject of monitoring on closed circuit television in public areas where he may go, as it is a familiar feature in places that the public frequent. The exposure of a person to measures of that kind will not amount to a breach of his rights under article 8.

[20] The Strasbourg court has not had occasion to consider situations such as that illustrated by the present case, where a person's movements in a public place are noted down by the police as part of their investigations when they suspect the person of criminal activity. But it could not reasonably be suggested that a police officer who came upon a person who has committed a crime in a public place and simply noted down his observations in his notebook was interfering with the person's right to respect for his private life. The question is whether it makes any difference that notes of his movements in public are kept by the police over a period of hours in a covert manner as part of a planned operation, as happened in this case.

[21] I think that the answer to it is to be found by considering whether the appellant had a reasonable expectation of privacy while he was in public view as he moved between his car and the block of flats where he lived and engaged in his other activities that day in places that were open to the public. Although Lord Macfadyen did not say so in as many words, it is plain that this was the basis for the decision in *Gilchrist v HM Advocate*. I would hold that it was rightly decided on this issue. There is nothing in the present case to suggest that the appellant could reasonably have had any such expectation of privacy. He engaged in these activities in places where he was open to public view by neighbours, by persons in the street or by anyone else who happened to be watching what was going on. He took the risk of being seen and of his movements being noted down. The criminal nature of what he was doing, if that was what it was found to be, was not an aspect of his private life that he was entitled to keep private. I do

not think that there are grounds for holding that the actions of the police amounted to an infringement of his rights under article 8.”

[62] Having dismissed the first question he then said that as the only ground for the submission that the evidence was incompatible with the appellant’s rights under Article 6(1) was that it had been obtained in a way that infringed his Article 8 rights, that question must be answered in the negative, as his Article 8 rights had not been infringed.

[63] From these authorities several basic principles can be discerned. Every person has a right to a private life. What is meant by a private life is incapable of precise or comprehensive definition. As a result each case must be taken on its own factual merits. Private life in the privacy of one’s own home is easier to ascertain. Yet however a person’s Article 8 rights are defined they do not fade once he steps onto the public street, though they may become greatly circumscribed. The circumstances in which a person is present on the public street will be significant in determining whether any aspect of his Article 8 right to a private life remains, and to what extent. The answer to the question whether a private life right exists in a public setting will be found by considering whether the person had a reasonable expectation of privacy in the public circumstances in which he placed or found himself. In this case the applicant placed himself in public view among a crowd of other persons engaged, allegedly, in public disorder. He was open to public view by anyone who happened to be watching, be they police or civilians. He took the risk of his presence and any activities being observed and noted down or otherwise recorded. What was the aspect of his private life which was in issue at that stage? None has been ventured. There must be an onus on the applicant to establish the aspect of his private life which he states is engaged at that stage or to characterise the interest which he seeks to protect. As in *Kinloch* there can have been no expectation of privacy in the circumstances of the instant case. The criminal nature of his activities or his presence, (if that is what they are), are not aspects of his life which he is entitled to keep private. Such activities should never be an aspect of private life for the purposes of Article 8. In my view a criminal act is far removed from the values which Article 8 was designed to protect, rather the contrary. In this case the applicant was photographed by the police, rather than his presence or activities simply noted down. I do not consider that is a material distinction. The photograph is probably a more accurate record of what is on-going. In my view the taking of the photographs of the claimant, in the particular circumstances of this case, did not amount to a failure to respect any aspect of the claimant’s private life within Article 8(1).

[64] Article 8(2) prohibits any interference with the exercise of the rights protected by Article 8(1). Therefore a person who claims an interference under Article 8(2) has to identify the right protected by Article 8(1) and probably that it was one that was being exercised or was capable of being exercised in some manner. Miss Higgins QC said she took no issue with the taking of the photographs but did with the use to

which they were put. However their use was alleged to be the interference with the exercise of a private right protected by Article 8(1), which was not justified under Article 8(2). That begs the same question – what private right was being interfered with by the publication of the photographs. In my view the applicant has not established that any aspect of his private life has been identified in the taking of his photographs in the public street. His appearance and identity (though not his name) were disclosed by his own acts in a public place. It cannot be his personal autonomy or space or any of the other aspects of private life that have been identified in the various authorities to which I have referred. Laws LJ referred in *Wood* to the elusive nature of some private life aspects. In this case the private life aspect alleged is illusory. Therefore no issue has been raised whereby the exercise of any Article 8 right has been interfered with by a public authority and therefore the justification issues under Article 8(2) do not arise for consideration. The applicant was a child at the time the photographs were taken. In law a child is anyone under the age of eighteen years. Should that make a difference as to whether a private life aspect has been raised? I do not think so. The issue is the identification of the person in the photograph whether the person be an adult or a child. Once he is identified and, if he is a child, he then becomes subject to the safeguards of the criminal justice system and is entitled to all the protections afforded to children as a result of their age.

[65] The police are under a duty to protect the community and to prevent and investigate criminal acts. One aspect of their investigations will involve the gathering of evidence and exhibits. The photographs represent real time evidence of alleged criminal acts. The police must be entitled to make use of such evidence in seeking to identify offenders by name. Their use in any criminal trial will be governed by the rules relating to the admissibility of evidence. Of course the police must be sensitive to the nature of the evidence which they may wish to publicise. In this instance the police exercised care in carrying out Operation Exposure and were sensitive to the issues involved, conscious that many of those photographed were young people. They engaged with the local community but in particular they carried out a human rights assessment of what they proposed to do. This was extremely comprehensive and went much beyond what, in my view, they were required to do. That they did so deserves commendation.

[66] For all these reasons I do not consider that the claimant has raised or identified any aspect of his private life which has not been respected (or breached or interfered with) by the police and I would dismiss the application on this preliminary ground.

[67] If I am wrong that an Article 8(1) right is not engaged, then for the reasons given by the LCJ, I would be satisfied that the publication of the photographs, if an interference with the exercise of a private right recognised in Article 8(1), was justified under Article 8(2). Their publication was in accordance with the law and necessary in a democratic society in the interests of public safety, and for the prevention of disorder or crime, and for the protection of the rights of others.