Trinity Term
[2015] UKSC 42
On appeal from: [2013] NIQB 44

JUDGMENT

In the matter of an application by JR38 for Judicial Review (Northern Ireland)

before

Lord Kerr
Lord Clarke
Lord Wilson
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

1 July 2015

Heard on 6 November 2014

Appellant
Mary Higgins QC
Ronan Lavery QC
(Instructed by MSM Law)

Respondent
Tony McGleenan QC
Paul McLaughlin
(Instructed by Crown Solicitors Office)

LORD KERR: (with whom Lord Wilson agrees)

Introduction

1. It is a common assumption that young people of succeeding generations become increasingly sophisticated and worldly-wise. Certainly, the young people of today have access to a range of external experiences, particularly through social media, that would have been inconceivable even 20 years ago. But the street urchins of Dickens' day were, arguably, just as knowing vis-à-vis their elders, as are today's youth. The seeming sophistication or worldliness of today's children does not mean that they are not as inherently immature as have been children throughout the ages. Apparent social sophistication is not to be equated with a lack of naiveté. Giving the appearance of being older than their years should not be confused with possession of mature judgment. Protection of our children from the consequences of their immaturity and the preservation of their innocence are just as vital as they have ever been.

2. The young man who is the appellant in this case is now 18 years old. He was born on 16 July 1996. On 23 and 26 July 2010 two newspapers, the Derry Journal and the Derry News respectively, published an image of him. He was at that time barely 14 years old. These photographs had been published by the newspapers at the request of the police. The publication of the appellant's photographs and those of others who had been involved in public disorder in Londonderry was part of a police campaign known as "Operation Exposure" which was designed to counteract sectarian rioting at what are called "interface areas" in parts of Derry. Interface areas are situated at the boundaries of parts of the city which are predominantly inhabited by one or other of the two main communities.

3. The appellant argues that publication of photographs of him constituted a violation of his article 8 rights. The Divisional Court in Northern Ireland (Morgan LCJ, Higgins and Coghlin LLJ) dismissed his application for judicial review on 21 March 2013.

Factual background

4. Mr McGleenan QC, counsel for the Chief Constable, has described the factual background as "convoluted" and that is certainly not an exaggeration. The case made on the appellant's behalf in the judicial review proceedings, by which he sought to challenge the legality of the police operation, was made largely through

affidavits from his father. On 14 July 2010 the Derry Journal had published images of closed circuit television (CCTV) pictures which had been taken during serious rioting in Derry in July 2010. In the first of his affidavits, the appellant's father claimed that these included images of his son. He also claimed that leaflets published and distributed by police on 16 August 2010 which again contained CCTV images of young people involved in rioting identified the appellant.

5. When the application for leave to apply for judicial review was first heard, two particular images from the 14 July issue of the Derry Journal and the leaflets were stated by his counsel to be those of the appellant. It was later established that, not only were these not images of the appellant, he did not appear at all in that particular issue of the newspaper or in the leaflets.

6. The appellant had been interviewed by police on 1 July 2010. He was questioned about his involvement in rioting on 24 May 2010 and 8 June 2010. He was shown CCTV footage of both incidents and he claimed to be able to identify himself from the footage of both incidents. He was also shown a booklet of some 115 photographs of persons involved in rioting on various dates in May and June 2010. These included the images contained in the leaflets which were later published by police on 16 August 2010. The appellant did not identify himself in any of these images.

7. In light of the statement by counsel for the appellant at the leave hearing that the appellant's image did appear in one of the photographs contained in the leaflet, he was interviewed again in relation to the incident portrayed in that photograph. During this second interview the appellant and his father were shown CCTV footage. As a result of this viewing, both concluded that, contrary to what had been said on his behalf at the application for leave to apply for judicial review, the appellant was not depicted in the image in the leaflet which had formerly been chosen as having identified him. So far as the image in the Derry Journal of 14 July 2010 was concerned, it was established that this was of someone else entirely. In sum, in neither of the particular images which counsel had told the court were of the appellant, was he in fact portrayed.

8. Following the second interview, a further affidavit was prepared for the appellant's father. It is claimed that this affidavit has been filed in the proceedings. Apparently, it has never been sworn, so it seems unlikely that it has actually been filed. In any event, in this affidavit, it was claimed that the appellant's image appeared in issues of the Derry Journal and the Derry News published on 23 and 26 July 2010 respectively. Both issues contained the same photograph. The appellant's father stated that the image came from video footage of an incident which he believed had occurred on 6 June 2010. It is now accepted by the respondent that the appellant is the figure shown in the photograph reproduced in these two issues of

the newspapers but the appellant's image was captured on 5 June rather than the sixth as the appellant's father believed.

9. The appellant's father also claimed in this second affidavit that, during the interview on 1 July 2010, his son had identified himself as the child throwing stones in the photograph that was published in the Derry Journal and the Derry News on 23 and 26 July 2010. This is disputed by the respondent. In affidavits filed on his behalf, the interviewing officer has said that, although CCTV footage of events on 5 June had not been shown during the interview on 1 July 2010, the appellant and his father were shown the image later reproduced in the newspapers on 23 and 26 July but the appellant had not been identified at that stage. Indeed, formal identification of the appellant was not made as the person shown in the photograph published on those dates until 11 May 2011. By that time, the six month limitation period that applies to any charge that might have been preferred against the appellant had elapsed. Accordingly, no action was taken against him.

10. The appellant was involved in offences other than those relating to the publication of his photograph. On 6 August 2009 he was arrested on a charge of riotous behaviour which had occurred on 13 July 2009 at Butcher's Gate, Derry. This was dealt with by a restorative caution on 29 June 2011. He was also charged with two separate offences of riotous behaviour alleged to have occurred on 6 June and 8 June 2010 and with possession of an offensive weapon and attempted criminal damage on the latter date. A youth conference was directed by Public Prosecution Service on 16 December 2010. The appellant failed to engage with this and on 31 May 2011 it was decided that he should be prosecuted for these offences. The riotous behaviour charges were dealt with by a youth conference ordered by the court on 23 October 2012. The possession of offensive weapon and attempted criminal damage charges were not proceeded with.

Operation Exposure

11. Chief Inspector Chris Yates is the area commander of Police Service of Northern Ireland (PSNI) for the Foyle District of Londonderry. He has described how interface violence between the two communities in this district was a regular occurrence during periods of heightened tension such as when parades were taking place. The number of incidents of violence decreased significantly during the period from 2006 to early 2009. But in the early part of 2009 it was observed that the number of such incidents at one particular location, the Bishop Street/Fountain estate interface, had increased substantially. This was of particular concern to the police because there is a residential home for the elderly and vulnerable in the vicinity. Inter-community violence in the area again became a regular occurrence, flaring up significantly during two parades in July and August.

12. The level of violence increased yet again during May and June 2010. It was more serious and prolonged than any experienced by Mr Yates since he had begun service in the Foyle district. Intelligence received by police suggested that vigilante groups were being formed on one side and dissident republicans were encouraging violence on the other side. Community representatives on the nationalist side informed police that they had lost influence over the youths in their area; indeed they had been confronted on occasions by dissident republican elements. Police officers on the ground reported on the absence of community representatives from either side during the disturbances.

13. The ongoing violence drained police resources and, in the estimation of Mr Yates, threatened to undermine community confidence in PSNI's response. Indeed, police were criticised for having failed to deal with the continuing disorder. The issue was raised at a meeting of the district police partnership on 16 June 2010. This is composed of, among others, local councillors and community representatives. The ongoing violence was discussed at the meeting and general concern was expressed.

14. The matter was discussed again on 1 July 2010 when Chief Inspector Yates was present at a meeting of the City Centre Initiative. This was attended by representatives of various political parties and community groups. Everyone present agreed that the violence at the interface had to be brought to an end. The chief inspector informed those present that the young people engaged in the recent public disorder had to be identified in order to ensure an effective response to the interface violence. He produced a booklet of photographs and asked all who were present to inspect these and to help him identify those captured in the images. He said that if the persons involved were not identified at the meeting or at later private meetings which he offered to hold with any of the representatives present, he would consider having them published in the local press. None of those depicted in the photographs was identified. The chief inspector was asked to defer placing the images in the newspapers and he agreed to do so for a period of two weeks. In the event, he was not contacted by anyone who had attended the meeting and he proceeded to arrange for the publication of the photographs in the local press.

15. The final decision as to whether particular images should be released to the press or contained in leaflets to be distributed by the police fell to Temporary Superintendent Sam Donaldson. In an affidavit filed on behalf of the respondent, Mr Donaldson explained how the strategy of seeking public assistance in identifying offenders from still images and CCTV footage had been developed in G police district in 2008 and 2009. (Foyle is in G police district). The strategy had proved to be a particularly effective tool in identifying offenders involved in interface violence and acts of public disorder. What follows in the next six paragraphs is Mr Donaldson's account of how the strategy is implemented.

16. Operation Exposure is a system of investigation of crime which comprises an elaborate series or stages of inquiry. The first stage involves the investigating officer inspecting the details of the individual offence which have been entered on the police database. At the next stage the officer follows what might be described as conventional lines of inquiry. This can include the recording of statements from injured parties and witnesses, the interviews of suspected offenders and, if the state of the evidence justifies it, the preparation of a prosecution file. When part of the criminal inquiry involves taking possession of CCTV or still photographic images, the investigating officer is not automatically entitled to make use of these to pursue the inquiry. He or she is required to ensure that all reasonable steps have been taken to identify a suspect by a less intrusive means. These may include door-to-door inquiries; forensic examination of items of evidence; circulation of details among other police officers; intelligence research; and liaison with other police services including An Garda Siochana.

17. When it is clear that all lines of reasonable inquiry have been exhausted, the investigating officer is authorised to request the CCTV unit to develop the best image from the available footage. This is then uploaded to police internal electronic briefing pages in order to facilitate identification of suspects. All serving police officers have access to these pages. As part of the Operation Exposure process, the briefing pages carry photographs of the persons that the police wish to identify, together with details of the incident under investigation. Officers are reminded to speak to the Operation Exposure officer if they are able to identify anyone from the images. Particular attention is paid to the role of neighbourhood officers because of their local knowledge and the greater likelihood of their being able to identify individuals. These officers are regularly briefed and it is the responsibility of the Operation Exposure officer to ensure that this particular line of inquiry has been pursued before proceeding to the next stage.

18. If it proves impossible to identify a suspect by internal police procedures, the question of releasing images to outside agencies is considered. The Operation Exposure officer must ensure that all other lines of inquiry have been fully pursued before seeking authorisation to release the images. A senior officer such as Mr Donaldson is briefed on the circumstances of the case, the lines of inquiry which have been pursued and the steps that the investigating officer has taken in relation to the identification of the suspect. The senior officer is also informed about the location of the incident under investigation; the injuries, if any, involved in the suspected offence; the ages of the injured parties and the estimated age of the offender. All of this is recorded in an official journal, together with any queries that may have been raised, for instance, about whether all necessary steps have been taken to identify a suspect by some other means. Consideration of the reasons in favour of and those against the release of a specific image is also recorded. All these steps are prescribed by an Operation Exposure guidance document which is modelled on national guidance issued by the Association of Chief Police Officers.

19. In accordance with specific provisions in the guidance documents, human rights issues are also considered. The authorising officer requires to be satisfied that not only have all other reasonable lines of inquiry been pursued but that the release of the image will have a positive effect on the investigation. The proportionality of an order for release is also considered – this involves considering whether it is in the public interest that it be released; the risk to the community should the individual depicted in the image remain unidentified; the frequency of the type of offence involved; and the consequences of it continuing to be committed.

20. Operation Exposure was not specifically designed as a general aid in the investigation of crimes committed by juveniles but where it is clear that the image to be released is that of a young person, particular care is taken and greater weight is given to the potential implications of the release of the image. Inquiry is made as to whether liaison has taken place with the local police officer who has a particular knowledge of young people in his area (the police youth diversion officer). Consideration is given to whether there is a risk to the young person from the community (in other words, whether he or she might be the target for a so-called "punishment beating"). The apparent age of the young person is taken into account. Unfortunately, it is the police experience that some young people involved in interface violence may be below the age of criminal responsibility. Where the authorising officer considers that this might be the case, release of the image will not be authorised.

21. Finally, a decision whether to release the image of a young person will involve consideration of where the best interests of the child lie. The authorising officer addresses this question in terms of whether it would be more beneficial to allow the young person to remain unidentified with the possibility that he or she would continue in the unlawful conduct or that it is better to intervene, in order to protect the young person from the dangers associated with involvement in public disorder. This examination takes place against the background that the preferred choice of the police service is to deal with an offending child in ways that do not involve the criminal justice system. The most common result of a child being identified as having taken part in this type of offending is what are described as "lower level interventions" such as parent/guardian involvement or youth diversion opportunities. Mr Donaldson stated that these are "often the desired, and most appropriate outcome".

22. The circumstances in which the appellant's image came to be published were explained by Inspector Jon Burrows. He described the sectarian violence that had occurred between April and July 2010 at the Fountain Street/Bishop Street interface. In that period there were at least 46 sectarian incidents there and over 100 offences were committed. Approximately 75 young people were involved. Police warnings were issued informing the public that CCTV filming of the disorder would take place. Notwithstanding this, violence at the interface continued unabated.

23. The inspector then considered whether to seek authorisation for the publication of images of those involved in the disorder. Before applying for this he conducted a risk assessment. This included addressing the risk that young people who were identifiable from the images might be targeted. This was considered to be low but mitigation measures were put in place, involving the obtaining of intelligence on the likelihood of targeting taking place and ensuring that all images published would be accompanied by a caption which referred to the presumption of innocence.

24. Inspector Burrows realised that the use of Operation Exposure carried a risk that young people identified by it would become criminalised and stigmatised. He sought to counteract this by adopting a "no positive charge policy", in other words that there would be a presumption in favour of diversion away from sectarianism and crime rather than prosecution. Highlighting the use of engagement procedures whereby the police and other agencies engage with the young person was an integral part of the Operation Exposure exercise.

25. The inspector produced a copy of the internal police guidance that had been prepared in order to regulate the implementation of the Operation Exposure policy. This stipulated that all other means of identifying and tracing the suspect must have been exhausted before images were published. It also required that special care be taken when release of images of suspects under 18 years was being contemplated. The test for disclosure would be more rigorously applied in those instances. Social services should be approached and offered the opportunity to view the images so that release of such images to the media could be kept to a minimum.

26. All of these steps were taken before the Operation Exposure exercise in July 2010 was authorised. Subsequently, in August 2011 that exercise was retrospectively analysed. The results analysis revealed that 102 offences had been committed between 24 May and 30 June 2010. The release of images in July 2010 had resulted in the identification of 37 persons (including the appellant) who had been engaged in interface violence. Of these 37, only five had been charged with criminal offences. The others had been dealt with through the youth diversion or the youth conferencing facility. This was despite the fact that, in Inspector Burrows' estimation, there was sufficient evidence to charge the young people involved with criminal offences. The reason that he gave for this was that the overarching objective of the exercise was to identify the offenders and help them to divert from the type of offending that they had been engaged in.

27. The results analysis also disclosed that there had been a 50% reduction in sectarian crimes in the Foyle district in July and August 2010 from the number committed in the same months the previous year. The report also recorded a marked reduction in sectarian incidents at the interface at Fountain Street, Londonderry.

The issues

28. The case made on behalf of the appellant before the Divisional Court was that the publication of photographs of him in the Derry Journal and the Derry News constituted a breach of his right to respect for a private life under article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). This was the single issue. And the question certified by the Divisional Court reflected that position. It was in these terms:

> "Whether the publication of photographs by the police to identify a young person suspected of being involved in riotous behaviour and attempted criminal damage can ever be a necessary and proportionate interference with that person's article 8 rights."

29. On the hearing of the appeal to this court, the appellant sought to introduce an argument that the retention of images of him by the police constituted a separate violation of article 8. Separate, that is, from the claim that supplying photographs of the appellant to the newspaper for publication was a breach of his article 8 rights. Unsurprisingly, the respondent objected to this new ground of challenge. The question of the legality of retaining the images (as opposed to publishing them) had not been considered by the Divisional Court because that court had not been addressed on the issue. Indeed, Morgan LCJ at para 22 of his judgment had said this about the nature of the application with which the court was dealing:

> "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. … 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."

30. It was decided that the appellant should not be permitted to introduce this new ground of challenge before this court. As the respondent pointed out, evidence about the reasons for retention of the appellant's photographs and whether these were to be retained for any particular length of time had not been given. To allow this particular challenge to proceed in the absence of such evidence would plainly be wrong. The sole remaining issue, therefore, is whether the publication of the photographs of the appellant constituted a breach of his article 8 right.

Is article 8 engaged?

31. The majority in the Divisional Court held that article 8 was engaged. Morgan LCJ dealt with this at para 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 paras 23 to 26 above [section 53 of the Justice (Northern Ireland) Act 2002, article 22 of the Criminal Justice (Children) (Northern Ireland) Order 1998, the Beijing Rules, the United Nations Convention on the Rights of the Child (UNCRC)] 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."

32. Higgins LJ did not agree. He considered that article 8 was not engaged. In para 63 of his judgment he said:

> "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)."

33. Before this court the respondent argued that the appellant could not be said to have any reasonable expectation of privacy where he had willingly engaged in acts of disorder in a public street. Ms Higgins QC (who appeared for the appellant) countered this by submitting that reasonable expectation of privacy was not in general a prerequisite for the engagement of article 8 and certainly not in the case of a child or young person. Alternatively, she suggested that, at best, reasonable expectation was a factor to be taken into account. It was not to be treated as determinative of the issue whether the Convention right was engaged.

34. In *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at para 20, Lord Nicholls of Birkenhead identified as "the initial question" in a claim that a person's article 8 rights had been violated by the publication of material about them, the issue "whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life". He then gave this warning in para 21:

> "Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. *Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.*" (emphasis supplied)

35. In *Kinloch v HM Advocate* [2012] UKSC 62, [2013] 2 AC 93 Lord Hope of Craighead took a similar approach. In that case the appellant complained that police had acted in breach of his article 8 rights in obtaining evidence by surveillance since they had failed to obtain authorisation for the surveillance under the Regulation of Investigatory Powers (Scotland) Act 2000. He was accused of converting and transferring criminal property consisting of large sums of money. Police had covertly observed the appellant and his associates in various public places leaving premises, entering cars and carrying a bag which, when he was searched, was found to contain a large sum of money. At para 19 of his judgment Lord Hope

acknowledged that there was a "zone of interaction" with others that, even in a public context, fell within the scope of private life but where "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" article 8 is not engaged.

36. Article 8 of ECHR is, arguably at least, the provision in ECHR with the broadest potential scope of application. How, after all, are limits to be set on the right to respect for one's private life, one's family life, one's home and one's correspondence? The *engagement* of the right, as opposed to justification of interference with it, must, of necessity, cover a wide field of an individual's activity. And the potential scope of application of the provision must vary according, not only to the conditions in which it is invoked, but also to the circumstances of the individual concerned. The concept of a reasonable expectation of a right to privacy, connoting, as it might seem to some, the notion that the individual concerned actually expected that his or her personal circumstances, on the occasion of the invasion of that privacy, ought to have been protected, and that that expectation was reasonable, is one to be approached with some caution, in my opinion, particularly in the case of children.

37. There is, at the least, a possible tension between the application of a reasonable expectation of privacy test and the well-established principle that any decision affecting a child should give prominence to his or her best interests. Moreover, an unduly rigorous use of the reasonable expectation test is impossible to reconcile with the breadth of possible application of article 8. As ECtHR said in *PG v United Kingdom* (2001) 46 EHRR 1272:

> "'Private life' is a broad term not susceptible to exhaustive definition. … 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'." (para 56)

38. It is clear from the next paragraph of the Strasbourg court's judgment in *PG* that it did not consider that the reasonable expectation of privacy was a "touchstone" test of whether article 8 is engaged, if, by that expression one means that it is determinative of the issue. In para 57, the court said:

> "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 article 8, even where the information has not been gathered by any intrusive or covert method. The court has referred in this context to the Council of Europe's Convention of January 28, 1981 for the protection of individuals with regard to automatic processing of personal data, which came into force on October 1, 1985 and whose purpose is: '[T]o secure in the territory of each Party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him.' Such data being defined as 'any information relating to an identified or identifiable individual'."(emphasis supplied)

39. The italicised sentence in this passage clearly indicates that where someone engages in activities (such as public disorder) which are liable to be recorded or reported, what is reasonable to expect as to protection of his or her privacy is a factor to be taken into account in deciding whether article 8 is engaged but it will not automatically determine that issue. Other factors such as the use to which a photograph might be put or whether the individual concerned has objections to its publication are also relevant. Thus in *Reklos v Greece* (2009) 27 BHRC 420, photographs taken of a day-old infant constituted a breach of his article 8 rights because his parents objected to the taking of his photograph. At para 42 the court said:

"... the court finds that it is not insignificant that the photographer was able to keep the negatives of the offending photographs, in spite of the express request of the applicants, who exercised parental authority, that the negatives be delivered up to them. Admittedly, the photographs simply showed a face-on portrait of the baby and did not show the applicants' son in a state that could be regarded as degrading, or in general as capable of infringing his personality rights. However, the key issue in the present case is not the nature, harmless or otherwise, of the applicants' son's representation on the offending photographs,

> but the fact that the photographer kept them without the applicants' consent. The baby's image was thus retained in the hands of the photographer in an identifiable form with the possibility of subsequent use against the wishes of the person concerned and/or his parents (see, mutatis mutandis, *PG and JH v The United Kingdom* 46 EHRR 1272, para 57)."

40. The significance of taking and using a person's photograph, in the context of article 8, was emphasised by the court in para 40:

> "A person's image constitutes one of the chief attributes of his or her personality as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image. Whilst in most cases the right to control such use involves the possibility for an individual to refuse publication of his or her image, it also covers the individual's right to object to the recording, conservation and reproduction of the image by another person. As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case …, obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image."

41. Prima facie, therefore, the taking and use of a photograph of an individual will lie within the ambit of article 8. The essential question is whether it is removed from that ambit because of the activity in which the person is engaged at the time the photograph was taken and because the person could not have a reasonable expectation that his or her right to respect for a private life arose in those particular circumstances. The fact that the activity in which the person is engaged is suspected to be criminal will not, by reason of that fact alone, be sufficient to remove it from the possible application of article 8.

42. In *R (L) v Comr of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2009] UKSC 3, [2010] 1 AC 410, this court held that disclosing criminal records during a Criminal Records Bureau check fell within article 8 because a person's private life could be affected by the stigma of having it revealed that he or she had criminal convictions. Although the appellant in that case had not been convicted of a criminal offence, in the course of making available to

her employers the result of an enhanced criminal record certificate, the Secretary of State disclosed certain information which had been supplied by the police commissioner. This was to the effect that the appellant's son had been placed on the child protection register under the category of neglect. It was stated that the appellant had refused to co-operate with social services. This information caused her employers to discontinue her employment. After reviewing several Strasbourg authorities (including *X v Iceland* (1976) 5 DR 86; *Niemietz v Germany* (1992) 16 EHRR 97; *Sidabras v Lithuania* (2004) 42 EHRR 104; *Rotaru v Romania* (2000) 8 BHRC 449; *Segerstedt-Wiberg v Sweden* (2006) 44 EHRR 14, and *Cemalettin Canli v Turkey*, (Application No 22427/04) (unreported) given 18 November 2008), Lord Hope, at para 27, said that this "line of authority from Strasbourg shows that information about an applicant's convictions which is collected and stored in central records can fall within the scope of private life within the meaning of article 8(1), with the result that it will interfere with the applicant's private life when it is released".

43. If disclosure of a person's actual criminal convictions falls within the scope of article 8, it is difficult to see how publication of an image of someone, such as the appellant, who was photographed when it was suspected he was engaged in criminal activity, would not likewise come within its ambit.

44. In *Sciacca v Italy* (2005) 43 EHRR 400 ECtHR held that article 8 could be engaged by the publication of a person's photograph in newspapers even where they were under investigation for (and subsequently convicted of) criminal behaviour. In that case the applicant had been charged with criminal association, tax evasion and forgery of official documents. Revenue police compiled a file on her containing, among other things, her photographs and fingerprints. A public prosecutor held a press conference in which the allegations against the applicant and others were discussed. Photographs from the police file were supplied to newspapers. Following this, two newspapers published the photographs of the applicant in articles which stated that she and others had been charged with serious offences. The case against the applicant ended with a special procedure for imposition of a penalty agreed between the applicant and the prosecution. The penalty involved the imposition of a term of imprisonment and a fine.

45. On the question of whether there had been an interference with Ms Sciacca's article 8 rights, the court said this at para 29:

> "Regarding whether there has been an interference, the court reiterates that the concept of private life includes elements relating to a person's right to their picture and that the publication of a photograph falls within the scope of private life. It has also given guidance regarding the scope of private life and it has found that there is:

> ‘a zone of interaction of a person with others, even in a public context, which may fall within the scope of a private life’ (*Von Hannover v Germany* (2004) 40 EHRR 1, paras 50-53)
>
> In the instant case the applicant’s status as an ‘ordinary person’ enlarges the zone of interaction which may fall within the scope of private life, and the fact that the applicant was the subject of criminal proceedings cannot curtail the scope of such protection.
>
> Accordingly, the court concludes that there has been interference.”

46. Of course, clear distinctions can be drawn between the *Sciacca* case and the present appeal. In that case it was not considered necessary, as it was here, to publish the applicant’s photograph for the purpose of identifying her. Also, she was not engaged in criminal activity at the time the photograph was published. Moreover, it might be said that she had a reasonable expectation that a photograph taken as part of conventional police procedures would not be published without her consent. But the case is notable in the present context for its unqualified statement of principle that the publication of a photograph falls within the scope of a private life. Thus, while even a 14 year old child might not have a reasonable expectation that his photograph would not be *taken* if he engaged in rioting in a public place, different considerations arise when it comes to the publication of the photograph.

47. The fact that the appellant was technically a child at the time of the publication of his photograph plays an important part in the decision whether that publication fell within the scope of his article 8 rights. The criminal justice system is geared to protect the identity of young offenders from disclosure. This is precisely to avoid the risks of criminalisation and stigmatisation. This is why such emphasis is placed by the police service and the prosecution service on youth conferences and other diversionary options. And it is why, if a child is involved in criminal proceedings, specific provision is made to ensure that his or her identity is not revealed. Article 22 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (SI 1998/1504 (NI 9)) contains express provisions about the protection of a child’s identity:

> “(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 …"

48. It does not lie easily with the scheme of protection of a child's identity envisaged by this provision that the publication of his photograph, for the very purpose of enabling those who know or recognise him to identify him in the course of criminal activity, should not fall within the scope of a Convention provision which guarantees his right to respect for a private life.

49. Moreover, as is common case, the nature and content of a child's right under article 8 must be informed by relevant international treaty provisions. Article 3(1) of UNCRC provides that "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". The United Nations Committee on the Rights of Children, in its comment on the significance of this provision in May 2013, said this in para 1 of its report:

> "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 (the Committee) 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 is a dynamic concept that requires an assessment appropriate to the specific context."

And this at para 4:

> "1. The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child. The Committee has already pointed out that 'an adult's judgment of a child's best interests cannot override the obligation to respect all 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."

And, finally, this at para 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."

50. The notion that a child's best interests can be properly catered for by supposing that when he or she engages in criminal activity in a public place, because he or she cannot therefore have a reasonable expectation of privacy, publication of his or her photograph, while engaged in that activity, does not come within the ambit of article 8 is, at best, incongruous, and is distinctly out of step with the philosophy which underpins article 3(1) of UNCRC. That philosophy, so far as it relates to criminal proceedings against children, is prominently proclaimed in article 40(2)(vii) of the Convention which requires states who are party to the Convention to ensure that the child's privacy is fully respected at all stages of the proceedings.

51. The Beijing Rules accord similar importance to the need to insulate children from the disclosure of their identity when they are involved in criminal proceedings. They were adopted by the General Assembly resolution 40/33 of 20 November 1985. Rule 8 provides:

> "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."

52. The commentary on this rule is to the following effect:

> "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."

53. Taken as indicators as to how article 8 should be interpreted in this case, these provisions are reasonably unmistakable. A child's identity should be protected even (or, perhaps, especially) when he or she has been subject to criminal proceedings. The ambit of article 8 of ECHR must be seen as including within its embrace the need to protect a child from exposure as a criminal. That it should apply to the publication of a photograph of a child while, apparently, engaged in criminal activity, must follow inexorably. I consider, therefore, that there has been an interference with the appellant's article 8 right.

54. This conclusion does not depend on the abandonment of the test of reasonable expectation of privacy as a measure of whether a particular form of activity carried out in a public place comes within the ambit of article 8. In appropriate circumstances, this will be of considerable importance and its application to those circumstances may lead to only one possible conclusion such as, for instance, an adult person engaging in crime in a public forum. Such a person could not have a reasonable expectation of privacy for his criminal activity. As in *Kinloch* he could

not expect that police would not be entitled to carry out surveillance of his criminal behaviour. That consideration may occupy a position of such importance in the question of whether particular circumstances come within the ambit of article 8, that no other factor could outweigh it. But it is important to understand that reasonable expectation of privacy, as a test of whether article 8 is engaged, cannot be accorded a status of unique importance with that automatic consequence in every conceivable circumstance where it can be said that a reasonable expectation of privacy was not present.

55. The present case exemplifies the point. If reasonable expectation of privacy was to be treated as the be all and end all of whether article 8 was engaged, it might be supposed that only one answer was possible. For the reasons that I have given, a more nuanced approach is warranted. The fact that the appellant was a child; the fact that the mooted interference with his article 8 right involved not only the taking of his photograph but also its publication, with the consequent risk of stigmatisation; and the fact that the consent of the appellant and his parents was neither sought nor given, combine to more than offset the importance of the reasonable expectation of privacy test in his case.

56. The test for whether article 8 is engaged is, essentially, a contextual one, involving not merely an examination of what it was reasonable for the person who asserts the right to expect, but also a myriad of other possible factors such as the age of the person involved; whether he or she has consented to publication; whether the publication is likely to criminalise or stigmatise the individual concerned; the context in which the activity portrayed in the publication took place; the use to which the published material is to be put; and any other circumstance peculiar to the particular conditions in which publication is proposed. To elevate reasonable expectation of privacy to a position of unique and inviolable influence is to exclude all such factors from consideration and I cannot accept that this is a proper approach. As I have said, reasonable expectation of privacy will often be a factor of considerable weight; it might even be described as "a rule of thumb" but to make it an inflexible, wholly determinative test is, in my opinion, to fundamentally misunderstand the proper approach to the application of article 8 and to unwarrantably proscribe the breadth of its possible scope.

57. *Von Hannover v Germany* (2004) 16 BHRC 545 is not authority for giving reasonable expectation of privacy this unique status. It is true that in para 51 of its judgment (quoted by Lord Toulson in para 84) the court referred to the reasonable expectation of privacy *but this was for the purpose of making clear that where there was such an expectation, that was a factor in favour of the engagement of article 8*. The court did *not* suggest that, if there was no reasonable expectation of privacy, that would be determinative of the issue. Indeed, it did not even address that question. Moreover, the court's discussion in para 52 about the Commission's reference to the use to which photographs might be put was quite separate from the

question of whether a there was a reasonable expectation of privacy. It is clear that the Commission (and the court) considered that the dissemination of photographs to the general public could alone give rise to interference with the article 8 right, irrespective of whether there was a reasonable expectation of privacy. That approach is plainly inconsistent with the view that, unless there was such an expectation, there could never be an interference with article 8 rights.

58. In para 22 of *R (Wood) v Comr of Police for the Metropolis* [2009] EWCA Civ 414, [2010] 1 WLR 123, Laws LJ outlined what he described as three safeguards against the "overblown use of article 8". The second of these was that the touchstone for the engagement of the article was a reasonable expectation of privacy. Laws LJ said that, absent such an expectation, "there is no relevant interference with personal autonomy". His authority for this proposition appears to rest on *Van Hannover* the opinions of Lord Nicholls and Lord Hope in *Campbell* and the judgment of Sir Anthony Clarke MR in *Murray v Express Newspapers plc* [2008] 3 WLR 1360 (see para 24 of Laws LJ's judgment).

59. For the reasons given earlier, I consider that *Von Hannover* does not support the proposition for which it was cited by Laws LJ. In relation to the opinions of Lord Nicholls and Lord Hope in *Campbell*, it is, I believe, significant that neither suggested, in quite the sweeping way that Laws LJ did, that reasonable expectation of privacy was a sine qua non of article 8 engagement. Neither stated in terms that if a reasonable expectation of privacy was not present, there could never be an interference with personal autonomy. True it is that Lord Nicholls referred to reasonable expectation of privacy as the touchstone of private life but that is a far cry from saying that this is an indispensable criterion for the engagement of article 8. It is to be remembered that *Campbell* was a breach of confidence case. Such a case is more likely to give rise to consideration of what it was reasonable for the person who claimed that his or her article 8 rights had been infringed to expect. Moreover, too much can easily be read into the use of the word, "touchstone". Understood, as I suggest it should be, as an expression connoting no more than a means by which the significance of the material to be assessed is considered or as a form of litmus test, the mistake of treating it as an obligatory condition is revealed.

60. Laws LJ's reliance on the judgment of Sir Anthony Clarke MR in *Murray* does not take further the debate as to whether reasonable expectation of privacy is an essential prerequisite of article 8 engagement. It is clear that the Master of the Rolls conceived the reasonable expectation of privacy test as one to be applied in a broad and general way. At para 36 he said:

> "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."

61. This passage does not partake of an approach which starts the inquiry into whether article 8 is engaged by asking, in a context-free way, whether there was a reasonable expectation of privacy. Rather, it commends an examination of all the circumstances of the case in order to determine whether such an expectation can be said to exist. This approach is echoed in the judgments of Lord Clarke and Lord Toulson in the present case. As I understand those judgments, it is suggested that considerations such as the age of the child, the circumstances in which the avowed interference took place, the purpose of the publication of photographs and whether consent had been obtained are relevant only in so far as they may be said to conduce to the overarching "touchstone" of a reasonable expectation of privacy. The reason for adopting such an approach is not explained other than by reference to earlier authority which, in turn, does not contain any analysis of why reasonable expectation of privacy should be given such unique and overweening status. There is certainly no obviously logical reason for approaching the question of engagement of article 8 in this way. The factors outlined earlier are unquestionably *capable* of bearing on the issue on a freestanding, autonomous footing and, absent any rational basis for treating them merely as a sub-set of reasonable expectation of privacy, this is how they should be evaluated.

62. I am therefore of the firm view that the reasonable expectation of privacy is but one of a number of factors which may be relevant to the issue of the engagement of article 8. That this is the correct approach is, it seems to me, clear from the judgment of Richards LJ in *R (C) v Comr of Police for the Metropolis (Library intervening)* [2012] EWHC 1681 (Admin) , [2012] 1 WKR 3007. Dealing with Laws LJ's judgment in *Wood*, Richards LJ said at para 36:

> "What Laws LJ said about the taking of photographs on arrest was obviously obiter. More importantly, it relied on Strasbourg decisions prior to *S v United Kingdom* which, as already explained, have to be re-assessed in the light of the judgment in that case; and it was based on a test of 'reasonable expectation of privacy' which, as the recent Strasbourg cases show, is not the only or determinative factor. In *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, at para 21, Lord Nicholls of Birkenhead said, in relation to article 8.1, that '[e]ssentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'. But that was plainly not the specific test applied by the Strasbourg court in *S v United Kingdom*; and the judgment in *PG v*

> *United Kingdom* makes clear, at para 27, that it is not the only test and that other considerations come into play, in particular, in relation to the retention of personal data …."

63. *Kinloch* does not throw doubt on the correctness of Richards LJ's analysis. As it happens, and unsurprisingly, the patent lack of any reasonable expectation of privacy in that case was a weighty factor which militated strongly against a finding that article 8 was engaged but nothing in Lord Hope's judgment in that case lends support to the notion that that factor must in all circumstances be present for engagement of the article to arise. The criminalisation of a child's activities and his possible stigmatisation by publishing photographs of him while apparently engaged in such activities are factors which were not in play in *Kinloch*. But they are distinctly in play in this case. Surveillance was the complained of activity in *Kinloch*; here it is the publication of photographs of the appellant which is in issue. That publication was, for reasons that I shall discuss below, justified. But it is extremely important not to conflate the question of justification with the issue of whether article 8 is engaged. It is wrong, in my judgment, to draw from cases such as *Kinloch* the notion that, because the occasion of possible interference involves the recording of what appears to be criminal activity, the subsequent use of that material can never engage article 8.

64. This point was clearly made by Lord Sumption in *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland (Equality and Human Rights Commission intervening)* [2015] UKSC 9, [2015] 2 WLR 664. In the passage which succeeds that quoted by Lord Toulson in para 10, Lord Sumption said this:

> "In one sense [the reasonable expectation of privacy] test might be thought to be circular. It begs the question what is the "privacy" which may be the subject of a reasonable expectation. Given the expanded concept of private life in the jurisprudence of the Convention, the test cannot be limited to cases where a person can be said to have a reasonable expectation about the privacy of his home or personal communications. It must extend to every occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court. This is consistent with the recognition that there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world. In this context mere observation cannot, save perhaps in extreme circumstances, engage article 8, but the systematic retention of information may do."

65. When one focuses, as one must, on the publication of the photographs of the appellant, rather than the activity on which he was engaged, and when one recognises the potential effect that their publication might have on the life of the child that he then was, it is not difficult to understand that article 8 must be engaged. It would be facile to say that, because he was rioting, he cannot have expected that a right to respect for private life would be engaged and, on that account alone, it was not engaged. A child's need for protection can go beyond what, if he was an adult, he would be reasonably entitled to expect.

66. Whether, therefore, one approaches the question of whether article 8 was engaged on the basis that reasonable expectation of privacy is but one factor in the equation or that that concept should be adjusted to take into account what the effect would be on the child, irrespective of his personal expectation, I am satisfied that there was an interference with his Convention right and that the essential issue in this case is whether that interference was justified.

Justification

67. Justification of interference with a qualified Convention right such as article 8 rests on three central propositions. The interference must be in accordance with law; it must pursue a legitimate aim; and it must be "necessary in a democratic society". Proportionality is a particular aspect of the last of these requirements.

68. The appellant takes no issue with the respondent's assertion that the interference with his article 8 right pursued a legitimate aim. It is claimed, however, that it was not in accordance with law and was not necessary in a democratic society.

69. As the Lord Chief Justice stated in para 32 of his judgment, section 32 of the Police (Northern Ireland) Act 2000 imposes a general duty on 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 light of its acknowledged responsibilities to children the police service devised Policy Directive 13/06 entitled PSNI Policing with Children and Young People. It aims to identify children and young people at risk of becoming involved in offending and works with partner agencies in the provision of support and intervention. It contains an express commitment to adhere to ECHR rights as well as the international standards in the UNCRC and the Beijing Rules. Policy Directive 13/06 is available to the public.

70. Publication of the appellant's photograph was subject to the Data Protection Act 1998. The photograph of the appellant constituted "sensitive personal data" (section 2(g) of the Act) and its publication was "processing" of the data under

section 1(1) of the Act. The police service is a registered data controller and must therefore comply with the data protection principles in relation to all personal data which it holds as data controller. Under section 29 of the Act, personal data is exempt from the first data protection principle, if processed for the purposes of the prevention and detection of crime and the apprehension and prosecution of offenders, except insofar as it required compliance with Schedule 2 and/or Schedule 3 to the Act. Since the processing related to sensitive personal data, the requirements of both Schedules were engaged. If any of the conditions in these Schedules was satisfied, the respondent is deemed to have acted in accordance with the Act. A condition common to both schedules is that the processing be necessary for the administration of justice. Plainly, this applies in the appellant's case. There was therefore no breach of the Data Protection legislation and I am satisfied that the publication of the appellant's photograph was in accordance with law.

Necessary in a democratic society

71. Clearly, the detection and prevention of crime, the prosecution and rendering to justice of those guilty of criminal offending and the diversion of young people from criminal activities, which may be said cumulatively to constitute the objective of the Operation Exposure campaign, are necessary in a democratic society. The essential question which arises under this rubric, therefore, is whether the devising and the application of the policy were proportionate.

72. As Lord Wilson in *R (Aguilar Quila) v Secretary of State for the Home Department (Aire Centre intervening)* [2011] UKSC 45, [2012] 1 AC 621, para 45 and Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, 790, paras 72ff explained, this normally requires that four questions be addressed:

i) is the legislative objective sufficiently important to justify limiting a fundamental right?;

ii) are the measures which have been designed to meet it rationally connected to it?;

iii) are they no more than are necessary to accomplish it?; and

iv) do they strike a fair balance between the rights of the individual and the interests of the community?

73. The importance of detecting and prosecuting criminal offenders, the prevention of future crime and the diversion of young people from criminal activity are self-evidently objectives of the first order of importance. In concrete terms in this case, dealing with sectarian violence at interfaces in Derry, which showed alarming signs of persistence and escalation, was obviously a pressing police and community priority. This was reflected in the concerns expressed by community leaders in the meetings referred to in paras 13 and 14 above. There is no question therefore that the objective of Operation Exposure was sufficiently important to justify an interference with the article 8 right.

74. One must concentrate, therefore, on the three remaining questions to be answered, as outlined in Lord Wilson's and Lord Reed's analysis. First, is Operation Exposure rationally connected to the objective that it sought to achieve? A number of possible options were available to police as to how to deal with the sectarian violence that was taking place in 2009 and 2010. In his affidavit, Inspector Burrows explained why arresting individuals involved in rioting at the Fountain Street interface was extremely difficult. These reasons have not been challenged. In short summary, they were that police in full riot gear could easily be outrun by young rioters who would descend a grassy slope into the Bogside area of Derry as soon as any arrest operation at the scene was attempted. Pursuing them into this area and attempting to carry out arrests was almost certain to bring about further disorder and community disaffection. Deciding to identify young rioters after the rioting had ended and either prosecuting them or securing their co-operation on diversionary alternatives had an obviously rational connection with the objective of detecting crime, preventing further disorder and diverting young people from criminal activity. The rational connection between Operation Exposure and its objective is plainly established.

Are the measures no more than is necessary to achieve the objective?

75. In *Bank Mellat* Lord Reed, in outlining the fourfold test of proportionality, followed the approach of Dickson CJ in the Canadian case of *R v Oakes* [1986] 1 SCR 103. In expressing the third element of the test, he endorsed the approach that one should ask "whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective".

76. The painstaking approach taken by the police service to the objective of identifying young offenders such as the appellant has been explained by Chief Inspector Yates and Superintendent Robinson. Internal police inquiries were made; community leaders and social services were asked whether they could identify those involved; and it is ironical that the appellant and his father were shown the photograph that was later published. Had they identified the appellant, no publication would have occurred.

77. Plainly, some means of identifying those involved in the rioting had to be found. Sectarian violence at interfaces in Derry could not be allowed to continue. This not only put at risk vulnerable and elderly people living in the area, as well as the young people involved in the violence themselves. It was corrosive of the good community relations in Derry which so many agencies are trying to promote. I am satisfied that publication of the photographs was, in this instance, truly a measure of last resort. I do not consider that a less intrusive means of achieving the objective of Operation Exposure was feasible. The third condition is satisfied, in my opinion.

A fair balance?

78. The final element in the proportionality examination is whether a fair balance has been struck between the rights of the individual and the interests of the community. The importance of the article 8 right and of the need to protect children and young persons from the risk of criminalisation and stigmatisation have been discussed above. The need for the decision-maker to be guided by the primary consideration of the best interests of the children has also been explained.

79. Striking the balance between the rights of the individual and the interests of the community should not, in this instance, be viewed solely as a competition between two opposing benefits. The appellant himself stood to gain by the opportunities afforded him to be diverted from the criminal activity in which he had been engaged. It was very much in his long term interests that he should become a law-abiding and useful member of his community.

80. The interests to the community generally are obvious. Quite apart from the deep unpleasantness and, indeed, danger to which those who lived in the area were subjected by these recurring riots, the peril in which they placed inter-community harmony is undeniable. The fact that the Operation was so successful in reducing the number of interface confrontations cannot be left out of account either. For these reasons and for the reasons given by the Lord Chief Justice in para 37 of his judgment, the balance fell firmly on the side of pursuing the option of publication of the appellant's photographs and those of others involved. The way in which he and others who were thus identified have been dealt with is testament to the benefit that was available to them by following that course. The benefit to the community is as unquestionable as it is considerable.

Disposal

81. I would dismiss the appeal.

LORD TOULSON: (with whom Lord Hodge agrees)

82. I agree that this appeal should be dismissed but, unlike Lord Kerr, I do not consider that the conduct of the police amounted, prima facie, to an interference with the appellant's right to respect for his private life, so as to fall within the scope of article 8 of the European Convention on Human Rights and Fundamental Freedoms.

83. Article 8.1 provides that "Everyone has the right to respect for his private and family life, his home and his correspondence".

84. In the leading case of *Von Hannover v Germany* (2004) 16 BHRC 545, concerning press photographs of the applicant engaged in various informal activities with members of her family or friends in locations outside her own home, the Strasbourg court said:

> "50. The court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name (see *Burghartz v Switzerland* [1994] ECHR 16293/90 at para 24) or a person's picture (see *Schussel v Austria* (Application No 42409/98) (admissability decision, 21 February 2002)).
>
> 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 (see, mutatis mutandis, *Niemietz v Germany* [1992] ECHR 13710/88 at para 29, and *Botta v Italy* (1998) 4 BHRC 81 at para 32.) There is therefore a zone of interaction with others, even in a public context, which may fall within the scope of "private life" (see, mutatis mutandis, *PG v UK* [2001] ECHR 44787/98 at para 56, and *Peck v UK* (2003) 13 BHRC 669 at para 57.)
>
> 51. The court has also indicated that, in certain circumstances, a person has a "legitimate expectation" of protection and respect for his 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" (see *Halford v UK* (1997) 3 BHRC 669 at para 45).
>
> 52. As regards photos, with a view to defining the scope of 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 (see, mutatis mutandis, *Friedl v Austria* [1995] ECHR 15225/89, (1995) 21 EHRR 83, Friendly Settlement, Commission opinion, at paras 49-52; *PG v UK* [2001] ECHR 44787/98 at para 58; and *Peck v UK* (2003) 13 BHRC 669 at para 61)."

85. This passage highlights three matters: the width of the concept of private life; the purpose of article 8, ie what it seeks to protect; and the need to examine the particular circumstances of the case in order to decide whether, consonant with that purpose, the applicant had a legitimate expectation of protection in relation to the subject matter of his complaint. If so, it is then up to the defendant to justify the interference with the defendant's privacy.

86. In an impressive analysis of the scope of article 8, Laws LJ said in *R (Wood) v Comr of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 WLR 123:

> "20. The phrase "physical and psychological integrity" of a person (*Von Hannover v Germany* (2004) 16 BHRC 545 (para 50), *S v UK* (2008) 25 BHRC 557 (para 66) is with respect helpful. So is the person's "physical and social identity" (see *S v UK* at 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 …
>
> 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 is name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the "zone of interaction" (*Von Hannover v Germany* (2004) 16 BHRC 545 (para 50) between himself and others …
>
> 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 that there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's 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 over blown use of article 8."

87. I have set out this passage at length because I agree with it and cannot improve on it. We are concerned in this case with the second of Laws LJ's qualifications – the "touchstone" of whether the claimant enjoyed on the facts a "reasonable expectation of privacy" or "legitimate expectation of protection". (I take the expressions to be synonymous.) In support of that part of his analysis Laws LJ cited *Von Hannover v Germany* at para 51 (set out above), *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 and *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481.

88. In *Campbell's* case Lord Nicholls said at para 21 that "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy". He also warned that courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Applying *Campbell's* case, Sir Anthony Clarke MR said in *Murray's* case at para 35 that "The first question is whether there is a reasonable expectation of privacy". He said at para 36 that the question is a broad one which takes account of all the circumstances of the case, including the attributes of the claimant, the nature of the activity in which the claimant was involved, the place at which it was happening, and the nature and purpose of the intrusion. The principled reason for the "touchstone" is that it focuses on the sensibilities of a reasonable person in the position of the person who is the subject of the conduct complained about in considering whether the conduct falls within the sphere of article 8. If there could be no reasonable expectation of privacy, or legitimate expectation of protection, it is hard to see how there could nevertheless be a lack of respect for their article 8 rights.

89. More recent authorities to the same effect are *Kinloch v HM Advocate* [2012] UKSC 62, [2013] 2 AC 93 and *R (Catt) v Association of Chief Police Officers of*

England, Wales and Northern Ireland (Equality and Human Rights Commission intervening) [2015] UKSC 9, [2015] 2 WLR 664.

90. In *Kinloch's* case the police carried out covert surveillance of the applicant as part of a criminal investigation which led to his prosecution and conviction for laundering criminal property consisting of large sums of money. He complained that the form of surveillance and use of the resulting evidence at his trial involved a breach of his article 8 rights. Lord Hope said in a judgment with which the other members of the court agreed:

> "19. There is a zone of interaction with others, even in a public context, which may fall within the scope of private life: *PG v United Kingdom*, 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 v United Kingdom*, para 57.
>
> 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 …
>
> 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. … The criminal nature of what he was doing, if that is what it was found to be, was not an aspect of his private life that he was entitled to keep private."

91. Citing *Campbell's* case and *Kinloch's* case, Lord Sumption said in *R (Catt) v ACPO* at para 4:

> "In common with other jurisdictions, including the European Court of Human Rights and the courts of the United States, Canada and New Zealand, the courts of the United Kingdom have adopted as the test

> for what constitutes 'private life' whether there was a reasonable expectation in the relevant respect."

92. Lord Kerr considers that caution is needed in applying the "reasonable expectation of privacy" test especially in a case involving a child, where the test may be in tension with the principle that any decision should give prominence to the child's best interests.

93. Lord Kerr draws attention to the observation of the Strasbourg court in *PG* at para 57:

> "There are a number of elements relevant to a consideration of whether a person's private life may be 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 … 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." (Emphasis added.)

The court did not expand on its thinking in the second sentence of this passage. The linkage between the two halves of the sentence is intriguing but obscure. It may be that the court had in mind that a person may have a reasonable but mistaken expectation of privacy. Be that as it may, I have difficulty in reading the court as meaning to suggest that a situation may come within the scope of article 8 even where the person concerned had no reasonable expectation of privacy, and it is difficult to see why that should be so. It is perhaps unfortunate that the point was not developed, but the case pre-dated *Von Hannover*, where the court referred to a "legitimate expectation" of protection, and the succeeding line of domestic authorities (including three decisions of the House of Lords or Supreme Court), which have adopted and applied the reasonable expectation test.

94. *Sciacca v Italy* (2005) 43 EHRR 400 was, as Lord Kerr has explained at para 44, a case where the police released to the press a photograph taken of the applicant while under arrest. There is no difficulty is seeing that the applicant had a legitimate expectation that the police would not make use of her photograph in that way, but it is a very different question whether a member of a crowd engaged in a violent

disturbance in a public place has a legitimate expectation of protection from the police seeking the help of the public to identify those involved. In a footnote to the passage in para 29 of the court's judgment (set out by Lord Kerr at para 45), the court cited paras 50 to 53 of the judgment in *Von Hannover* as the foundation of its observations. I have set out (at para 3) the relevant passage in *Von Hannover*, including the reference to a "legitimate expectation" of protection which is an important part of the guidance given by the court in that case. The court has not gone so far as to suggest that the taking or use of a photograph of a person is all circumstances an interference with a person's private life.

95. The fact that the appellant was a child at the relevant time is not in my opinion a reason for departing from the test whether there was a reasonable (or legitimate) expectation of privacy, but it is a potentially relevant factor in its application.

96. In the case of a child too young to have a sufficient appreciation of the idea of privacy there must obviously be some modification, but this caused no difficulty to the court in *Murray v Express Newspapers plc*. Sir Anthony Clarke MR approved (at para 37) the approach taken by the trial judge, Patten J, who had said [2007] EWHC 1908 (Ch) at para 23:

> "A proper consideration of the degree of protection to which a child is entitled under article 8 has … to be considered in a wider context by taking into account not only the circumstances in which the photograph was taken and its actual impact on the child, but also the position of the child's parents and the way in which the child's life as part of that family has been conducted. … The question whether a child in any particular circumstances has a reasonable expectation for privacy must be determined by the court taking an objective view of the matter including the reasonable expectations of his parents in those same circumstances as to whether their children's lives in a public place should remain private. Ultimately it will be a matter of judgment for the court with every case depending upon its own facts. The point that needs to be emphasised is that the assessment of the impact of the taking and the subsequent publication of the photograph on the child cannot be limited by whether the child was physically aware of the photograph being taken or published or personally affected by it. The court can attribute to the child reasonable expectations about his private life based on matters such as how it has in fact been conducted by those responsible for his welfare and upbringing."

97. In considering whether, in a particular set of circumstances, a person had a reasonable expectation of privacy (or legitimate expectation of protection), it is

necessary to focus both on the circumstances and on the underlying value or collection of values which article 8 is designed to protect.

98. I therefore do not agree with Lord Kerr's suggestion (para 56) that the test of reasonable expectation of privacy (or legitimate expectation of protection), excludes from consideration such factors as the age of the person involved, the presence or absence of consent to publication, the context of the activity or the use to which the published material is to be put. The reasonable or legitimate expectation test is an objective test. It is to be applied broadly, taking account of all the circumstances of the case (as Sir Anthony Clarke said in *Murray's* case) and having regard to underlying value or values to be protected. Thus, for example, the publication of a photograph of a young person acting in a criminal manner for the purpose of enabling the police to discover his identity may not fall within the scope of the protection of personal autonomy which is the purpose of article 8, but the publication of the same photograph for another purpose might. Nor am I persuaded by Lord Kerr's reading of *Von Hannover* (in para 57 of his judgment) that the Commission and the court treated dissemination to the general public as a self-standing test.

99. The facts set out by Morgan LCJ at para 37 included the following:

> "(i) the violence at this [the Fountain Street/Bishop Street] 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."

100. These facts have obvious relevance to the issue of justification, but it is also relevant to understand the nature of the activity in which the appellant was involved in considering whether the scope of article 8 extends to his claim (or, to use language familiar to lawyers, whether article 8 "is engaged"). When the authorities speak of a protected zone of interaction between a person and others, they are not referring to interaction in the form of public riot. That is not the kind of activity which article 8 exists to protect. In this respect the case is on all fours with *Kinloch*. Lord Hope's words are equally applicable to the appellant: "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." If, for example, members of the public gave descriptions of a rioter from which an artist prepared an indentikit, would its use by the police for the purpose of his identification be an infringement of his right to privacy? I consider not.

101. I should make it clear that I do not suggest that there could never be circumstances in which publication of the photographs which are the subject of this case could fall within the scope of the appellant's article 8 rights. Photographs can become historic and re-publication of material which was once properly in the public domain may give rise to a valid complaint. In *R (Catt) v ACPO* the court, applying the test of reasonable expectation of privacy, held that the systematic retention of personal details about a person on police files for a period of years was within the scope of article 8. But we are concerned with publication, in the recent aftermath of criminal activity, of photographs taken of public rioting for the purpose of identifying those involved. I agree with Higgins LJ that this situation is far removed from the values which article 8 was designed to protect.

102. The court was referred to the provisions of the Police (Northern Ireland) Act 2000 and the Justice (Northern Ireland) Act 2002. Under the Police Act, section 32, it is the duty of the police to protect life and property; to preserve order; to prevent the commission of offences; and where an offence has been committed, to take measures to bring the offender to justice. Under the Justice Act , section 53, it is the principal aim of the youth justice system to protect the public by preventing offending by children; all persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim, with a view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions; but all such persons and bodies must also have regard to the welfare of children with a view to furthering their personal, social and educational development. I do not consider that these provisions affect the question whether the conduct of the police in releasing the CCTV images for publication was prima facie an interference with the appellant's right to respect for his private life.

103. If, contrary to my opinion, there was an interference by the police with the appellant's right to respect for his private life, I agree fully with Lord Kerr that it was justified and there is nothing which I would wish to add on that issue.

LORD CLARKE: (with whom Lord Hodge agrees)

104. The facts giving rise to this appeal are set out in detail by Lord Kerr. I agree with Lord Kerr and Lord Toulson that this appeal must be dismissed on the basis that, if the facts fall within article 8.1 of the ECHR so that (as it is often put) article

8.1 is engaged, the conduct complained of was justified so that there was no breach of article 8 because of the provisions of article 8.2. Like Lord Toulson, I do not wish to address the justification issue. However, I wish to add a short judgment on the question whether article 8.1 is engaged. I do so because Lord Kerr and Lord Toulson have reached different conclusions.

105. The question which divides them is whether article 8 is only engaged where the alleged victim has a legitimate expectation of privacy or a reasonable expectation of protection and respect for his private life. As Lord Toulson shows at para 84, the latter expression was used by the European Court of Human Rights in the leading case of *Von Hannover v Germany* (2004) 16 BHRC 545 at para 51. The expression "reasonable expectation of privacy" is found in a number of English cases. I agree with Lord Toulson that the two expressions have the same meaning. Subject to one point, I also agree with him that Laws LJ expressed the position correctly in *R (Wood) v Comr of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 WLR 123 at paras 20-22, which he quotes at para 86. Laws LJ said at para 22 that the touchstone for the engagement of article 8.1 is whether the claimant enjoys on the facts a "reasonable expectation of privacy". Laws LJ went so far as to say that, absent such an expectation, there is no relevant interference with personal autonomy so as to engage article 8. As appears below, I would not go quite as far as that. As Lord Toulson noted, Laws LJ cited para 51 of *Von Hannover*, together with two English cases, namely *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 and *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481. The more recent domestic cases cited by Lord Toulson in paras 8 to 10, namely *Kinloch v HM Advocate* [2012] UKSC 62, [2013] 2 AC 93 and *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland (Equality and Human Rights Commission intervening)* [2015] UKSC 9, [2015] 2 WLR 664, are to the same effect.

106. That is to my mind true in *Catt* even though, as Lord Kerr says at para 62, the whole passage in para 4 of Lord Sumption's judgment reads as follows:

> "In common with other jurisdictions, including the European Court of Human Rights and the courts of the United States, Canada and New Zealand, the courts of the United Kingdom have adopted as the test for what constitutes 'private life' whether there was a reasonable expectation in the relevant respect: see *Campbell* … para 21 (Lord Nicholls of Birkenhead) and *Kinloch* ... paras 19-21 (Lord Hope of Craighead DPSC). In one sense this test might be thought to be circular. It begs the question what is the 'privacy' which may be the subject of a reasonable expectation. Given the expanded concept of private life in the jurisprudence of the Convention, the test cannot be limited to cases where a person can be said to have a reasonable expectation about the privacy of his home or personal communications. It must extend to

> every occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court. This is consistent with the recognition that there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world. In this context mere observation cannot, save perhaps in extreme circumstances, engage article 8, but the systematic retention of information may do."

Lord Sumption was not suggesting that any test other than the legitimate expectation of privacy might be appropriate.

107. All the domestic cases support the proposition that, as Lord Nicholls put it, the touchstone of private life is whether the person in question had a reasonable expectation of privacy or, as Lord Sumption put it in *Catt*, the test for what constitutes private life is whether there was a reasonable expectation in the relevant respect.

108. Lord Kerr places some reliance on para 36 of the judgment of Richards LJ in *R (C) v Comr of Police of the Metropolis* [2012] EWHC 1681 (Admin), [2012] 1 WLR 3007 as follows:

> "What Laws LJ said [in *Wood*] about the taking of photographs on arrest was obviously *obiter*. More importantly, it relied on Strasbourg decisions prior to *S v United Kingdom* [(2008) 48 EHRR 50] which, as already explained, have to be re-assessed in the light of the judgment in that case; and it was based on a test of 'reasonable expectation of privacy' which, as the recent Strasbourg cases show, is not the only or determinative factor. In *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, at para 21, Lord Nicholls of Birkenhead said, in relation to article 8.1, that '[e]ssentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'. But that was plainly not the specific test applied by the Strasbourg court in *S v United Kingdom*; and the judgment in *PG v United Kingdom* [(2008) 46 EHRR 51] makes clear at para 57, that it is not the only test and that other considerations come into play, in particular, in relation to the retention of personal data …."

109. It is true that in *S v United Kingdom* the court does not expressly refer to the reasonable expectation of privacy but its analysis seems to me to be consistent with it. It is also true that in *PG* the court said at para 57 that a person's expectations may

be a significant, although not necessarily a conclusive, factor. I cannot at present think of a situation where article 8.1 would be engaged in the absence of a reasonable expectation of privacy or a reasonable expectation of protection and respect for the private life of the applicant. It is difficult to see why article 8.1 should be engaged where the applicant has no reasonable expectation of privacy. It is important in this respect to have regard to the fact that the concept of reasonable expectation is a broad objective concept and that the court is not concerned with the subjective expectation of the person concerned, whether that person is a child or an adult.

110. As Laws LJ put it in *Wood* at para 22, absent a reasonable expectation of privacy, there is no relevant interference with personal autonomy, which (as he explains in para 21) is a central feature of article 8. Although, in the light of the present state of the Strasbourg jurisprudence, I for my part would not go so far as to say that such a case is impossible, the test of reasonable expectation is in my opinion relevant in this class of case.

111. I agree with Lord Toulson that *Kinloch* is a case of some significance on the facts here. In para 90 he sets out the facts and relies upon paras 19 to 21 of Lord Hope's judgment in this court. The complaint was that the form of surveillance and the use of the resulting evidence involved a breach of the applicant's article 8 rights. Lord Hope said:

> "19. There is a zone of interaction with others, even in a public context, which may fall within the scope of private life: *PG v United Kingdom*, …, 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 v United Kingdom*, para 57 …
>
> 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 …
>
> 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. … The criminal nature of what he was doing, if that is what it was found to be, was not an aspect of his private life that he was entitled to keep private."

112. I agree with Lord Toulson that on the facts here the criminal nature of what the appellant was doing was not an aspect of his private life that he was entitled to keep private. He could not have had an objectively reasonable expectation that such photographs, taken for the limited purpose of identifying who he was, would not be published. I would not however hold that the mere fact that a person is photographed in the course of a criminal activity deprives him or her from the right to prevent the police from publishing the photographs. Thus, if the photographs had been published for some reason other than identification, the position would have been different and might well have engaged his rights to respect for his private life within article 8.1. I would not therefore put the point quite as broadly as Lord Hope does in para 21 of *Kinloch* quoted above.

113. I respectfully differ from Lord Kerr in so far as he distinguishes the position of a child. I adhere to the views I expressed in *Murray's* case to which Lord Toulson refers at paras 88, 96 and 98. As ever, all depends upon the circumstances of the case and, in the case of a child, the context is of particular importance. So, for example, the attributes of the child, the nature of the activity in which he or she was involved, the place where the activity was happening and the nature and purpose of the intrusion complained of are all relevant factors. I do not think that any of the decisions of the European Court of Human Rights to which we were referred leads to any other conclusion, although I accept that it does not always refer to the reasonable expectation point.

114. As Lord Toulson says at para 96, in *Murray* the Court of Appeal (comprising Laws, Thomas LJJ and myself) approved the approach of Patten J at first instance so far as a child is concerned. I remain of that view today. All the factors identified by Patten J as quoted by Lord Toulson are relevant or potentially relevant in considering whether article 8.1 is engaged in a particular case. Thus I agree with Lord Toulson at para 98 that the age of the person involved, the presence or absence of consent to publication, the context of the activity and the use to which the relevant material is put are all relevant. The law is to be applied broadly, taking account of all the circumstances of the case. In Lord Steyn's famous phrase, in law context is everything.

115. In the instant case, for the reasons given by Lord Toulson at paras 100 to 102, I agree with him that the test is not satisfied on the facts of this case, which involves the publication, in the recent aftermath of criminal activity, of photographs taken of public rioting for the purpose of identifying those involved. I reach that conclusion having regard to all the circumstances of the case, including the fact that the appellant was 14 at the material time.