

W201 The Individual and the State

Study notes on civil liberties: a comparison of English law and Article 8 and Protocol 1

This course requires

- an understanding of civil liberties in England and Wales and
- an ability to compare English law with convention rights

1 Freedom of property

English law

Unusually there is a general statement of this right in English law in the landmark case of **Entick v Carrington** 1765 and the right is reflected in the civil actions available in tort for its breach (trespass to land and trespass or negligence to goods or conversion of goods).

In **Entick v Carrington** the Secretary of State had sent two King's messengers with a warrant he had issued under his own authority to break in and seize papers alleged to be seditious. Entick sued the messengers for trespass to house and goods. No legal authority for the trespass could be established and Entick won his case. Lord Camden CJ said:

“The great end for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.”

For better or worse there have been many statutory inroads into this basic right especially in recent times.

The Inland Revenue have been given wide powers of search and seizure. These were tested in **R v Inland Revenue Commrs ex parte Rossminster Ltd** 1980 Lords. A warrant had been granted for the search of Rossminster's premises on the basis of an unspecified suspected tax fraud. The Court of Appeal quashed the warrant as it alleged no specific offence. Lord Denning said:

“in pursuance of our traditional role to protect the liberty of the individual - it is our duty to say that the warrant must particularise the specific offence”

The House of Lords reversed the Court of Appeal on the ground that the requirements of the statute had been met by the wording used in the warrant. They said **Entick v Carrington** was still good law but felt powerless to go behind the statute.

The police have also been given wide powers of entry search and seizure. These are set out in the Police and Criminal Evidence Act (PACE) 1984.

Summary of police powers of entry search and seizure

1. Entry under warrant

Section 8 PACE 1984

A Justice of the Peace can issue such a warrant for entry and search if there are reasonable grounds for believing an indictable offence has been committed.

A Justice's warrant is not related to an arrest - it is an evidence gathering procedure.

Execution of warrants are governed by strict conditions (eg producing the warrant on execution and staying within its terms) Sections 15 & 16 PACE 1984.

2. Entry without warrant (under statutory authority)

Before arrest

Section 17 PACE 1984

The police have extensive powers to enter and search for the purpose of making an arrest inter alia

- to execute a warrant of arrest (note this is different from a search warrant)
- to arrest a person for an indictable offence
- to recapture escapers from prison
- to save life or limb or prevent serious damage

After arrest

Section 18 PACE 1984

This enables police to go and look for evidence after they have arrested someone for an indictable offence by searching usually his home or car. The police use this all the time.

Section 32 (2) (b) PACE 1984

This enables the police to enter and search premises in which a person was arrested (or was in immediately before his arrest). Police use this where a person is arrested away from his home as Section 18 will not apply.

3. Residual common law power

To enter and deal with or prevent a breach of the peace - preserved by Section 17 (6) PACE 1984.

4. General power of seizure

Section 19 PACE 1984

If police are already **lawfully** on premises they have a general power to seize evidence.

Convention

Protocol 1 Article 1

...every ... person is entitled to the peaceful enjoyment of his possessions.

There are exceptions to this right in the public interest.

This provision has been used to challenge planning decisions and compulsory purchase and nationalisations.

Article 8

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

There are exceptions for

- national security
- public safety
- economic well being
- prevention of disorder or crime
- protection of health or morals
- protection of the rights and freedoms of others.

Because of the exception for crime the scope for a successful challenge to police or Inland Revenue powers is limited.

However in **Keegan v UK** 2007 ECHR Keegan was able to establish a breach of Article 8 despite a lawful execution of a search warrant and lawful entry under Section 17 of the Police and Criminal Evidence Act 1984 by the police.

The police were seeking a robbery suspect. The suspect's mother had been a council tenant at Keegan's address 12 months before. After she left the house was vacant for six months and Keegan and his family had been tenants for a further six months. The police forced entry with a metal ram at 7am one morning seeking the robbery suspect. These events took place in 1999 before the Human Rights Act became law. Keegan's action for damages in the UK courts failed in the absence of malice on the part of the police. Before the European Court of Human Rights Keegan succeeded. Keegan relied on

Article 8 and the state on the exception for prevention of crime in Article 8:2. The Court found that the police action pursued a legitimate aim – the prevention of crime. However the action was not necessary in a democratic society or proportionate because the police had not taken the basic precaution of checking that the suspect still lived at the address. Keegan received damages.

2 Privacy

English law

No general right existed but partial protection was offered by the tort remedies of defamation, trespass and breach of confidence. However in 2001 the Court of Appeal recognised a right of privacy grounded in the equitable doctrine of breach of confidence. The injustice which the absence of any general right to privacy lead to was illustrated in the case of **Kaye v Robertson** 1991 C A (An actor Gordon Kaye received head injuries in a car accident. Reporters entered his hospital room and photographed and ‘interviewed’ him. An application for an injunction to restrain publication failed.)

Glidewell L J said:

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

However in **Douglas v Hello** 2001 C A Michael Douglas sought an injunction to prevent Hello magazine publishing unauthorised wedding photographs. Held - the injunction should be refused as Douglas was seeking to protect not his privacy but the commercial value of rights sold to OK magazine. Therefore damages and not an injunction became the suitable remedy. In the course of the judgment the majority of the Court accepted the following propositions:

- 1) Kaye v Robertson was no longer good law (Sedley LJ and Keene LJ)
- 2) The law now recognised and would protect a right of personal privacy - grounded in the equitable doctrine of the breach of confidence (Sedley LJ and less enthusiastically Keene LJ).

In addition Lord Justice Sedley only found:

- 3) The HRA 1998 required courts to give effect to the right to respect for private life in Article 8.
- 4) In balancing Article 8 and Article 10 (freedom of expression) an unjustifiable invasion of privacy was entitled to no less regard than the right to publish and Section 12(4) which states that “The court must have particular regard to the Convention right to freedom of expression”) did not affect this. Neither element was a trump card.

5) Article 10 applied between one private litigant and another. This included Article 10.2 which qualified the right of freedom of expression in favour of the rights of others (eg the right of privacy). (Therefore in practical terms both Article 10 and Article 8 had horizontal effect in this case.)

The finding of Sedley LJ that Articles of the Convention can have horizontal effect and apply to private individuals and bodies as well as public bodies was followed in **Thompson and Venables v News Group Newspapers Ltd** 2001 Div Ct.

However in other recent cases courts have shown reluctance to develop a freestanding right to privacy and have relied where possible on other rights such as breach of confidence.

When the damages claims in **Douglas v Hello** were eventually heard in 2003 in the Divisional Court by Lindsay J he declined to decide the case on breach of privacy. He awarded Douglas damages for breach of commercial confidentiality.

Regarding recognition of a privacy law he said:

“a judge should ... be wary of doing that which is better done by Parliament. ...if Parliament does not act soon the less satisfactory course of the courts creating the law bit by bit ... with inevitable delays and uncertainty, will be thrust upon the judiciary.”

Similarly in **Campbell v Mirror News Group Ltd** 2004 Lords the court did not rely on Article 8 to create a new right of privacy. Instead the court considered the right to privacy afforded by an action for breach of confidence and used Article 8 to help determine this.

Lady Hale in **Campbell** said “our law cannot ... develop a general tort of invasion of privacy”.

In finding the correct balance between Article 8 (Privacy) and Article 10 (Freedom of expression) courts will assess the weight to be given to press freedom in each individual case looking at each right, at any relevant restrictions and then applying a proportionality test. Cases in this area have turned on their individual facts. Article 8 prevailed in the **Mary Bell** case 2003 Div Ct (fragile mental health a factor) and in **Campbell** (Lords split 3:2) (medical treatment a factor). Compare these cases with in **Re S** 2004 Lords (Press right to report a murder trial (Art 10) overcame the right of privacy of a child of the accused (Art 8)).

The case of **Murray v Express Newspapers** 2008 C A shows how far the law has developed. A photographer took clandestine photos with a long range lens of JK Rowling and her 19 month old child in a public street. One photo was published. At first instance the judge struck out a claim based on the infant’s alleged right to privacy as unarguable in law. On appeal the Court of Appeal held it was arguable that the infant had a reasonable expectation of privacy (and therefore Article 8 was in principle engaged). In **Murray** the Court of Appeal followed **Campbell** and considered an ECHR case **Von**

Hannover v Germany 2005. In the latter case photographs were taken of Princess Caroline of Monaco and her children in public. The ECHR in finding a breach of Article 8 did not look for a special reason (such as medical treatment in **Campbell**) to make Article 8 prevail. Instead they said the test was the contribution the published photos made to “a debate of general interest”.

Compare this with **Kaye v Robertson** 1991 where the Court of Appeal could offer a plaintiff no remedy at all prior to the Human Rights Act 1998.

The Courts (Lord Justice Sedley excepted!) are understandably reluctant to attempt to lay down a new tort of invasion of privacy partly because they are restricted by the facts of each individual case and it then becomes difficult to set out a new law in a comprehensive way. Also they do not wish to be accused of legislating. However if Parliament fails to act they may have no choice. The law will now develop in one of two ways.

- 1 Parliament will introduce a statutory privacy law.
- 2 Judges will continue (with some reluctance) to develop the law on a case by case basis. (As in **Douglas and Campbell**).

Recent cases before the European Court of Human Rights in Strasbourg show the need for the issue of privacy law to be addressed in England and Wales. In **Peck v UK** 2003 ECHR a man attempting suicide was caught on CCTV. Footage identifying him was broadcast on national TV. The Court found that his right to respect for private life under Article 8 had been violated. The court also recognised that at present English law did not provide a remedy. In **Wainwright v UK** 2007 ECHR strip searches of visitors at Armley Prison were found to breach Article 8. However the absence of a general right in English law to sue for invasion of privacy meant there was no effective remedy (under Article 13) for the breach.

Convention

Article 8 (see above)

Every one has the right to respect for his private ... life.

This has been used successfully in the area of telephone tapping.

In **Malone v UK** 1985 the Court found that the law on telephone tapping was unclear and did not offer sufficient protection. The government then enacted the Interception of Communications Act 1985 which sets out when warrants for interceptions can be granted.

In **Halford v UK** 1997 ECHR A breach of Article 8 was established. Ms Halford an Assistant Chief Constable on Merseyside was in dispute with her employers. She alleged sex discrimination. Senior police officers intercepted her office telephone calls.

Interception by the Merseyside Police of their own phones was outside the 1985 Act so no warrant was required. The Court found unanimously that there had been a breach of Article 8. It reasoned that an employee has a reasonable expectation of privacy in the absence of a warning that calls might be intercepted and that since UK law did not regulate the position at all where the police intercepted their own phones the interference was not in accordance with the law as required by Article 8.

This case illustrates well the difference in legal reasoning between the traditional English approach and that of the European Court of Justice. In England absence of a right of privacy meant that the police could intercept their own phones as statute did not forbid it. Under the convention the existence of a right to privacy meant that it was for the state to show legal justification for interference with the right.

The wording of Article 8. 2 was crucial:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law”.

Article 8 has also been invoked to challenge successfully police retention of DNA and fingerprint samples of persons arrested but not subsequently convicted of any crime.

In **S and Marper V UK** 2008 ECHR the European Court of Human Rights has ruled that two British litigants should not have their DNA and fingerprints retained by the police. S was a 12-year-old acquitted of attempted robbery, and Michael Marper was an adult against whom domestic harassment charges were discontinued. Both asked the Police to destroy their DNA and fingerprints but this was refused. English Courts,(the High Court, the Court of Appeal, (Sedley LJ dissenting) and the House of Lords) had upheld the police refusal. In contrast the European Court of Human Rights’ ruling found that the police's actions were in violation of Article 8 of the European Convention on Human Rights. The decision could have major implications on the rules for storing DNA records,

First the court found that there had been an interference with private life under Article 8 when the police retained DNA and fingerprints.

Secondly the court considered the possible justification for the breach under Article 8(2) “prevention of disorder or crime”. The court acknowledged the importance of the fight against crime and the assistance that retention of DNA samples could bring. However the court said: "The retention in question constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society."

Thirdly the judges ruled the retention of the men's DNA "failed to strike a fair balance between the competing public and private interests," and that the UK government "had overstepped any acceptable margin of appreciation in this regard". The Court felt that the

strong consensus existing among the Contracting States was of considerable importance and narrowed the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private life in this sphere.

They added that they were "struck by the blanket and indiscriminate nature of the power of retention in England and Wales". They noted that "England, Wales and Northern Ireland appear to be the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence." They also noted that Scotland had not followed England's example.

Subsequently in **Wood v Metropolitan Police Commissioner** 2009 the Court of Appeal has found that retention by the police of photographs of a campaigner against the arms trade (who had no previous convictions and who had committed no criminal offence) breached Article 8. The photos were taken in April 2005 in public streets as the campaigner left the AGM of a company involved in the arms industry. The police proposed to keep the photos in case the campaigner had been involved in unlawful activity at the AGM and might be in the future at an arms exhibition in September 2005. The Court found that taking and retaining the photographs engaged Article 8 (relying on Marper). They further found that the taking and retention of the photographs were in pursuit of a legitimate aim, namely "the prevention of disorder or crime". However once it became clear the campaigner had done nothing illegal at the AGM further retention was not proportionate. Dyson LJ said "The retention by the police of photographs of a person must be justified and the justification must be the more compelling where the interference with a person's rights is, as in the present case, in pursuit of the protection of the community from the risk of public disorder or low level crime, as opposed, for example, to protection against the danger of terrorism or really serious criminal activity."

Finally Article 8 has been used successfully to challenge widely drawn terror legislation. In **Gillan and Quinton v UK** 2010 ECHR the court found that the right of the police to randomly stop search and question people, **without grounds for suspicion**, under Sections 44 and 45 of the Terrorism Act 2000 were not subject to adequate legal safeguards against abuse and violated Article 8 (the right to a private life).