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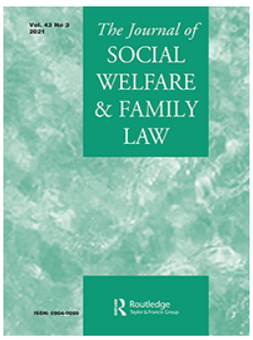

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The right ambit – Lady Hale and the limitations of Article 8 ECHR

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ABSTRACT

This article considers the way the interpretation of the 'ambit' of the right to respect for private and family life under Article 8 ECHR has developed in the English courts over time and explores Lady Hale's influence on this development. English courts started by taking an unduly narrow interpretation of 'ambit'. The majority in *Secretary of State for Work and Pensions v M* even sought to make a connection between the intensity of the infringement of the right and its 'ambit'. Lady Hale dissented and correctly identified 'ambit' and justification as separate issues, and that the intensity of a potential infringement only is a question for the latter. In *Re McLaughlin* she later stated that the English courts wrongly had relied on domestically developed concepts rather than the Strasbourg jurisprudence, thus setting the courts on the right path. The article concludes that nevertheless the final steps to arriving at the correct interpretation still need to be taken: the express recognition that the intensity of the infringement cannot define the 'ambit' of the right concerned, but rather is a question that needs to be considered separately when determining whether the infringement can be justified.

KEYWORDS

ECHR; family life; Lady Hale; interpretation; Article 8 ECHR; Article 14 ECHR; ambit

Introduction

The United Kingdom's relationship with the European Convention on Human Rights (ECHR) has always been an ambivalent one, probably best summarised and satirised by a sketch featuring Patrick Stewart (Susman *et al.* 2016). The ECHR and the ECtHR (along with 'Europe' and the European Union, all of which usually either ignorantly or wilfully are amalgamated into one) certainly have been favourite targets – and scapegoats – of the British tabloid press and politicians. The false but very public assertion by the then Home Secretary that an illegal immigrant could claim human rights and avoid deportation because they owned a cat is but one example (BBC Online 2011, Wagner 2011).

Nevertheless, the ECHR undoubtedly has had a profound impact on English law. In the area of family law, it was the case of Marckx v. Belgium (1979–80) 2 EHRR 14 in which the European Court of Human Rights (ECtHR) for the first time interpreted Article 8 as comprising the area of family law (and succession law) *as such* (cf. Pintens and Scherpe 2011, 2014). This meant that family laws could be subject to scrutiny under Article 14 and thus had to be applied without discrimination. Moreover, the Court also

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found that Article 8 contained a *positive* obligation, meaning that the State had to actively ensure that Article 8 rights of citizens were protected. Marckx therefore had an immediate and a lasting impact on the development of family law in Europe. This influence also is very visible in English family law (Law Commission of England and Wales 1982, esp. pp. 23 and 28, Maidment 1979, p. 231f, Hayes 1980, Pintens and Scherpe 2011), and indeed the decision fits well into a period where there already was, as John Eekelaar (2021) has put it, a clear trend towards 'diminution of state powers over individuals and the growing assertion of individual rights' (see Eekelaar 1986, 1994a, 1994b, 2017, p. 8–17).

Much of this influence materialised in court decisions. This contribution will focus on one aspect of Lady Hale's influence in this area, namely the development of the jurisprudence regarding the so-called 'ambit' of Article 8. Other terms are often being used for the same concept, namely that a right is 'within the scope' (Petrovic v Austria [1998] ECHR 21 at [29]) or that the 'subject matter constitutes one of the modalities of the exercise of the right' (National Union of Belgian Police v Belgium [1975] ECHR 2 at [28]). The French language versions of ECtHR decisions, as helpfully pointed put by Lord Walker (Secretary of State for Work and Pensions v M [2006] UKHL 11 at [57]), use terms such as '*emprise*' (grasp) and '*champ*' (field). By contrast, in the English courts (but crucially *not* in the English language versions of the ECtHR decisions), the term 'engaged' is used commonly. But as it has been remarked repeatedly (e.g. by Lord Hope in Harrow London Borough Council v Quazi [2003] UKHL 43 at [47], Laws LJ in Sheffield City Council v Smart [2002] EWCA Civ 4 at [22] and Lord Walker in Secretary of State for Work and Pensions v M [2006] UKHL 11 at [57]), that term is misleading and may give rise to misunderstandings (on which see below, section "Article 8 – Ambit and ambiguities").

As will be demonstrated below, it was Lady Hale's position on this issue – which from the beginning showed a much greater understanding of the nature of the ECHR than that of many of her peers – that went from being a minority view to shaping the approach of the courts in England and Wales today. But it was a long road.

'Respect' and the interpretation of the ECHR

Article 8 is regarded as 'one of the most open-ended provisions' and 'one of the most dynamically interpreted provisions' of the Convention (Feldman 1997). It probably also is one of the most misunderstood provisions of the ECHR in England and Wales. Two issues may have contributed to this in particular: the mental or actual omission of the word 'respect' when dealing with the rights contained in Article 8 (on which see below, section "The lack of 'respect'"), and the interpretative approach to the ECHR in general and article 8 in particular in England and Wales (on which see section, below "The right(s) interpretation").

The lack of 'respect'

Unlike other Convention provisions, rather unconventionally, Article 8 does not set forth rights as such but a right to *respect* for private and family life. That this is an important distinction should be obvious just from the primary text. Nevertheless it seems to be lost

not only on many UK politicians, including those who hold offices in which they should know better like a Home Secretary who later became Prime Minister (cf. Hennessy 2012), but also – rather worryingly – on some judges. For example, Andrews J in Steinfeld and Keidan v Secretary of State for Education (on which see below, section "The low point – Steinfeld and Keidan in the High Court") consistently referred to 'the right to family life under Article 8′ ([2016] EWHC 128 at [25], [28], [33]-[34], [39], [72] and [84]). However, the actual wording of the article is meant to make clear that it *presupposes* the existence of a family (or private) life to be applicable. Referring to (and thinking of) a 'right to family life' instead of a 'right to *respect* for family life' increases the risk of construing the right wrongly. This was (finally!) recognised expressly by the Court of Appeal in Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others [2017] EWCA Civ 1916, a case in which not awarding bereavement benefits for surviving partners in a cohabitation relationship was held to be incompatible with Article 14 in conjunction with Article 8. With remarkable clarity regarding the 'respect' issue, Sir Terence Etherton MR found (at [72]):

> The emphasis in both the judge's judgment and the submissions of the Secretary of State on the "promotion" of family life, as distinct from promotion of "respect for [. . .] family life" as specified in Article 8, is misplaced.

This very clear warning that the proper wording of the provision, and the different focus resulting from it, must be heeded, hopefully will be heard and respected by the judiciary and especially the executive in the future.

The right(s) interpretation

Another reason for the difficulties Article 8 and particularly the 'ambit' issue have caused in England and Wales stems from what arguably is a different understanding of 'rights' in common law and civil law jurisdictions, partially due to the basic difference in interpretative approaches.

The abovementioned Marckx case is a good example for the clash between what were the dominant statutory interpretation techniques in civil law and common law jurisdictions. In Marckx, the English judge, Sir Gerald Fitzmaurice (on Sir Gerald and his background see Merrills 1976–77, Merrills and Jennings 1998), in his fiercely dissenting opinion relied on the classic grammatical, historical and literal interpretation of the Convention. By contrast, the majority, which consisted solely of judges from civil law jurisdictions, favoured a teleological, purposive approach, recognising the Convention as a 'living instrument'. Until today, the latter is the interpretative approach taken by the ECtHR, often also referred to as 'dynamic' or 'evolutive' interpretation. In the case, it led towards the finding of a positive obligation to respect private family and life under Art. 8.

But for Sir Gerald (in Marckx, 1979, para 7 of the dissenting opinion), it was

> (. . .) abundantly clear (at least it is to me) — and the nature of the whole background against which the idea of the European Convention on Human Rights was conceived bears out this view — that the main, if not indeed the sole object and intended sphere of application of Article 8, was that of what I will call the 'domiciliary protection' of the individual. He and his family were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; (. . .) Such, and not the internal,

> domestic regulation of family relationships, was the object of art. 8, and it was for the avoidance of these horrors, tyrannies and vexations that 'private and family life . . . home and . . . correspondence' were to be respected, and the individual endowed with a right to enjoy that respect . . .

This view mirrors what he previously had expressed in Golder v United Kingdom (1979–80) 1 EHRR 524. Indeed, a historical interpretation would come to this conclusion. Not only is the text of Article 8 based on Article 12 of the Universal Declaration of Human Rights (Connelly 1986, p. 568f.), which arguably merely contains a 'negative' obligation, a defence against 'attacks' by the state:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Also, an earlier draft of Article 8 read:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference

According to Frowein and Peukert (1996, p. 338) this draft text thus 'very clearly' had stipulated a positive obligation, but ultimately it was not accepted. From this, one could legitimately infer that no positive obligation was intended. Moreover, the fact that in international treaties the Contracting States generally give up part of their sovereignty, and that they would not want to relinquish more of their sovereign rights than absolutely necessary and clearly agreed on, also points towards a narrow and literal interpretation (Rigaux 1979, p. 529, Sturm 1982, p. 1153, Maidment 1979, p. 230, Forder 1990, p. 163).

However, the majority took a different view, following what the Court had stated clearly before in Wemhoff v Germany (1979–80) 1 EHRR 55 at [8]:

> Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.

Following Wemhoff, the Commission further elaborated in Golder v UK (Report of the Commission of 1 June 1973, Series B, No 16, with Sir Gerald dissenting) that the overriding function of the Convention was to protect the rights of the individual and not merely to create mutual obligations between states which are to be restrictively interpreted having regard to the sovereignty of these states. The purpose of the Convention was to make the protection of the individual an effective one. In Tyrer v United Kingdom (1979–80) 2 EHRR 1, decided shortly before Marckx, the Court then added that 'the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions' (at [31]) and maintained this view in Marckx. Today, the 'dynamic' and 'evolutive' interpretation generally applies in the sphere of human rights concerning the family and family law (Jayme 1979, p. 2426, Duffy 1982, p. 194, Meeusen 1995, p. 137, Warbrick 1998, p. 32). There is also no longer any doubt that the state has positive obligations to protect individuals (Grosz, Beatson and Duffy 2000, pp. 256 f.), as today it is fully accepted that there are situations, where – as Douglas (1988, p.102) has put it very aptly – the state simply cannot 'claim to remain

neutral' (see for example the cases of X and Y v Netherlands (1986) 8 EHRRR 235 and Opuz v Turkey (2010) 50 EHRR 28).

The underlying difference with regard to interpretation can also (rather crudely) be put like this: in civil law jurisdictions statutory or treaty provisions *create* the law, whereas the underlying assumption in common law jurisdictions is that they *change* the law. Thus the former invites a broader and more open (and indeed teleological) interpretation as the provisions are meant to regulate that area of law, whereas the latter tends to interpret narrowly so that the provisions do not overreach beyond what that specific legislation was meant to change. As regards the ECHR, this has led to interpretation by common law courts often construing rights more narrowly, whereas civil law courts often interpret the rights more widely and acknowledge that they may be infringed – and then limiting the exercise at the justification stage. Civil lawyers generally are much less worried about giving rights a wider scope, as they are much more comfortable with finding that while a right is infringed, that infringement is justifiable and there therefore is no violation of the ECHR. From the wording of the Convention it is obvious that this 'infringement but no violation' approach is what the drafters had in mind.

As can been seen below, the interpretation and concept of rights, and how far they reach, appears to be at the heart of the issues that have arisen in England in the interpretation of Article 8, and specifically its 'ambit'. It is against this background that the English courts' interaction with Article 8, and especially Lady Hale's contribution, must be understood.

Article 8 – ambit and ambiguities

As already mentioned, defining what it is exactly that Article 8 ECHR is protecting is a difficult task because of its 'open-ended' nature. It is well-established, that Article 14 is not a free-standing right but requires that another ECHR right is engaged (Belgian Linguistics Case (no. 2) [1968] ECHR 3). Therefore, when determining whether there was a violation of Article 14 *in conjunction* with Article 8, defining the protective scope of Article 8 is even more difficult. The finding of such a violation of Article 14 in conjunction does not require that Article 8 itself is violated (Abdulaziz, Cabales, and Balkandali v UK [1985] ECHR 7 at [71]), but that the matter in question falls within the 'ambit' of Article 8 and that there is discrimination (i.e. a non-justifiable differential treatment because of one of the protected characteristics). Being within the 'ambit' means that the matter in question must be one of the 'modalities of the exercise of the right in question'. In other words: if a state shows respect for family life, it must do so without discrimination. Typical examples are adoption (Fretté v France [2002] ECHR 156 and EB v France [2007] ECHR 211) or parental leave (Petrovic v Austria [1998] ECHR 21): Article 8 ECHR does not, as currently understood, mandate a legal framework for adoption or parental leave, and thus not having such frameworks would not be a violation of Article 8. However, if such legal frameworks exist, they are 'modalities' by which family life is exercised and thus must not be applied in a discriminatory way.

Intense debate about intensity – Secretary of State for Work and Pensions v M

The English case in which the question of 'ambit' was discussed most intensely was Secretary of State for Work and Pensions v M [2006] UKHL 11.

The 'essential point', as Lord Walker put it in the decision (at [41]; for the full facts and statutory provisions see [35]-[47]) of the case was not in dispute and was set out by Sedley LJ in the Court of Appeal decision ([2004] EWCA Civ 1343 at [9], repeated with approval by Lord Walker) as follows:

> The broad effect of the material provisions is to allocate the financial responsibility of separated parents for the maintenance of their children by pooling the absent parent's income and outgoings with those of his or her new partner if, but only if, that partner is of the opposite-sex. For same-sex couples this means that the one who is an absent parent is assessed as if living alone, with generally disadvantageous consequences.

The reason for this was the definition of 'unmarried couple' in the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, which allowed for a reduction for the new household, read as follows: 'a man and a woman who are not married to each other but are living together as husband and wife'. Thus the applicant's complaint was that she was being discriminated against based on her sexual orientation/ the gender of her new partner.

Respect and engagement up to the Court of Appeal

The complaint was successful at all previous stages (for the history of the case see [51]-[54]), including the Court of Appeal where Sedley LJ had held at [49]:

> Putting it schematically, the child support scheme sets out to respect family life by making allowance for the joint expenses of an absent parent's new household. It is this, without regard to discrimination, which brings the measure within the ambit of Article 8. If then the scheme discriminates between one family unit and another on the ground of its members' sexuality, Article 14 too becomes engaged. Here, by treating their finances as wholly separate when they are not, and by consequently assessing M's child support payment at a higher sum than if theirs was a heterosexual partnership, the scheme manifests a different level of respect for their family life.

He then at [67] concluded that there was no sufficient justification for this differential treatment. Neuberger LJ at [133] concurred:

> . . . the reduction in liability effected by regulation 11 is accorded for the purpose of ensuring that that absent parent's new family is not so deprived of money that it is significantly detrimentally affected by the liability of the absent parent to pay child support. To my mind, it follows from this that M has made good her case that the relevant provision, of which she does not have the benefit because she is in a same-sex, rather than a heterosexual, relationship, was enacted out of respect for family life, the family life in question being that of the absent parent and his/her new partner.

Tenuous arguments in the House of Lords

However, the majority in the House of Lords (like Kennedy LJ in his dissent in the Court of Appeal) found that the link between the child support payments and family life was 'too tenuous' to fall within the ambit of Article 8. Baroness Hale was the sole dissenter (on which see below).

In part, the majority relied on the reasoning that the ECtHR had not found that same-sex couples can have 'family life', which is why Lord Nicholls would allow the appeal (see esp. [21]-30], and also Lord Mance at [126]-[156]). Indeed, a positive finding that same-sex couples can have family life only followed later in Schalk and Kopf v Austria [2010] ECHR 1996. However, this contribution will not engage with the validity of that argument (but it is worth noting Baroness Hale's dissent at [113]-[116] and the ECtHR decision in the case, JM v United Kingdom [2010] ECHR 1361 at [54]-[58]), and rather focus on the way the majority constructed the 'ambit' of Article 8 as 'too tenuous'.

Lord Walker, with whom Lords Bingham and Lord Mance concurred and Lord Nicholls 'would have agreed' (at [34]), first looks at the terminology used regarding the issue of 'ambit', and then at [60] opines that Strasbourg case law does not 'lead to the conclusion that even the most tenuous link is sufficient' to bring the matter within the ambit of a right. His concern was that otherwise the reach of Article 14 would be too wide, and he expressly refers to Lord Nicholls view in Ghaidan v Godin Mendoza [2004] UKHL 30 at [11] who in turn referred to the concerns expressed by Laws LJ in Carson and Reynolds v Secretary of State for Work and Pensions [2003] EWCA Civ 797 at [32]-[41].

This view may have been coloured somewhat by the European Commission of Human Rights (First Chamber) decision in *Logan v United Kingdom*[1996] ECHR 81 though even according to Lord Walker this decision 'merits passing mention only' (at [68]). Logan had complained that having to make child support payments left him with insufficient money to maintain reasonable contact with his children, but his application was declared inadmissible as manifestly ill-founded. The only potentially relevant finding for the matter at hand was that the Commission had stated at [2] that insofar as the child support legislation

> . . . seeks to regulate the assessment of maintenance payments from absent parents, [this] does not by its very nature affect family life.

The Commission then went on to say that it also was not shown that the effect and the operation of the legislation was of such a 'nature and degree' as to disclose any lack of respect for the applicant's rights under Article 8. While this at first glance may appear to support the view that there needs to be an impact of some 'degree', *Logan* can nevertheless not serve as proper authority for the ambit issue. Firstly, it is a mere decision on admissibility from 1996 by a Commission chamber; secondly, because it is merely an admissibility decision it contains no deliberation or analysis of the relevant issues and merely states a result, as is common for such decisions; and thirdly and crucially, it only concerns a complaint for a direct infringement of Article 8 and no separate complaint relying on Article 14 was raised or considered; thus, the issue of ambit could not and did not arise, as Baroness Hale pointed out expressly in her dissent at [109]. Hence it is, at best, of very limited relevance for the questions raised in M. That notwithstanding, Lord Walker quotes the above passage at [68], and later lists it as 'an example of unsuccessful reliance on a much more remote link' at [84]. Of course, Logan is only one of many ECtHR decisions Lord Walker considers before ultimately finding that the matter at hand is not within the ambit of Article 8. He reaches this conclusion despite at [87] accepting that M and her new partner are 'family' and the measure in question is intended to promote family life, because 'it does not have more than a tenuous link with respect to

family life'. Lord Walker does not offer further explanation here, but goes on to say that the case

> (. . .) on respect for private life also fails, for similar reasons. There has been no improper intrusion on her private life. She has not been criminalised, threatened or humiliated.

It is that last bit, which resonates very much with Sir Gerald's abovementioned reference to 'four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings' in Marckx (which was also expressly discussed by Lord Hope in Harrow London Borough Council v Quazi [2003] UKHL 43), that allows a glimpse at the crucial misunderstanding underlying the interpretation of Article 8 and 'ambit'. Similarly, Lord Bingham held at [4] that

> (. . .) the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions are. At the outer extremity, it may not.

He then at [5] stated that the enhanced payment in question does not impair M's family or private life in a 'material' way, even though accepting that she will have less money because

> (. . .) this does not impair the love, trust, confidence, mutual dependence and unconstrained social intercourse which are the essence of family life, nor does it invade the sphere of personal and sexual autonomy which are the essence of private life.

The language of 'intrusion', 'invasion', 'criminalisation', 'humiliation' and 'threat' shows that the mindset of their Lordships still very much was in line not only with Sir Gerald's view of the purpose of Article 8, but also ensnared in the abovementioned historical, grammatical and essentially very common law interpretation of the rights involved. This is particularly remarkable as their Lordships accepted that the very purpose of the child support rules *was* to support the new family (and thus family life). Therefore, despite having acknowledged that the matter in question affected family life, they held that it was not within the ambit of the right because the 'link was too tenuous'.

What is it then, that makes a link more or less 'tenuous'? The very fallacy of the reasoning of Lords Walker and Bingham is that they were looking at the intensity of the infringement to establish whether the matter is within the ambit of the right. Not only is it somewhat counterintuitive to look at the degree of an infringement of a right to determine whether or not the right is engaged (i.e. not infringed). It also brings with it the risk of misconstruing the 'ambit' entirely, because the whole – and undisputed – point of the construct of Article 14 is that the Convention right in question need not be infringed for Article 8 to be engaged, as Baroness Hale has stated again in Re McLaughlin [2018] UKSC 48 at [20]. Intensity and ambit are completely separate issues. For a matter to be within the ambit, it is not necessary that there is an 'invasion' or a criminalisation, as the case of parental leave shows (on which see above, section "Article 8 – Ambit and ambiguities" and below section "A Hale dissent"). Neither is it necessary that the potential infringement is 'material', as the intensity of an infringement (or lack thereof) is an issue that needs to be dealt with at the justification stage, and not when determining the ambit of a right. If the infringement is only minor, then it can be justified

much more readily. But by allowing the appeal and stating that the matter was outside of the ambit of Article 8, their Lordships essentially implicitly accepted that some families were more worthy than others of support. The 'temporal' element of non-recognition of same-sex couples at the time, on which the majority also relied, rightly or wrongly, should be irrelevant for the ambit question as it solely relates to the justification stage.

Perhaps it was the context and the basis for the differential treatment that influenced the decision-making. Would their Lordships have argued the same if the sum in question had been 1000 pounds/week rather than the low amount it was in the case? (Rather tellingly, there seems to have been disagreement at the various instances about what the exact amount actually was. By the time the case was decided by the ECtHR, the amount was determined to be £25.18/week, see *JM v United Kingdom* [2010] ECHR 1361 at [24]). Would their Lordships have argued the same if, say, the differential treatment had been based on a different protected characteristic such as ethnic background or religion (cf. Scherpe 2020)? Imagine, for example, that the regulations had said that all atheists, all blond and blue-eyed parents or everybody born on a Tuesday would not benefit from the reduction. Or that the benefit would not be available for couples of 'mixed race'. Would we ever have accepted that Article 8 is not 'engaged', to apply the terminology commonly used in English courts, that the matter is outside of the 'ambit' if the basis for the differentiation was that grossly discriminatory, even if the effect of the differential treatment was just very minor? Hopefully not, because if an issue is not within the 'ambit', there cannot be a finding of discrimination – and consequently there would be no need to justify the differential treatment either. The conclusion therefore must be that the intensity of the infringement cannot and must not define the ambit of a right (see also Scherpe 2007, p. 402, Wikeley 2006, p. 546).

A Hale dissent

Baroness Hale in her dissenting opinion at [106] cut through much of the debate by simply stating the obvious: that at the heart of the matter was the complaint 'that some couples are treated differently from others'. She consequently had no difficulties in finding at [107] that 'the child support scheme is *clearly* capable of affecting the enjoyment of the right to respect for family life' (emphasis added) and at [108] that therefore the operation of the child support scheme equally clearly fell

> . . . within the ambit of the mother's right to respect for her family life with her children. It is one aspect, among many others, of the state's support for family life.

Interestingly, she reaches this conclusion by referring to the reasoning by counsel for the United Kingdom Government (!) in *Logan v United Kingdom* [1996] ECHR 81 at [2] which argued that the child support scheme was one aspect of the state showing support for family life:

> . . . there is a pressing social need to ensure that parents fulfil their responsibilities to their children and, the CSA strikes a fair and reasonable balance between the absent parent's responsibilities for his or her children and the need for a system that produces fair and consistent results, preserves the parents' incentive to work and reduces the dependency of parents with care on income support, providing consequent savings to tax-payers.

However, as Baroness Hale pointed out at [108], in M counsel for the Agency apparently argued the opposite, namely that is was 'simply the state's way of enforcing private obligations of a parent to support their children'. Baroness Hale then convincingly explained, referring to her dissenting opinion in R (Kehoe) v Secretary of State for Work and Pensions[2005] UKHL 48, that this argument by itself is insufficient to take the matter outside of the ambit as the

> . . . child support scheme is the state's way of enforcing both of these obligations – the obligation owed to the children and the obligation owed to the state to prevent the children becoming a charge on the state.

To further highlight the inconsistency between the majority's approach and that of Strasbourg, Baroness Hale then refers to the case of Petrovic v Austria [1998] ECHR 21 (on which see above, section "Article 8 – Ambit and ambiguities") which concerned differential parental leave for mothers and fathers. In that case, as Baroness Hale rightly points out, the father was not prevented from taking leave or looking after the child if he wanted to (so no 'four o'clock in the morning rat-a-tat on the door', to use the language of Sir Gerald). The actual issue was that the state simply did not offer any support by offering him an allowance which was available to mothers. While there was no obligation to offer such an allowance (and consequently Article 8 itself was not breached), the matter was without any difficulty deemed to fall within the ambit of Article 8: the existence of parental leave allowance in itself 'demonstrated the state's respect for family life' (at [109] Lady Hale then offered an enlightening example (at [110], emphasis in the original):

> Test it this way. The private law of child maintenance used to discriminate *systematically* between mothers and fathers. There was power to order a father to pay maintenance to the mother for the benefit of the children when there was no power to order the mother to pay maintenance to the father. The enforcement of the obligation to maintain one's children was one of the ways in which the state respected and facilitated the family life of both parents and children. Had the system continued to discriminate between mothers and fathers, this would surely have been sufficient to engage article 14. Whether or not the difference in treatment could be justified (as it was in both Petrovic v Austria and Fretté v France) is another matter.

Unlike the majority, Baroness Hale therefore clearly distinguished between the questions of ambit and justification, ultimately holding that the differential treatment could not be justified and therefore dissented (cf. [113]-[118]). But what makes her dissent particularly remarkable is her structured approach to Article 8, correctly identifying ambit and justification as separate issues. This meant that, unlike her peers in the House of Lords, she was able to throw off the shackles of the common law background and embrace the understanding of 'rights' underlying the ECHR and the purposive interpretation that the ECtHR itself applies (on which see above, section "'Respect' and the interpretation of the ECHR").

Explanation is not justification – the ECtHR

When the case was decided by the ECtHR (as JM v United Kingdom [2010] ECHR 1361), they found in a very terse and not very enlightening decision that the matter fell within the ambit of Article 1 of Protocol 1, the protection of property (which had been given very short shrift in the House of Lords decision). After finding that there indeed was

a violation of Article 14 in conjunction with Article 1 of Protocol 1, the Court unfortunately felt it not necessary to decide whether it also fell within the ambit of Article 8. Interestingly, the Court also found that the argument raised by the Government (and which had found favour in the House of Lords) that the differential treatment was justified since at the time same-sex couples had not yet been found to have 'family life' by the ECtHR was 'more an explanation than a justification'. In other words, as Wikeley (2006, p. 547) has put it very aptly (and humorously) in his commentary on the House of Lords decision, the justification offered in this case was, at best, tenuous.

Heavy weather

While ECtHR made clear that the way the majority in the House of Lords had dealt with the ambit-issue was not quite right, unfortunately (but perhaps tactfully) they did not elaborate *what* was quite wrong about it. Thus it was for the English courts to pick up the pieces and have another go, but the questionable approach of the majority in *M* soon started causing difficulties. Indeed, as Baroness Hale subsequently observed in Re McLaughlin [2018] UKSC 48 at [20], 'it is fair to say that the English courts have made rather heavy weather of the ambit point'. For present purposes, the focus will be on those two cases that arguably constitute the low point and the decisive upswing.

The low point – Steinfeld and Keidan in the High Court

Arguably, the narrow interpretation of the ambit of Article 8 reached its low point in the first instance decision in the case of Steinfeld and Keidan v Secretary of State for Education [2016] EWHC 128 in which an opposite-sex couple complained that they were discriminated against because they could not enter into a civil partnership. Even in light of what was said in M, Andrews J's decision is difficult to comprehend, not only for the reasons already pointed out (see above, section "The lack of 'respect'").

Andrews J at [25] found that that in order for an issue to come within the ambit of a right, it must be established 'that a personal interest close to the core of such a right is infringed by the difference in treatment complained of'. This is perilously close to finding that Article 8 itself must be infringed before a matter can be within the ambit – and even in M itself it was made clear that this was not the case. She then at [27] picked up Lord Bingham's findings of the 'essence' of the rights (see above, section "Tenuous arguments in the House of Lords") as well as Lord Nicholls' 'the more seriously and the more directly' the issue 'impinges upon the values underlying the substantive article, the more readily it will be regarded as being within the ambit'. She also repeats Lord Walker's 'less serious interference' argument – which of course in itself is a fallacy, as pointed out already (see above, section "Tenuous arguments in the House of Lords"): how can one say that a right is not interfered with when the interference with the right is *acknowledged* to exist, but discarded because it is minor? By following M on this point and thus by focusing on the intensity of the infringement Andrews J misconstrued the ambit question.

Andrews J at [35] then relied on Potter P's finding at [107] in *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam), which in turn relied on M and again repeated the misconceived notion that there was no infringement because there was no criminalisation, threat or humiliation. Despite very well-established ECHtR jurisprudence to the contrary (just

see Johnston and Others v Ireland [1986] ECHR 17 at [56]; Keegan v Ireland [1994] ECHR 18 at [44]; Kroon and Others v the Netherlands [1994] ECHR 35 at [30]; Van der Heijden v the Netherlands [2012] ECHR 588 at [50]; Schalk and Kopf v Austria [2010] ECHR 1996 at [91]), she therefore concluded at [37] that a loving, intimate, long-term relationship between a man and a woman, and from which children had resulted, was not within the ambit of Article 8 – because their 'ability to continue to live together *as a family* is wholly unimpaired' (emphasis added). So they are a family, but not within the ambit of family life? Respectfully: if that scenario does not 'engage' the ambit of Article 8 – what does? She later at [38] found the same with regard to private life, stating that there 'is no evidence that they are subjected to humiliation, derogatory treatment, or any other lack of respect for their private lives on grounds of their heterosexual orientation by reason of the withholding of the status of civil partners from them'. Again (and as already pointed out above) the emphasis on 'humiliation' and 'derogatory treatment' explains how the Article 8 was misinterpreted here with regard to its 'ambit'.

Not unexpectedly, the Court of Appeal in its decision ([2017] EWCA Civ 81) did not feel equally constrained by the precedent of M and unanimously, and without any difficulty, rejected Andrews J's approach regarding the 'ambit'. After considering the same ECtHR decisions as Andrews J, especially *Schalk and Kopf* [2010] ECHR 1996 and also *Oliari v Italy* [2015] ECHR 716[2015] ECHR 716, Beatson LJ at [141] held that:

> [i]n the light of this it must in principle follow that stable and committed different-sex relationships amount to family life whether or not the couple have married. It must in principle also follow that the disadvantage such couples face when compared with same-sex couples falls within the ambit of family life within Article 8.

But more importantly, the judges (at [15]-[16], [136]-[139] and [166]) also very clearly distinguished between ambit and justification. Whether another choice to formalise their relationship (i.e. marriage) was available or not did not detract from the fact the state offered the legal regime of civil partnership which was denied to them (Bridge LJ at 168]). Thus the matter was within the ambit and any dispute really only concerned the justification of the differential treatment.

By the time the matter reached the Supreme Court, the Government wisely had conceded that the matter fell within the ambit of Article 8, so the issue did not arise there (for a full discussion of the case see Scherpe 2019).

The upswing: taking ambit sufficiently seriously – Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others

As discussed above (at The lack of 'respect'), *Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others* [2017] EWCA Civ 1916 is an important milestone in the development of the understanding of Article 8 in England and Wales as it puts the proper understanding of 'respect' on firm footing. However, its importance also extends to the question of 'ambit'. After stating at {45]-{47] that the 'close to the core' and 'infringement'-terminology utilised by Lord Bingham in M and also in the subsequent case of R (Clift) v Secretary of State for the Home Department [2006] UKHL 54 at [13]was problematic, Sir Terence Etherton MR then at [48] agrees with counsel that

> . . . the only sure common thread running through the various descriptions of the ambit test (. . .) in the several speeches in *M* [2006] 2 AC 91 is that the connection or link between the facts and the provisions of the Convention conferring substantive rights must be more than merely tenuous.

Sir Terence then, building on the Court of Appeal's findings in Steinfeld (see above, section "The low point – Steinfeld and Keidan in the High Court"), at [55] summarises the legal position regarding 'ambit' as follows:

> (. . .) The claim is capable of falling within Article 14 even though there has been no infringement of Article 8. If a state has brought into existence a positive measure, which, even though not required by article 8, is a modality of the exercise of the rights guaranteed by article 8, the state will be in breach of article 14 if the measure has more than a tenuous connection with the core values protected by article 8 and is discriminatory and not justified. It is not necessary that the measure has any adverse impact on the complainant in a positive modality case other than the fact that the complainant is not entitled to the benefit of the positive measure in question.

Sir Terence reaches these conclusions, as he had to, within the confines of the authority of M, but nevertheless manages to contribute significantly to the proper understanding of Article 8 and its ambit in England and Wales by essentially establishing a clearer test.

Is the English understanding of Article 8 now hale and hearty?

So is the English understanding of Article 8 now hale and hearty? Well, not quite yet. In Re McLaughlin [2018] UKSC 48, the case from which the abovementioned 'heavy weather' comment stems, Lady Hale again had the opportunity to engage with the question of the right ambit of Article 8. Arguably, on the facts this was not really necessary, but certainly a welcome opportunity for further clarification. After reiterating much of the above, and immediately after quoting the above paragraph 55 from Smith with the 'new' test, she added at [22]:

> It may turn out that this is too restrictive a test: for example, "core values" is a concept derived from the domestic rather than the Strasbourg jurisprudence.

She continued to say that there was no problem applying the Smith test to the case at hand. Hence, this remark was *obiter*. However, with this nice sideswipe she chipped away further at the still common (mis)understanding of the ambit test.

Lady Hale clearly has succeeded in properly embedding the rights structural approach with a distinction between ambit and justification. But what her remark in Re McLaughlin suggests is that English courts need to take great care not to overplay the ostensibly 'tenuous' nature of a link to Article 8 and the misplaced focus on 'core values' and 'infringement'. It (hopefully) is unthinkable that an English court in a case where the issue is only very tenuously connected to Article 8 but blatantly and obviously discriminatory, would preclude itself from a finding of discrimination (as it would have to if the matter was deemed to be outside the ambit), merely because the connection is 'tenuous' or not about a 'core value'. Consider, for example, a statute that would stipulate a mandatory one-pound discount for purchase of cinema tickets for families including anyone named Wilfred or Alexander Cedd, or mandatory free access to public swimming pools to all baptised

children and their families on Mondays. Neither cinema nor swimming are particularly closely related to 'the core' of private and family life, and while enjoyable, one could comfortably live without them. Or consider that benefits such as in *M*, as in the examples given above (see above, section "Tenuous arguments in the House of Lords), would only be awarded to blond and blue-eyed parents or everybody born on a Tuesday, or were expressly not awarded to 'mixed race couples'. None of this would amount to a 'rat-a-tat on the door', there would be no threat, no criminalisation, no humiliation. But no court in England and Wales could find this to be the blatant and obvious discrimination in violation of Article 14 in conjunction with Article 8 ECHR that these examples undoubtedly would be unless the matter is deemed to fall within the ambit of Article 8 first. Thus, it is absolutely crucial to get the ambit right.

Lady Hale has set the English courts on the right path. 'Ambit' is not about 'core values', and a discussion of whether or not a matter is 'too tenuous' to be within the ambit in doubt ought to be resolved by leaving the matter for the justification stage. Her approach significantly reduces the danger and temptation to let the intensity of the measure in question determine the extent of the right, which, as explained above, is the wrong approach to 'ambit'. The last piece missing now is an express recognition of that very fact by the courts.

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