Trinity Term
[2020] UKSC 32
On appeal from: [2019] HCJAC 61

JUDGMENT

Sutherland (Appellant) *v* Her Majesty's Advocate (Respondent) (Scotland)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Leggatt

JUDGMENT GIVEN ON

15 July 2020

Heard on 3 June 2020

Appellant
Gordon Jackson QC
Fred Mackintosh QC
Paul Harvey
(Instructed by Public Defence Solicitors' Office (Glasgow))

Respondent
Alison Di Rollo QC
Alan Cameron
Lesley Irvine
(Instructed by Crown Agent, Crown Office)

Intervener (Director of Public Prosecutions)
Duncan Atkinson QC
(Instructed by Appeals and Reviews Unit, Crown Prosecution Service)

LORD SALES: (with whom Lord Reed, Lord Hodge, Lord Lloyd-Jones and Lord Leggatt agree)

1. This case concerns the use in a criminal trial of evidence obtained by members of the public acting as so-called "paedophile hunter" ("PH") groups, and whether this is compatible with the accused person's rights under article 8 of the European Convention on Human Rights ("the ECHR"). PH groups impersonate children online to lure persons into making inappropriate or sexualised communications with them over the internet, and then provide the material generated by such contact to the police.

2. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

3. An adult member of a PH group, acting as a decoy, created a fake profile on the Grindr dating application using a photograph of a boy aged about 13 years old as a lure to attract communications from persons with a sexual interest in children. The appellant entered into communication with the decoy, who stated in the course of exchanges first on Grindr and continued on the WhatsApp messaging platform that he was 13 years old. In the belief that the decoy was a child, the appellant sent him a picture of his erect penis. The appellant also sent him messages to arrange a meeting. When the appellant arrived for the meeting, he was confronted by members of the decoy's PH group who remained with him until the police arrived.

4. Copies of the appellant's communications with the decoy were provided to the police. The respondent, as public prosecutor, charged the appellant with offences related to sexually motivated communications with a child: (i) an offence of attempting to cause an older child (ie a child who has attained the age of 13 years, but has not yet attained the age of 16 years) to look at a sexual image, for the

purposes of obtaining sexual gratification (contrary to section 33 of the Sexual Offences (Scotland) Act 2009 - "the 2009 Act"); (ii) an offence of attempting to communicate indecently with an older child (contrary to section 34 of the 2009 Act); and (iii) an offence of attempting to meet with a child for the purpose of engaging in unlawful sexual activity (contrary to section 1 of the Protection of Children and the Prevention of Sexual Offences (Scotland) Act 2005 - "the 2005 Act"). I will refer to these together as "the charges". In each case, the charge was put in terms of an attempt to commit the offence, because the appellant believed the decoy was a child whereas he was in fact an adult.

5. After indictment on the charges in Glasgow Sheriff Court, the appellant lodged a preliminary minute objecting to the admissibility of the evidence sought to be relied upon by the respondent on the basis that it had been obtained by covert means without authorisation under the Regulation of Investigatory Powers (Scotland) Act 2000 ("RIPSA"). The appellant also lodged a minute objecting to the admissibility of the evidence provided by the PH group on the basis that it was obtained covertly without authorisation or reasonable suspicion of criminality in violation of his rights under article 8.

6. By a ruling dated 30 July 2018, after a hearing conducted on the basis of agreed facts (as set out below), the Sheriff repelled the appellant's objections to the admissibility of the evidence provided by the PH group. Later, at a trial on 29 and 30 August 2018, the respondent led evidence from the decoy and two police officers. The appellant did not lead any evidence. He was convicted on each of the charges.

7. At a later hearing, the appellant was sentenced to 12 months' imprisonment on each charge, to be served consecutively. He was also made subject to the notification requirements of section 92(2) of the Sexual Offences Act 2003 for a period of ten years.

8. The appellant appealed against his conviction to the High Court of Justiciary ("the High Court"). He contended that the Sheriff should have found that the evidence provided by the PH group was obtained in breach of the requirements of RIPSA, that his rights under article 8 in relation to respect for his private life and correspondence were violated by admission of that evidence and that the Sheriff should have excluded it. The appellant's appeal was heard in conjunction with the appeal in another case, which is not relevant for present purposes. By an interlocutor dated 20 September 2019 the High Court (the Lord Justice General, Lord Brodie and Lord Malcolm) refused both appeals. It granted the appellant permission to appeal to this court in relation to certain compatibility issues.

The appeal on the compatibility issues

9. Article 8 is a Convention right for the purposes of the Human Rights Act 1998 ("the HRA"). Section 6(1) of the HRA provides that "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right" (this is subject to certain exceptions which are not relevant in this case). A prosecuting authority is a public authority. A court also is a public authority for these purposes: section 6(3)(a) of the HRA.

10. The case comes before this court by way of an appeal on compatibility issues pursuant to section 288AA of the Criminal Procedure (Scotland) Act 1995. So far as is relevant for present purposes, a compatibility issue means a question, arising in criminal proceedings, as to whether a public authority has acted in a way which is made unlawful by section 6(1) of the HRA: see section 288AA(4), read with section 288ZA(2). On an appeal under section 288AA, "the powers of the Supreme Court are exercisable only for the purpose of determining the compatibility issue" (subsection (2)(a)); when it has determined the compatibility issue "the Supreme Court must remit the proceedings to the High Court" (subsection (3)). An appeal under section 288AA may be brought only with permission given by the High Court or by the Supreme Court (subsection (5)).

11. In this case, the High Court has granted permission to appeal in relation to its determination in the criminal proceedings against the appellant of two compatibility issues, as follows:

> 1. whether, in respect of the type of communications used by the appellant and the PH group, article 8 rights may be interfered with by their use as evidence in a public prosecution of the appellant for a relevant offence; and
>
> 2. the extent to which the obligation on the state, to provide adequate protection for article 8 rights, is incompatible with the use by a public prosecutor of material supplied by PH groups in investigating and prosecuting crime.

12. As should be clear, this is not a full appeal, but an appeal limited to these compatibility issues.

Factual background and the judgment of the High Court

13. In his ruling on 30 July 2018 the Sheriff set out the agreed facts as follows:

> "2. The Crown witness, Paul Devine, is a volunteer with 'Groom Resisters Scotland', an organisation which aims to protect children by catching 'online predators'. The organisation consists of 'decoys' and 'hunters'. Decoys create fake online personas with a general appearance of being under the age of 16. They remain in character as someone aged less than 16 in all communications with the public. In the event of a member of the public having apparently engaged in a sexual conversation with a decoy, a face to face meeting will be arranged at which a hunter or hunters will be present, who will then record and film the member of the public, while confronting them regarding the person's prior communication with the decoy persona. This recording may also be made available on the internet 'live', so that interested parties can see the confrontation take place. The video will also be uploaded onto various websites in order that it may be viewed by others. The organisation makes contact with the police at or after the time of the confrontation. The sexual communications between the decoy and the member of the public concerned, as well as the recording/film, of that person's confrontation with the hunters or extracts therefrom, are disclosed to the police for investigation.
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> 3. Groom Resisters Scotland is one of several organisations deploying similar operating methods which operate in Scotland and other parts of the United Kingdom. The police are aware that there are a number of 'hunter' organisations operating in Scotland and across the United Kingdom, and evidence obtained from those organisations has led to a number of criminal investigations and prosecutions.
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> 4. In the present case the crown witness Devine, acted as a decoy. Groom Resisters Scotland provided him with photographs of a boy aged approximately 13 years old and he created an online profile on an 'App' named 'Grindr', a forum through which males apparently can arrange to meet one another, inter alia, for sexual purposes. The terms and conditions of that 'App' specify that users must be aged 18 or over. There was communication between the witness Devine,

> as the decoy and the minuter [the appellant], wherein sexual images and sexual written communications were sent by the minuter to the decoy. The decoy shared fake personal details with the minuter, staying in character as a 13 year old boy. During the course of communications with the minuter, the decoy's Grindr account was blocked and could no longer be used. There was further communication between the decoy and the minuter on 'WhatsApp' and ultimately, arrangements were made between the minuter and the decoy for them to meet in person. The decoy advised two of the 'hunters' in Groom Resisters Scotland, namely Crown witnesses Carling and Constable of these arrangements. The Witnesses Carling and Constable then attended the meeting place at the arranged time and confronted the minuter, broadcasting the confrontation live on Facebook. Film of the confrontation has since been posted onto social media. During the confrontation the police were contacted by Groom Resisters Scotland. Police officers attended during the ongoing confrontation between the minuter and the 'hunters' and Groom Resisters Scotland subsequently provided the police with extracts of the communications between the minuter and the decoy and the minuter and the hunters."

14. The High Court, in its judgment, referred to exchanges taking place in online "chat rooms"; but the parties agree that this was a slip. All the relevant exchanges took place in communications between the appellant and the decoy which were not shared with others. The exchanges using the WhatsApp messaging platform were protected by end-to-end encryption.

15. The evidence led at trial confirmed the account given above. The appellant initially contacted the decoy on Grindr on 18 January 2018. The record of the communications between them provided by the PH group showed that from the initial point of contact by the appellant, sexually explicit questions and statements were sent by the appellant to the decoy, as were sexually explicit photographs, including, at the outset, a photograph of the appellant holding his erect penis, to which the decoy responded stating that he was 13. Over the period to 31 January, when the meeting which was arranged by the appellant took place, sexual communications continued to be sent by the appellant to the decoy. During that period the decoy remained "in character" as a 13-year-old boy. All sexual communications came from the appellant. The decoy responded to the appellant's messages, including answering questions posed of him about his sexuality. The appellant asked the decoy to delete the messages which the decoy agreed to do. After some time, the appellant asked the decoy to move the conversation to WhatsApp and they swapped telephone numbers to enable this to happen.

16. Entrapment was not in issue in the case, so no examination of the law in relation to that topic is needed.

17. The appellant complained that the circumstances of the case were such that authorisation was required to be obtained under RIPSA for the decoy to act as a covert human intelligence source within the meaning of that Act; that no such authorisation had been obtained; and that as a result the evidence of the decoy had been obtained unlawfully. However, the Sheriff and the High Court held that RIPSA had no application in the circumstances of this case, since the decoy acted on his own initiative and not at the instigation of the police (paras 52-53 of the High Court's judgment).

18. This part of the High Court's judgment is not a matter which affects the compatibility issues which this court has to decide. The Dean of Faculty, Mr Gordon Jackson QC, for the appellant, sought to raise the RIPSA issue at the hearing before us in order to develop an argument that the acquisition and use of the evidence of the communications between the appellant and the decoy were not "in accordance with the law", as is required by article 8(2) where there is an interference with rights under article 8(1). However, the compatibility issues to which the appeal relates do not turn on the application of article 8(2), but on the prior question of the extent and effect of the rights conferred by article 8(1).

19. There was also some debate at the hearing in this court as to whether the appellant thought that the decoy was a child at the time he sent his first message to him. The Dean of Faculty claimed that the appellant only learned this later in the course of their exchanges. He emphasised that according to Grindr's terms a person can only have a profile on the site if they are 18 or over, and observed that people putting up profiles on dating sites do not always use true photographs of themselves. The Solicitor General for Scotland, Ms Alison Di Rollo QC, for the respondent, did not accept the Dean of Faculty's claim. She pointed out that the profile photograph used by the decoy appeared to be of a child, that the standard terms of dating websites regarding age are not always observed by persons using those sites, and that the appellant was told by the decoy that he was 13 years old very early in the exchanges and expressed no surprise and was in no way deterred from continuing to send sexualized messages.

20. This court is not in a position to resolve this issue of fact and it is not necessary to do so for the purposes of this appeal. The charges in the indictment related to communications across the period from 18 to 31 January 2018, without dividing up the communications more precisely in respect of their timing. The trial was conducted on that basis, without any need for findings to be made as to the appellant's precise state of belief as to the age of the person with whom he was communicating at the outset of that period. The appellant did not give evidence

about that. Nor did he make any submissions in the Sheriff Court or the High Court about this point, or suggest that it was a significant matter in relation to what are now the compatibility issues before this court. Accordingly, it is appropriate to proceed on the footing that throughout the whole or substantially the whole of the course of the relevant communications between the appellant and the decoy, the appellant believed the decoy to be a child aged 13.

21. The High Court noted that the ECHR, and article 8 in particular, is primarily concerned with the protection of the rights of individuals from interference by the state. However, the High Court also observed (para 47) that, in addition to its prohibitive aspect, article 8 imposes a positive obligation on the state to provide a suitable framework within which an individual's article 8(1) rights are protected from interference by other private individuals, including employers, citing *Köpke v Germany* (2011) 53 EHRR SE 26 (p 249), para 41, and the judgment of the Third Section of the ECtHR in *Ribalda v Spain* CE:ECHR:2018:0109JUD000187413, para 54 (there is now a Grand Chamber judgment in this case, dated 17 October 2019, to which I refer below).

22. The High Court held (para 48) that since the decoy acted on his own behalf as a private citizen and not at the instigation of the police or any other public authority, the gathering of the evidence of the communications by him was not a case of interference by the state with the appellant's correspondence. The appellant had sent his messages to the decoy, who had received them and passed them on to the police:

> "There was no surveillance or interception (*AD v The Netherlands*, European Commission on Human Rights [CE:ECHR:1994:0111DEC002196293] 'THE LAW' at para 2 citing *G, S and M v Austria* (App no 9614/81), unreported, European Commission on Human Rights, 12 October 1983). [The appellant was] fully participating in the communications and [was] aware that they were reaching the intended recipient […]. The messages had reached their destination and in due course they were handed to the police for the purposes of prosecuting a crime."

23. As regards the appellant's private life, the High Court was prepared to accept (para 49) that, at a general level, a person's internet chats fall within the broad ambit of article 8(1) (*Garamukanwa v United Kingdom* [2019] IRLR 853, ECtHR, para 22), but went on to say that given the lack of any longstanding pre-existing relationship between the appellant and the person with whom he thought he was communicating, he had no reasonable expectation that the communications would remain confidential or private (*Halford v United Kingdom* (1997) 24 EHRR 523,

para 45; *Ribalda v Spain*, judgment of the Third Section, para 57; *Garamukanwa v United Kingdom*, para 23). The appellant had voluntarily engaged in his communications on Grindr and WhatsApp with a person he believed to be a child, for sexual purposes. By the time the police were informed, the criminal activity had already been carried out.

24. The court said (para 50) that even if there had been a reasonable expectation of privacy or confidentiality on the part of the appellant, the interference with the appellant's right to respect for his private life would have been justified under article 8(2). There was no involvement of the state prior to the evidence of the communications being obtained; the evidence was delivered to the police for the purposes of prosecuting significant criminal activities; and the admission of the evidence of the communications to proof at trial would be subject to the common law rules of fairness. The activities of the decoy were subject to general legal constraints applicable to him as a private individual at common law and under the criminal law, and his actions were justifiable as being for legitimate purposes of the prevention of crime and the protection of the rights and freedoms of others.

25. The court further observed (para 51) that even if there had been a violation of the appellant's article 8 right to private life, it would not necessarily follow that the evidence of the communications provided by the decoy should have been excluded from admission to proof at trial. The question of exclusion or not of evidence gathered in breach of a person's rights under article 8 would depend upon whether it was possible to have a fair trial, on application of article 6 of the ECHR (right to a fair trial) and domestic law rules to safeguard the fairness of criminal proceedings. In the court's view, given the protections available under both these regimes, there was no unfairness in the criminal proceedings against the appellant arising from the admission of the evidence provided by the decoy.

Discussion

> *Issue (1): were article 8 rights interfered with by the use of the communications provided by the PH group as evidence in the public prosecution of the appellant?*

26. This issue is directed to consideration of the rights of the appellant under article 8(1) which are said to be relevant in the context of the circumstances of this case. In line with the submissions made on behalf of the appellant in the courts below, the Dean of Faculty submits that there was an interference with the appellant's rights to respect for his private life and for his correspondence under article 8(1). On the basis that there was an interference with those rights, the High

Court should have held that the respondent was required to show that such interference was justified under article 8(2).

27. In general terms, article 8 reflects two fundamental values. These were summarised by Baroness Hale of Richmond in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] 1 AC 719, para 116, as "the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason" and "the inviolability of … the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people". The right to respect for private life and correspondence in article 8(1) may be engaged with reference to the first of these values even where the conduct engaged in by an individual is not in itself worthy of respect in accordance with the scheme of the ECHR: see, eg, *Benedik v Slovenia*, CE:ECHR:2018:0424JUD006235714, in which the ECtHR found there was an interference with the right of respect for private life in relation to a police investigation into the downloading and copying of child pornography by the applicant via the internet. In light of the history and objects of the ECHR, state surveillance of private communications is a matter of special concern and state authorities have a particular responsibility to respect a person's private life and correspondence.

28. In the present case, however, as the High Court emphasised, the evidence of the communications between the appellant and the decoy was gathered by a private individual acting on his own behalf, and not by means of surveillance by state authorities, nor by a private individual acting on behalf of or at the instigation of a public authority (the type of situation addressed in *MM v The Netherlands* (2004) 39 EHRR 19). Therefore, it is not necessary to say more in this judgment about the first value referred to by Baroness Hale in *Countryside Alliance*.

29. For reasons which reflect those given by the High Court, in the circumstances of this case I do not accept the Dean of Faculty's submission that there was any interference with the appellant's rights under article 8(1). In my view, there was no interference with those rights at any stage, whether by reason of (a) the actions of the decoy in attracting then recording and passing on evidence of the relevant communications; (b) the actions of the police in taking investigative action based on that evidence and passing it on to the respondent; (c) the actions of the respondent in presenting charges against the appellant based on that evidence and then relying upon it at trial; or (d) the actions of the Sheriff Court in admitting the evidence at trial and convicting the appellant on the basis of it. The compatibility issue on this appeal relates particularly to (c). However, it is relevant to keep in mind the other stages as well, as they are connected with each other in the sense that they are all relevant to bringing the appellant's conduct to the attention of the public authorities with responsibility for ensuring that the criminal justice system was brought into proper operation in relation to that conduct.

30. The position is essentially the same in this case in relation to both the right to respect for private life and the right to respect for correspondence under article 8(1), so they can be considered together.

31. In my judgment, there are two reasons why the appellant's rights under article 8(1) in relation to respect for private life and respect for his correspondence were not interfered with in the circumstances of this case: (i) the nature of the communications from the appellant to the decoy, whom he believed to be a child, was not such as was capable of making them worthy of respect for the purposes of the application of the ECHR; and (ii) the appellant had no reasonable expectation of privacy in relation to the communications, with the result that he enjoyed no relevant protection under article 8(1) as regards their disclosure to and use by the respondent and the other public authorities referred to above. I develop these points below.

(i) The nature of the communications by the appellant

32. An individual's rights under article 8(1), so far as relevant here, are to "respect for" his private life and his correspondence. In my view, it is implicit in this formulation that the features of his private life and his correspondence for which protection is claimed under article 8(1) should be capable of respect within the scheme of values which the ECHR exists to protect and promote.

33. Part of that scheme is the second fundamental value protected by article 8 identified by Baroness Hale in *Countryside Alliance*, referred to above. In relation to that aspect of article 8, states party to the ECHR have a special responsibility to protect children against sexual exploitation by adults.

34. In *X and Y v The Netherlands* (1986) 8 EHRR 235, a mentally handicapped girl aged 16, Miss Y, was forced into sexual intercourse by an adult. This behaviour did not constitute a criminal offence under Dutch law at the time. The European Court of Human Rights ("ECtHR") held that by reason of this lacuna in the criminal law, the Netherlands had violated the right of Miss Y to respect for her "private life" under article 8(1); this was stated to be "a concept which covers the physical and moral integrity of the person, including his or her sexual life" (para 22). At para 23, the ECtHR recalled, with reference to the case of *Airey v Ireland* (1979-1980) 2 EHRR 305, para 32, that:

> "… although the object of article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative

> undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."

35. At para 24 the ECtHR observed that "the choice of the means calculated to secure compliance with article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the contracting states' margin of appreciation"; and "there are different ways of ensuring 'respect for private life', and the nature of the state's obligation will depend on the particular aspect of private life that is at issue". However, although recourse to the criminal law was not necessarily the only answer in every case, and Miss Y had relevant rights under civil law to claim damages or injunctive relief, the ECtHR said this at para 27:

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

The Dutch criminal code failed to provide Miss Y with "practical and effective protection" (para 30), with the result that her rights under article 8 had been violated. See also *MC v Bulgaria* (2005) 40 EHRR 20, para 150: the positive obligations on the state inherent in the right to effective respect for private life under article 8 include that "effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection".

36. In *KU v Finland* (2009) 48 EHRR 52 an unknown person placed an advert of a sexual nature on an internet dating site, ostensibly on behalf of the applicant, a 12-year-old boy, without his knowledge or consent, which suggested that he was looking for an intimate relationship with a boy of his own age or older. The applicant was contacted by an older man. The applicant's father requested that the police take action to identify the person who had placed the advert, but the internet service-provider refused to provide details to identify him and the Finnish courts, applying national privacy laws, refused to order it to do so. The ECtHR held that in these circumstances there had been a violation of the applicant's right to respect for his private life under article 8, by reason of the lack of effective criminal sanctions against the perpetrator.

37. The ECtHR again highlighted, at para 41, that the concept of "private life" in article 8(1) covers the physical and moral integrity of the person, and in that regard referred to "the potential threat to the applicant's physical and mental welfare brought about by the impugned situation and to his vulnerability in view of his young age". At paras 42-43 the ECtHR reiterated that there may be positive obligations inherent in an effective respect for private life, and that while the choice of means to comply with such obligations will generally be a matter falling within a contracting state's margin of appreciation, "effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions".

38. At paras 45-46 and 49, the ECtHR said this (omitting footnotes):

> "45. The Court considers that, while this case might not attain the seriousness of [*X and Y v The Netherlands* (1986) 8 EHRR 235], where a breach of article 8 arose from the lack of an effective criminal sanction for the rape of a handicapped girl, it cannot be treated as trivial. The act was criminal, involved a minor and made him a target for approaches by paedophiles.
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> 46. The Government conceded that at the time the operator of the server could not be ordered to provide information identifying the offender. It argued that protection was provided by the mere existence of the criminal offence of calumny and by the possibility of bringing criminal charges or an action for damages against the server operator. As to the former, the court notes that the existence of an offence has limited deterrent effects if there is no means to identify the actual offender and to bring him to justice. Here, the court notes that it has not excluded the possibility that the state's positive obligations under article 8 to safeguard the individual's physical or moral integrity may extend to questions relating to the effectiveness of a criminal investigation even where the criminal liability of agents of the state is not at issue. For the court, states have a positive obligation inherent in article 8 of the Convention to criminalise offences against the person including attempts and to reinforce the deterrent effect of criminalisation by applying criminal law provisions in practice through effective investigation and prosecution. Where the physical and moral welfare of a child is threatened such injunction assumes even greater importance. The court recalls in this connection that sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children

> and other vulnerable individuals are entitled to state protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives.
>
> …
>
> 49. The court considers that practical and effective protection of the applicant required that effective steps be taken to identify and prosecute the perpetrator, that is, the person who placed the advertisement. In the instant case such protection was not afforded. An effective investigation could never be launched because of an overriding requirement of confidentiality. Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others. Without prejudice to the question whether the conduct of the person who placed the offending advertisement on the internet can attract the protection of articles 8 and 10, having regard to its reprehensible nature, it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context. Such framework was not however in place at the material time, with the result that Finland's positive obligation with respect to the applicant could not be discharged. …"

39. In the present case, it is an open question whether the United Kingdom had a positive obligation under article 8 which required it to legislate in the way it did in sections 33 and 34 of the 2009 Act and in section 1 of the 2005 Act, or whether it could, under its margin of appreciation, have chosen not to criminalise the conduct set out in those provisions. In the absence of legislation to create those particular offences, there would still have been other criminal offences which offered a measure of protection for the moral and physical integrity of children against the predations of paedophiles. However, it is clear that these provisions in the 2009 Act and the 2005 Act were enacted to enhance the protection for children in relation to "grave types of interference with essential aspects of their private lives" (to use the language of the ECtHR in *KU v Finland*). The assessment of the Scottish Parliament is that having such offences on the statute-book is a necessary element in the fabric of protection afforded to children. Whilst, as in *KU v Finland*, the conduct which is criminalised by these provisions is not as serious as that in *X and Y v The*

Netherlands, in each case it involves direct sexualised communication with a child, including (in the case of section 1 of the 2005 Act) as a prelude to sexual contact between a paedophile and a child. The offences in question provide protection for children against conduct involving them directly, by contrast with the more indirect form of protection at issue in *KU v Finland*, and they are at least as important as the provisions of criminal law in that case. In my view, the Scottish Parliament having enacted such protection for children by way of the criminal law, it is an aspect of the positive obligation of the state under article 8 to ensure that there can be effective enforcement of the law as contained in these provisions, in much the same way as in *KU v Finland*.

40. In *KU v Finland*, the ECtHR, at para 49, put to one side the question whether the conduct of the person who placed the offending advertisement on the internet could attract the protection of article 8 (and also the right to freedom of expression under article 10 of the ECHR), "having regard to its reprehensible nature". In the present case, however, as noted above, the conduct which is made the subject of the criminal offences that are in issue involves direct, sexually motivated contact between a paedophile and a child. In my view, in the absence of any question of state surveillance or interception of communications, and where all that is in issue is the balance of the interests of a person engaging in such conduct and of the children who are the recipients (or intended recipients) of the relevant communications, the reprehensible nature of the communications is such that they do not attract protection under article 8(1). They do not involve the expression of an aspect of private life or an aspect of correspondence which is capable of respect within the scheme of values inherent in the ECHR.

41. This view is supported by three matters. First, the conduct in question involves contact between a paedophile and a child which is criminal in nature and is capable of affecting the child more immediately and in a more directly damaging way than the conduct in issue in *KU v Finland*.

42. Secondly, as observed above, the state has a positive obligation under article 8, owed to children, to enforce these provisions of the criminal law effectively. That obligation reflects the protection which article 8 requires to be accorded to fundamental values and essential aspects of private life in relation to children, who are recognised to be vulnerable individuals. Accordingly it is clear that, under the scheme of the ECHR and for the purposes of article 8, the interests of children in this field have priority over any interest a paedophile could have in being allowed to engage in the conduct which has been criminalised by these provisions.

43. Thirdly, article 17 of the ECHR (prohibition of abuse of rights) supports the conclusion that the criminal conduct at issue in this case is not such as is capable of

respect for the purposes of article 8(1). Article 17 is included in Schedule 1 to the HRA. It provides:

> "Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

The actions of the appellant were aimed at the destruction or limitation of the rights and freedoms of a child under article 8 which are the subject of positive obligations owed to children by the state under that provision, in a context in which those positive obligations outweighed any legitimate interest the appellant could have under article 8(1) to protection for his actions.

44. In *R v G (Secretary of State for the Home Department intervening)* [2008] UKHL 37; [2009] AC 92, a boy of 15 had sexual intercourse with a girl of 12. He was charged with an offence of rape of a child under 13, contrary to section 5 of the Sexual Offences Act 2003. The girl's initial complaint had been that the intercourse had not been consensual. After the charge was brought, the boy indicated that he was willing to plead guilty on the basis that the girl had told him that she too was aged 15 and the intercourse had in fact been consensual. The prosecution was prepared to proceed on that basis. Section 5 is an offence of strict liability, in the sense that the consent of the girl provides no defence and there is no defence of reasonable belief that the girl is aged 13 years or above. The boy pleaded guilty to the offence and was sentenced. Later, in addition to a complaint based on article 6, he complained that in light of the basis of plea accepted by the prosecution, the charge against him should have been changed to a lesser charge of unlawful sexual intercourse with a girl under 13, contrary to section 13 of the 2003 Act, and that it had been a breach of his rights under article 8 for the prosecution to proceed against him with the charge of rape under section 5. The boy's appeal based on article 6 was dismissed unanimously by the House of Lords and his appeal based on article 8 was dismissed by a majority of three to two. In the majority, Lord Hoffmann considered that the decision to proceed under section 5 rather than section 13 gave rise to no interference with rights under article 8 (paras 7-10); Lord Mance considered that the decision to proceed under section 5 could not be regarded as unjustified or disproportionate (para 72; ie, by implication, under article 8(2)); and Baroness Hale considered that the decision to proceed under section 5 involved no interference with the boy's rights under article 8(1) (para 54), but even if it did it was justified under article 8(2) (para 55). In the minority, Lord Hope of Craighead (with whom Lord Carswell agreed) considered that there was an interference with the boy's right to respect for his private life under article 8(1), which could not be justified as a proportionate interference under article 8(2) (paras 37-39). Lord Hope emphasised at para 37 that, as set out in the basis of plea, the sexual intercourse was consensual

intercourse between children (and, it may be added, in circumstances where the boy believed the girl to be 15, the same age as himself and just one year below the age of consent).

45. In addressing the question whether there was an interference with the boy's rights under article 8(1), Baroness Hale said this at para 54:

> "In effect, … the real complaint is that the defendant has been convicted of an offence bearing the label 'rape'. Parliament has very recently decided that this is the correct label to apply to this activity. In my view this does not engage the article 8 rights of the defendant at all, but if it does, it is entirely justified. The concept of private life 'covers the physical and moral integrity of the person, including his or her sexual life': *X and Y v The Netherlands* 8 EHRR 235, para 22. This does not mean that every sexual relationship, however brief or unsymmetrical, is worthy of respect, nor is every sexual act which a person wishes to perform. It does mean that the physical and moral integrity of the complainant, vulnerable by reason of her age if nothing else, was worthy of respect. The state would have been open to criticism if it did not provide her with adequate protection. This it attempts to do by a clear rule that children under 13 are incapable of giving any sort of consent to sexual activity and treating penile penetration as a most serious form of such activity. This does not in my view amount to a lack of respect for the private life of the penetrating male."

46. In my view, this statement by Baroness Hale accurately reflects the position that, for the purposes of considering whether there is an interference with the rights of an individual to respect for his private life (and, in the present case, for his correspondence) under article 8(1), it is necessary that the activity of the individual should be capable of respect within the scheme of values which the ECHR exists to protect and promote. See also *In re JR38* [2015] UKSC 42; [2016] AC 1131, para 100: "it is … 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", and it did not extend to protect the claimant in relation to police publication of photographs of him participating in a riot (per Lord Toulson, with whom Lord Hodge agreed; see also para 98: "… 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 …"); and para 112 (Lord Clarke of Stone-Cum-Ebony, with whom Lord Hodge also agreed): "… 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".

47. The judgment of the ECtHR in *Benedik v Slovenia* illustrates the same analytical approach to article 8. At paras 107-110 the court examined the nature of the applicant's interest involved in the case, concluding at para 110 that since the case involved investigations by public authorities it concerned privacy issues "capable of engaging the protection of article 8 of the Convention"; then at paras 115-118 the court examined the question whether the applicant had a reasonable expectation of privacy in relation to his use of the internet, and concluded that he did (see further below). As a result of the examination of these two matters the ECtHR concluded that there had been an interference with the applicant's right to respect for his privacy under article 8(1), so that it was necessary to consider whether that interference was justified under article 8(2).

48. The appellant in *R v G* made an application to the ECtHR, relying on his rights under article 6 and article 8. The ECtHR dismissed his application at the admissibility stage: (2011) 53 EHRR SE25. It held that the complaint based on article 8 was manifestly without foundation. However, in doing so the ECtHR made this observation at para 35 of its decision:

> "The court notes that at the time of the events in question, the applicant was 15 years old and the complainant was 12. The applicant was convicted and sentenced on the basis that both parties had consented to sexual intercourse and that the applicant had reasonably believed the complainant to be the same age as him. In these circumstances, the court is prepared to accept that the sexual activities at issue fell within the meaning of 'private life' (see, mutatis mutandis, *SL v Austria* (2003) 37 EHRR 39). The court therefore concludes that the criminal proceedings against the applicant, which resulted in his conviction and sentence, constituted an 'interference by a public authority' with his right to respect for private life."

> [In the case of *SL v Austria*, a violation of the rights of a 15-year-old homosexual boy under article 14 of the ECHR, read with article 8, was found in relation to a law which criminalised consensual homosexual relations between the applicant and men aged 19 and above, but not relations with other adolescents in the 14 to 18 age bracket.]

The ECtHR in *G v United Kingdom* considered that, even on the basis that there had been an interference with the boy's right to respect for his private life under article 8(1), the interference was justified under article 8(2).

49. The Dean of Faculty sought to rely on para 35 of the decision in *G v United Kingdom* in support of his submission that there was an interference with the appellant's rights to respect for his private life and correspondence in the present case. However, I do not consider that it assists him. That case was concerned with precocious sexual activity between children, between a boy aged 15 and a girl believed to be 15. This involved an aspect of the boy's own personal development and experimentation in relation to intimate relationships at a stage of his own life which attracts particular protective concern under the scheme of the ECHR. The present case is very different. The appellant is an adult, not a child or adolescent at a developmental stage. Indeed, I think that the emphasis in the observations of the ECtHR upon the particular facts of the case in *G v United Kingdom* serves to support the view that in the appellant's case there was no interference with his rights under article 8(1).

50. The appellant had no legitimate interest under the scheme of the ECHR, as against the decoy, to assert or maintain privacy in the communications he sent the decoy. The sending of those communications constituted criminal offences, and the decoy was entitled to provide to the police evidence about them which he had in his knowledge and in his possession. That action by the decoy involved no interference with the appellant's rights under article 8(1). Once the decoy had provided information to the police, they had in their possession evidence of the commission of criminal offences and the appellant had no legitimate interest under the scheme of the ECHR to prevent the police from acting on that evidence, or to prevent the police from passing it on to the respondent with a view to its use in a prosecution of the appellant. Likewise, once the police passed the evidence to the respondent, the appellant had no legitimate interest under the scheme of the ECHR to prevent the respondent from making use of that evidence in criminal proceedings against him. The police and the respondent, as relevant public authorities, had a responsibility, under the scheme of values in the ECHR, to take effective action to protect children, to the extent that the information provided by the decoy indicated that the appellant represented a risk to them.

(ii) No reasonable expectation of privacy

51. According to the Strasbourg case law, an important indication whether the right to respect for private life and correspondence is engaged in relation to an individual's communications is whether the individual had a reasonable expectation of privacy in relation to them: see eg *Halford v United Kingdom* (1997) 24 EHRR 523, para 45; *Garamukanwa v United Kingdom*, paras 22 and 29; *Benedik v Slovenia*, paras 98, 101 and 115-116; and *Ribalda v Spain*, CE:ECHR:2019: 1017JUD000187413, GC, paras 89-90 and 93.

52. In *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457, para 21, Lord Nicholls of Birkenhead observed 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". This observation was the subject of debate in this court in *In re JR38* [2015] UKSC 42; [2016] AC 1131. In that case, with a view to identifying persons who had participated in a riot, the police released photographs showing the claimant, a boy of 14, participating in the violence. The claimant complained that in doing so, the police had breached his right under article 8 to respect for his private life. This court held, by a majority, that there had been no interference with the claimant's right under article 8(1) and affirmed that the touchstone for the engagement of article 8(1) is whether, on the facts, the individual had a reasonable expectation of privacy in relation to the subject matter of his complaint: see paras 87-98 (Lord Toulson, with whom Lord Hodge agreed), and 107 and 110-112 (Lord Clarke, with whom Lord Hodge agreed). The court was unanimous that, if article 8(1) was engaged, the interference with the claimant's rights would have been justified under article 8(2). However, dissenting on the question of the application of article 8(1), Lord Kerr of Tonaghmore (with whom Lord Wilson agreed) said that, although whether there is a reasonable expectation of privacy will often be a factor of considerable weight, it is not necessarily decisive and has to be weighed alongside other factors relating to the context, including in particular in that case the age of the claimant: paras 56 and 59.

53. In *Benedik v Slovenia*, at paras 100-106 the ECtHR recapitulated the relevant principles to be derived from its case law, saying this at paras 100-101:

> "100. The Court reiterates that private life is a broad term not susceptible to exhaustive definition. Article 8 protects, inter alia, the right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. 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' (see *Uzun v Germany* [CE:ECHR:2010:0902JUD003562305], para 43).
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> 101. There are a number of elements relevant to the consideration of whether a person's private life is concerned by measures affected outside his or her home or private premises. In order to ascertain whether the notions of 'private life' and 'correspondence' are applicable, the Court has on several occasions examined whether individuals had a reasonable expectation that their privacy would be respected and protected (see *Bărbulescu v Romania* [[2017] IRLR 2032, GC], para 73, and *Copland v United Kingdom*, [(2007) 45 EHRR 37], paras 41-42). In that context, it has stated that a reasonable

> expectation of privacy is a significant though not necessarily conclusive factor (see *Bărbulescu*, cited above, para 73)."

At para 106, the ECtHR referred to the judgment of the Grand Chamber in *Delfi AS v Estonia* (2016) 62 EHRR 6, at para 148, in which it was noted that different degrees of anonymity are possible on the internet: an internet user may be anonymous to the wider public, while their identity is known to their internet service provider.

54. The ECtHR held that the applicant in the *Benedik* case had a reasonable expectation of privacy, notwithstanding that he used a computer connected to the internet via an internet service provider which had details of the identity of the subscriber (in that case, the applicant's father): paras 115-118. On that basis, the ECtHR found that there had been an interference with the applicant's right to respect for his privacy under article 8(1) and held that it was not justified under article 8(2). That was because the legal regime governing the circumstances in which the police could obtain details of the identity of the subscriber and hence could learn the identity of the applicant was not clear, so the interference was not "in accordance with the law" for the purposes of article 8(2).

55. As the phraseology indicates, whether a reasonable expectation of privacy exists in relation to a particular matter is an objective question: *Benedik v Slovenia*, para 116; *In re JR38*, paras 98 (Lord Toulson) and 109 (Lord Clarke).

56. In the present case, by contrast with the situation in *Benedik v Slovenia*, the appellant's communications were sent directly to the decoy, a private individual believed by the appellant to be a child of 13. Their contents were not a matter in relation to which the recipient could be thought to owe the appellant any obligation of confidentiality. There was no prior relationship between the appellant and the recipient from which an expectation of privacy might be said to arise between them (contrast the position in *Ribalda v Spain*, in which the applicants had a reasonable expectation that they would not be subjected to covert video surveillance by their employer; and contrast the position which might arise in relation to intimate letters sent in the course of an established romantic relationship between adults). The appellant's contact with the decoy came out of the blue and exhortations by the appellant in messages sent to the decoy that he should keep their communications private did not establish a relationship of confidentiality. Furthermore, the appellant believed that he was communicating with a 13-year-old, a child of an age in relation to whom it was foreseeable that he might well share any worrying communications he received with an adult.

57. The present case is, therefore, analogous to the situation posited by Lord Toulson in *In re JR38* at para 100, where he said:

> "… 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 v HM Advocate* [2013] 2 AC 93. Lord Hope DPSC's words, at para 21, 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 identikit, would its use by the police for the purpose of his identification be an infringement of his right to privacy? I consider not."

58. In the present case, the decoy was a member of the public who provided the police with evidence in his possession pertaining to the commission of criminal offences by the appellant. As the ECtHR observed in *Delfi AS v Estonia*, at para 148, and *Benedik v Slovenia*, at para 106, there may be different expectations of confidentiality in relation to use of the internet, depending on the person with respect to whom the question is asked. In the present context, the appellant may have enjoyed a reasonable expectation of privacy in relation to his communications for the purposes of article 8(1) so far as concerned the possibility of police surveillance or intrusion by the wider public, but he had no reasonable expectation of privacy in relation to the recipient of his messages. He could not reasonably expect that, where his messages constituted evidence of criminal conduct on his part, the recipient would not pass them on to the police.

59. Once evidence of the messages had been passed to the police by the decoy, the appellant had no reasonable expectation that the police should treat them as confidential, so that they should not make use of that evidence to investigate whether a crime had been committed. Under the scheme of the ECHR, they were bound to do so in order to safeguard children. Nor did the appellant have any reasonable expectation that the respondent should treat the messages as confidential, so that they should not make use of that evidence in bringing a prosecution in respect of his criminal activity. Again, under the scheme of the ECHR, the possibility of effective prosecution of serious crimes committed in relation to children is part of the regime of deterrence which a state is required to have in place to protect them. Open justice is an important principle in domestic law and under the ECHR, so a defendant in the position of the appellant can have no reasonable expectation that a prosecution in which reliance is placed on material of this kind will take place in anything other than a public forum.

60. There is also an area of overlap between the issue of reasonable expectation of privacy and the issue of the nature of the communications by the appellant,

addressed above. The majority judgments in *In re JR38* indicate that the nature of the information in question is relevant as part of the context in which an assessment whether a reasonable expectation of privacy exists is to be made. As Lord Toulson said at para 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."

See also para 112 (Lord Clarke).

61. I have found it helpful in this case to separate out these issues and subject them to distinct examination, as the ECtHR did in *Benedik v Slovenia*. However, it can also be said that the discussion above regarding the nature of the communications provides further reasons why, for the purposes of article 8(1), the appellant could have no reasonable expectation of privacy in relation to them.

62. Even on the approach of Lord Kerr in *In re JR38*, there has been no interference with the appellant's rights under article 8(1). Unlike the claimant in that case, there is no special feature of the appellant's circumstances, such as his being a child deserving of protection under the scheme of the ECHR, which could support a conclusion that his rights under article 8(1) were interfered with, in the absence of his having a reasonable expectation of privacy.

Conclusion on compatibility issue (1)

63. For the reasons set out above, I consider that the High Court was right to hold that there was no interference with the appellant's rights under article 8(1) in the circumstances of this case.

Issue (2): the extent to which the obligation on the state, to provide adequate protection for article 8 rights, is incompatible with the use by a public prosecutor of material supplied by PH groups in investigating and prosecuting crime.

64. I can be short in addressing this issue, focusing on the circumstances of the appellant's case. I have already concluded in relation to the first compatibility issue that there was no interference with the appellant's rights under article 8(1) associated with the collection by the decoy of evidence about the communications or with the

use of that evidence by the relevant public authorities. Clearly, therefore, in this case the state had no supervening positive obligation arising from article 8 to protect the appellant's interests which would impede the respondent in any way in making use of the evidence about his communications with the decoy to investigate or prosecute in respect of the crimes he was alleged to have committed. On the contrary, in so far as positive obligations under article 8 were engaged, the relevant positive obligation on the respondent, as a public authority, was to ensure that the criminal law could be applied effectively so as to deter sexual offences against children. Contrary to the appellant's argument, article 8 has the effect that the respondent should be entitled to, and indeed might be obliged to, make use of the evidence of the communications with the decoy in bringing a prosecution against him.

65. In *Ribalda v Spain*, the employer of the applicants, a private company, gathered evidence by covert video surveillance of their behaviour at work on which it relied to dismiss the applicants for theft. The national courts held that the dismissals were justified and lawful. The applicants complained to the ECtHR that the Spanish state had interfered with their right to respect for private life under article 8 by reason of the national courts accepting and relying on the evidence derived from the covert surveillance by the employer. The Grand Chamber of the ECtHR held, first, that the applicants had a sufficient reasonable expectation of privacy such that article 8 was applicable (paras 92-95). The Grand Chamber then addressed compliance with article 8, summarising the applicable principles regarding positive obligations at paras 109-116 of its judgment, including the following:

> "109. The court observes that, in the present case, the video-surveillance measure complained of by the applicants was imposed by their employer, a private company, and cannot therefore be analysed as an 'interference', by a state authority, with the exercise of Convention rights. The applicants nevertheless took the view that, by confirming their dismissals on the basis of that video-surveillance, the domestic courts had not effectively protected their right to respect for their private life.
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> 110. The court reiterates that although the object of article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may necessitate the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see

> *Söderman v Sweden* [CE:ECHR:2013:1112JUD000578608, GC], para 78 and *Von Hannover v Germany (No 2)* [ECHR:2012:0207JUD004066008, GC], para 98). The responsibility of the state may thus be engaged if the facts complained of stemmed from a failure on its part to secure to those concerned the enjoyment of a right enshrined in article 8 of the Convention (see *Bărbulescu v Romania* [[2017] IRLR 1032, GC], para 110, and *Schüth v Germany* [CE:ECHR:2010: 0923JUD000162003], paras 54 and 57).
>
> 111. Accordingly, in line with the approach it has followed in similar cases, the court takes the view that the complaint should be examined from the standpoint of the state's positive obligations under article 8 of the Convention (see *Bărbulescu*, cited above, para 110; *Köpke* [*v Germany* (2010) 53 EHRR SE 26]; and *De La Flor Cabrera* [*v Spain* CE:ECHR:2014:0527 JUD001076409], para 32). While the boundaries between the state's positive and negative obligations under the Convention do not lend themselves to precise definition, the applicable principles are nonetheless similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing private and public interests, subject in any event to the margin of appreciation enjoyed by the state (see *Palomo Sánchez v Spain* [CE:ECHR:2011:0912JUD 002895506, GC], para 62, and *Bărbulescu*, cited above, para 112). The margin of appreciation goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by independent courts. In exercising its supervisory function, the court does not have to take the place of the national courts but to review, in the light of the case as a whole, whether their decisions were compatible with the provisions of the Convention relied upon (see *Peck* [*v United Kingdom*, CE:ECHR:2003:0128JUD004464798], para 77, and *Von Hannover (No 2)*, cited above, para 105)."

Applying these principles, having regard to the state's margin of appreciation and the fair balance to be maintained between the interests of the applicants and their employer, the Grand Chamber held that there had been no violation of any positive obligations owed to the applicants under article 8.

66. As is evident from this recent judgment of the Grand Chamber, positive obligations under article 8 only arise where article 8 is applicable in a claimant's case in the first place. In the present case, however, as set out above, article 8 is not applicable in relation to the appellant's complaint.

67. Further, even where article 8 is applicable, a contracting state has a margin of appreciation as to how to strike a fair balance between the competing interests which are in issue. Since, in the present context, the state has a positive obligation to operate an effective criminal law regime to deter and punish persons who threaten to harm young children, there is no doubt that the use by the respondent of the evidence provided by the decoy for the purposes of the prosecution of the appellant under that regime involved no breach of any positive obligation owed to the appellant.

68. In that regard, it is relevant that the appellant rightly accepts that the offences with which he was charged under the 2009 Act and the 2005 Act were, in themselves, compatible with article 8. In *SXH v Crown Prosecution Service (United Nations High Commissioner for Refugees intervening)* [2017] UKSC 30; [2017] 1 WLR 1401, this court addressed the question whether the rights of an individual under article 8(1) were interfered with when the prosecution service in England and Wales decided to bring a prosecution for an offence under a statutory provision which, as here, was agreed to be compatible with the rights of the accused under article 8. Lord Toulson (with whose judgment Lord Mance, Lord Reed and Lord Hughes agreed) observed (para 34) that it was difficult to envisage circumstances in which the initiation of a prosecution against a person reasonably suspected of committing such a criminal offence could itself be an interference with that person's rights under article 8(1). There might be rare and exceptional circumstances in which that could happen: see para 23, setting out the view of the Court of Appeal to that effect, with which Lord Toulson agreed at para 35; and the members of the appellate committee in *R v G*, apart from Lord Hoffmann, contemplated that there might be such a case. However, there are no exceptional circumstances which apply in the present case. The Scottish Parliament has enacted the criminal law provisions in sections 33 and 34 of the 2009 Act and section 1 of the 2005 Act to protect the rights of children, and it was clearly within the state's margin of appreciation under article 8 and that of the respondent as the prosecuting authority to deploy the evidence provided by the decoy in support of a prosecution brought under those provisions.

Other issues in the High Court

69. In light of the way in which the compatibility issues have been framed by the High Court, other aspects of the High Court's judgment do not arise for consideration in this court. However, I think it is appropriate to observe that, even if the appellant had been able to show that there had been an interference with his rights under article 8(1), he would still have faced fundamental difficulties in challenging the overall conclusion of the High Court that his appeal against his conviction should be refused.

70. First, the High Court concluded that, even if there had been an interference with the appellant's rights under article 8(1) arising from the use of the evidence provided by the decoy in the police investigation and prosecution of the appellant, it would have been justified under article 8(2) as being in accordance with the law and necessary in a democratic society, as a measure proportionate to promoting the legitimate objectives of the prevention of disorder or crime and the protection of the rights and freedoms of others. Although the issue of justification under article 8(2) does not arise under the compatibility issues before this court, I can see no reason to think that the High Court was in error in this part of its judgment.

71. Secondly, even if the appellant had been able to establish that there had been a breach of his rights under article 8 by reason of the use of the evidence provided by the decoy in the investigation and in the prosecution, it would not follow that his conviction should be quashed, as the High Court rightly pointed out. Generally, evidence obtained in breach of article 8 may be relied on in criminal proceedings, provided that there is no violation of the right under article 6 of the ECHR to have a fair trial and no breach of any rules of domestic law regarding the fairness of criminal proceedings: see eg *Kinloch v HM Advocate* [2012] UKSC 62; [2013] 2 AC 93, paras 15-17 (Lord Hope of Craighead). The High Court considered that there was no unfairness in the proceedings against the appellant (para 51). Again, I see no reason to disagree with their assessment.

Conclusion

72. For the reasons given above, I would dismiss the appeal. In relation to the first compatibility issue, I would answer that in this case there was no interference with the appellant's right to respect for his private life and correspondence under article 8(1) by reason of the use by the respondent of the evidence obtained from the decoy in the public prosecution of the appellant. In relation to the second compatibility issue, I would answer that there was no incompatibility between the obligation on the state to protect rights arising under article 8 and the use by the respondent in this case of the evidence provided by the decoy in support of the prosecution of the appellant.