

6. HOW FAR IS PRIVACY PROTECTED BY MEDIA REGULATORS?

Introduction

- 6.1 The increasing involvement of the courts in privacy issues over the past twenty years has been mirrored by the increasing activity of media regulators. From the 1960's concerns over media invasions into privacy have resulted in a number of draft privacy bills being promoted¹ and since the early 1970's numerous committees have published reports which, in general, have recommended greater regulation of the media.² The Broadcasting Act 1981 created a Broadcasting Complaints Commission ("BCC") to deal with complaints about fairness and invasion of privacy. In 1996 this was replaced by the Broadcasting Standards Commission ("BSC") which, amongst other responsibilities, is required to draw up a code which will help to avoid "unwarranted infringement of privacy in, or in connection with the obtaining of material" included in radio and television programmes.³
- 6.2 Statutory regulation of broadcasters has never been extended to the print media. The Press Council was set up in 1953 in order to censure unacceptable journalistic conduct⁴ but was widely perceived as a toothless watchdog⁵ and in 1989 a private members' bill aimed at setting up a statutory complaints body received support. In response, the government set up a committee chaired by David Calcutt QC to consider "Privacy and Related Matters". In 1990 the Calcutt report recommended, amongst other things, that the Press Council should be replaced by a Press Complaints Commission ("PCC") which would have eighteen months to demonstrate

¹ "Privacy Bills" were introduced by Lord Mancroft in 1961, by Alexander Lyon MP in 1967, by Brian Walden MP in 1969, by William Cash MP in 1987 and by Lord Stoddart in 1989.

² Younger Committee Report On Privacy (1972) Cmnd 5012; Calcutt Committee Report on Privacy and Related Matters (1990) Cm 1102; Calcutt Review Of Press Self-Regulation (1993) Cm 2135; National Heritage Select Committee Fourth Report on Privacy And Media Intrusion 1993; Lord Chancellor's Department and Scottish Office consultation paper, *Infringement of Privacy* 1993.

³ Broadcasting Act 1996, s.107.

⁴ For some history, see Robertson and Nicol on *Media Law* (4th Ed., 2002), pp.678-679; and see G Robertson, *People against the Press* (Quartet Books, 1983).

⁵ For example, the Sunday Sport completely ignored the Press Council condemnation of its behaviour in the Gordon Kaye case (see *Kaye v Robertson* [1991] FSR 62 and see 1.1 above).

“that non-statutory self-regulation can be made to work effectively. If it fails we recommend that a statutory system for handling complaints be introduced.”

In response, and in order to avoid statutory controls, the press set up the PCC at the beginning of 1991.⁶ Calcutt's review of self-regulation in 1993 was highly critical and recommended a statutory complaints procedure. In 1995, the Conservative Government's White Paper *Privacy and Media Intrusion*⁷ rejected all recommendations for statutory regulation and for a new tort of invasion of privacy. It approved continuing self-regulation. The Labour Government continued this approach after 1997 and there are currently no government plans for statutory press regulation.

- 6.3 Both the statutory and the non-statutory regulators have drawn up detailed codes of practice, available on their respective websites.⁸ These codes have acquired extra significance as a result of section 12(4) of the HRA, which requires the court to have particular regard to “any relevant privacy code” when considering any remedy which may affect freedom of expression.⁹

Broadcasting Standards Commission (“BSC”)

- 6.4 The BSC is a statutory regulator covering matters of fairness, privacy, taste and decency in all forms of broadcasting media. It considers and adjudicates on complaints and monitors and reports on standards and fairness in broadcasting.¹⁰ Its remit covers programmes broadcast by the BBC and by commercial broadcasters whether on cable or satellite. There is overlap with the operation of the ITC, which regulates only commercial broadcasters.
- 6.5 The BSC has produced a “Code on Fairness and Privacy” which deals with matters including hidden microphones and cameras (para 18); recording of telephone calls (para 22); doorstepping (para 25); suffering and distress (para 28) and children (para 15).

⁶ For an account of the PCC from 1991 to 2001, see Richard Shannon *A Press free and responsible: self-regulation and the PCC 1991-2001* (John Murray, 2001).

⁷ (1995) Cm 2918.

⁸ PCC at www.pcc.org.uk; BSC at www.bsc.org.uk; ITC at www.itc.org.uk.

⁹ See Brooke L.J. in *Douglas v Hello!* [2001] 2 WLR 992 and *Campbell v Frisbee* [2002] EWHC 328 (Ch.).

¹⁰ Broadcasting Act 1996, s.106 and 107.

The BSC code provides that an infringement of privacy will not be acceptable unless there is an “overriding public interest” in disclosing the information. This includes revealing or detecting crime or disreputable behaviour, protecting public health or safety, exposing misleading claims or disclosing significant incompetence in public office (para 14). The code states “for much of the time, the private lives of most people are of no legitimate public interest” (para 16).

- 6.6 Parliament did not define privacy in any of the Broadcasting Acts. In *R v Broadcasting Complaints Commission, ex p Granada Television*¹¹ the broadcaster contended that a finding of infringement of privacy could not be made in relation to matters which were already in the public domain. The Court of Appeal said that it was a reasonable inference that the Broadcasting Act did not contain a definition of privacy because Parliament

“considered it more appropriate that the difficult questions of fact and degree and value judgment, which are raised by the question of the concept of an infringement of privacy, are best left to a specialist body ... whose members have experience of broadcasting.”¹²

In that case the Court of Appeal also held that the fact that the matter had previously been put in the public domain did not preclude there being an invasion of privacy. It was a matter of fact and degree for the regulator.¹³

- 6.7 The importance of the specialist role of media regulators in determining what is meant by “privacy” was also emphasised in the case of *R v Broadcasting Standards Commission, ex p BBC*.¹⁴ In that case, the BBC had secretly filmed several sales transactions in Dixons stores to check whether Dixons had been selling second hand goods as new. The BSC found that the actions of the BBC had amounted to an unwarranted infringement of the company's privacy. The BBC challenged the adjudication by way of judicial review arguing that a company could not complain about an infringement of privacy, since this was by its very nature personal and human in nature. The Court of Appeal upheld the

¹¹ [1995] EMLR 163.

¹² at 167.

¹³ See also para 18 of the BSC Code.

¹⁴ [2001] QB 885.

adjudication of the BSC on the basis that, under the terms of section 111 of the Broadcasting Act 1996, complaints of invasion of privacy could be made by a corporate body.

- 6.8 The Court of Appeal made it clear that media regulators had a "broad licence" as to their exercise of their judgment and discretion in relation to complaints of infringement of privacy. The position was summarised by Lord Woolf MR in the following terms:

"So long as the approach which the BSC adopt is one to which, in their statutory context, the words 'infringement of privacy' are capable of applying then the courts should not interfere. It is only if an approach to 'infringement of privacy' by the BSC goes beyond the area of tolerance that the courts can intervene. There will be situations which fall within the grey area where it will be very much a matter of judgment whether they fall within the remit of the BSC or not. In the latter situations, having regard to the role the legislation gives to the BSC, the answer to the scope of their remit is that it is something for the BSC to determine not the courts. The nature of their work and their membership are important when considering the role of the courts in relation to adjudications by the BSC. What constitutes an infringement of privacy or bad taste or a failure to conform to proper standards of decency is very much a matter of personal judgment. This is not an area on which the courts are well equipped to adjudicate".¹⁵

It should, however, be noted that the *Ex parte Granada* and *Ex parte BBC* cases both involve challenges by the media to adverse privacy adjudications. In both cases, the regulator had given the Code an interpretation which was arguably wider than that required by the common law or Article 8.

- 6.9 We suggest that the position would be different if the regulator had taken a narrower view of the meaning of "privacy" than the common law or Article 8. As Lord Woolf MR said in the *Ex parte BBC* case:

"To construe a statute so that it does not provide less than the protection given by the Convention can be appropriate, but I would resist the use of the Convention to cut down the protection which a statute would otherwise provide".¹⁶

A regulator which rejects a privacy complaint on the basis of a narrow view of the extent of private life should not be given the same "margin of tolerance" afforded in the *Ex parte Granada* and *Ex parte BBC* cases and the court is likely to be much readier to intervene.

- 6.10 The BSC decisions concerning privacy have included secret filming, doorstepping and the broadcasting of names or photographs without consent.¹⁷ The following decisions are worthy of note:

- The broadcast of the name and photograph of a person unfairly accused of being connected with a murder,¹⁸ or unfairly accused of being "the daughter-in law from hell",¹⁹ or unfairly accused of electoral abuse;²⁰
- Secret filming in a Dixon's Store ;²¹
- Identification of and film of the house of a person on bail broadcast prior to trial;²²
- Broadcast of film taken without consent of person receiving medical treatment after road accident;²³
- A talk show host telephoning the complainant live and broadcasting the conversation without warning or permission;²⁴
- Broadcast of interviews with three Thai women involved in sex slave trade but without them giving fully informed consent.²⁵

¹⁵ At 894 (para 17).

¹⁶ The decisions are available on the BSC website (see note 8 above).

¹⁷ *The Underworld: The Krays* BBC1 02/03/1994.

¹⁸ *Meet the In-Laws* ITV 14/11/1998.

¹⁹ *Spotlight* BBC1 11/02/1997.

²⁰ *West Eye View* HTV 21/08/1997 and *Watchdog* BBC1 27/03/1997.

²¹ *Look North News* BBC1 11/02/1998.

²² *Close Up North: Dying to Get There* BBC1 23/09/1998.

²³ *James Whale Show* Talk Radio 25/03/1998.

²⁴ *Dispatches: The Sex Slave Trade* Channel 4 29/04/1999.

¹⁶ At 893 (para 16).

6.11 The BSC does not have jurisdiction to deal with privacy complaints prior to the programme being broadcast. The point arose in relation to the BSC's predecessor, the BCC, in *R v Broadcasting Complaints Commission, ex p Barclay*.²⁶ The Barclay brothers complained prior to broadcast that a BBC film crew had, without permission, visited their private island. The BCC declined to adjudicate on the basis that it no jurisdiction to entertain such a complaint. The complainant's application for judicial review was refused by Sedley J. He held that the terms of the Broadcasting Act 1990 limited the power of the BCC and that it could not deal with a privacy complaint prior to the programme being broadcast. He suggested that this meant that there was no effective remedy for breach of privacy and that this was inconsistent with European Convention rights.

"It cannot therefore entertain an anticipatory complaint even where, once the programme is broadcast, the complaint is bound to succeed. It follows that in this field and to this extent, as elsewhere in English law, the individual is without an effective remedy before a national authority if the right to respect for his or her private and family life is violated. For those who consider that privacy is a right which needs protection in English law and for those concerned with the conformity of the United Kingdom's law with the standards set out in the European Convention on Human Rights, the argument will doubtless not end here."

6.12 A number of other procedural points can be noted:

- Only the person affected or someone authorised by that person may make a complaint.²⁷ The BSC may refuse to consider a complaint if the person affected was not the subject matter of the treatment and he did not have sufficient direct interest.²⁸
- The BSC have oral hearings but these are not open to the public.
- When the BSC adjudicates against a broadcaster the adjudication is published in its monthly bulletin and on its website. The BSC has no power to fine or order publication of

²⁶ (1997) 9 Admin LR 265.

²⁷ s.111(1) Broadcasting Act 1996.

²⁸ s.111(7) Broadcasting Act 1996.

an apology or correction. Sometimes the broadcaster is directed by the BSC to broadcast a summary of the adjudication.

- There is no right of appeal against BSC decisions although they are subject to judicial review.²⁹

The Independent Television Commission ("ITC") and The Radio Authority

6.13 These statutory bodies grant licences for independent television and radio services respectively. The terms of these licences require the licensees to comply with codes of practice which the statutory bodies draw up and enforce.³⁰ They can enforce breaches of privacy by directing the prospective broadcasters either to publish a summary of the adjudication or to publish an apology.

6.14 The ITC Programme Code is probably the most comprehensive of the regulators' codes. It has detailed guidance for filming in public or semi-public places, for undercover filming and for filming people in distress. The ITC code quotes Articles 8 and 10 of the European Convention and states:

"As a public authority the ITC must seek to ensure that the guidance given throughout this code is consistent with Convention principles." (Section 2)

In discussing public interest exceptions, it states that any act that relies on a public interest must be proportionate to the actual interest served and provides examples of what the public interest might be:

- detecting or exposing crime or serious misdemeanour;
- protecting public health or safety;
- preventing the public from being misled by some statement or action of an individual or organisation;
- exposing significant incompetence in public office.

It should be noted that the definition of "public interest" is different from that in other codes.

²⁹ See para 6.29 below.

³⁰ Broadcasting Act 1990, ss.1-7.

- 6.15 Unlike other regulators, the ITC has power to impose a financial penalty and the ITC also monitors programmes so that it may investigate a matter without a formal complaint being made. In the event of a serious breach of code the ITC has power to direct the licensee to broadcast an apology.
- 6.16 The Radio Authority has two relevant codes, the Programme Code and the News and Current Affairs Code. There is no express reference to privacy in either.
- 6.17 In practice if a privacy complaint is made to the ITC or the Radio Authority, it will be referred to the BSC,³¹ and this will remain the practice until OFCOM starts operation.

OFCOM

- 6.18 The government is introducing a new media regulator, OFCOM which will take over the functions of the broadcast regulators above (including the ITC, Radio Authority and BSC), as well as ICSTIS³² and OFTEL. The paving Act is already in force³³ and the Communication Bill will probably be enacted in 2003/2004. Under the new legislation, there will in general be deregulation of the broadcast media and probably a single code and more consistent adjudications. Publication of the draft Bill has recently been delayed.
- 6.19 The position of the BBC in the new regime is not yet clear.³⁴ The BBC is not a statutory body; it is created under Royal charter and its broadcasting obligations are set out within the terms of a licence agreement with the Secretary of State which is reviewed regularly. It has been suggested that the BBC should be on a formal statutory footing and regulated by OFCOM like other broadcasters, but it is doubtful whether this will happen. The extent of OFCOM's remit over the BBC remains uncertain.

³¹ See Memorandum Of Understanding between BSC and The Radio Authority.

³² Independent Committee for the Supervision of Standards of Telephone Information Services, the self-regulating body for telephone chat lines.

³³ Office of Communications Act 2002.

³⁴ See Government White Paper "A New Future for Communications", CM 5010 and the Government Response to the Second Report from the CMS Select Committee 2000-2001, CM 5316.

Press Complaints Commission

- 6.20 The PCC is a voluntary organization set up and paid for by the print media. Most but not all print media subscribe to the PCC and there has been substantial debate over and criticism of its operations. Unlike most other regulators, working journalists and editors serve on the PCC together with lay members. Any publication which is criticized by the PCC must print the adjudication in full and in due prominence. Sometimes the PCC will censure the newspaper involved.
- 6.21 The PCC code is the shortest of the regulators' codes and it has been regularly updated. Clause 3 of the code provides:
- (i) everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent.
- (ii) the use of long lens photography to take pictures of people in private places without their consent is unacceptable.
- Note: Private places are public or private property where there is a reasonable expectation of privacy."
- Privacy is also protected in other clauses; clause 4 in relation to harassment; clause 5 in relation to intrusion to grief or shock; clause 6 in relation to children and clause 9 in relation to hospitals.
- 6.22 Intrusions into privacy and intrusions taking place in respect of children and hospitals can be justified when they are in the public interest. The definition of "public interest" in the PCC Code includes
- "detecting and disposing of serious crime or a serious misdemeanor; protecting public health and safety; preventing the public from being misled by some statement or action of individual organizations."

The Code states that in any case where the public interest is invoked, the PCC "will require a full explanation by the editor demonstrating how the public interest was served". Further, in

cases involving children, editors must demonstrate "an exceptional public interest to over-ride the normally paramount interests of the child".

- 6.23 The interpretation of "privacy" under the PCC Code was considered in *R (Ford) v Press Complaints Commission*.³⁵ The applicant, the well known television journalist, Anna Ford, sought permission to apply for judicial review of the PCC decision rejecting her complaint about publication of photographs of her and her partner on a secluded but public beach abroad. Silber J refused permission on the basis of the "broad discretion" given to media regulators and the "extended deference given by the courts" to their decisions.³⁶

"... the type of balancing operation conducted by a specialist body, such as the Commission is still regarded as a field of activity to which the courts should and will defer. The Commission is a body whose membership and expertise makes it much better equipped than the courts to resolve the difficult exercise of balancing the conflicting rights of Ms. Ford and Mr. Scott to privacy and of the newspapers to publish. Put in another way, the courts should only interfere with decisions of the Commission when in the words of Lord Woolf, 'it would be clearly desirable to do so'. So the threshold for interference by the courts is not low as it must be satisfied that it is not merely desirable but clearly desirable to do so."³⁷

We suggest that this approach is not correct. In contrast to the decision in *Ex parte BBC* on which the court relied, the PCC was taking a narrow view of the ambit of "private life". In such a situation it is not appropriate to defer to the regulator. This is a case in which the court should have made a primary judgment as to whether the applicant's privacy had been invaded by the publication of the photographs. This required a full hearing and we suggest that permission for judicial review should have been given.

³⁵ [2002] EMLR 95.

³⁶ At 104 (para 26).

³⁷ At 105, para 28.

- 6.24 PCC privacy complaints have included disclosure of:

- Intimate sexual details in kiss and tell stories. The decisions are not consistent. In some cases where the complainant has previously disclosed details about his/her private life, this is said to have compromised the claim to privacy; in others not;³⁸
- Photographs of people in private places such as the private gardens of a residence in the South of France have been held to infringe privacy;³⁹
- Photographs of people in non private places such as shopping in Los Angeles with young child⁴⁰ and photographs of a news reader on a secluded but public beach in Majorca⁴¹ have been held not to be infringements of privacy;
- Publication of a home address was held to be an infringement of privacy,⁴² but not in a case involving publication of photographs and details of someone's home but no precise address, even though the person involved had been subject to death threats;⁴³
- Details about and photographs of children have been held to be infringements of privacy.⁴⁴ Photographs taken of a well-known author and her 8 year old daughter in their swimsuits on a public but secluded beach in Mauritius have been held to be an invasion of privacy;⁴⁵
- Photographs of Prince William hiking and crossing a river in Chile were held to be an infringement of privacy since there was a "reasonable expectation of privacy".⁴⁶

- 6.25 In some circumstances the PCC will adjudicate even if there has been no publication, for example where there has been breach of Clause 4 (harassment), Clause 6 (children) or Clause 9 (hospitals)

³⁸ Complaint dated 23rd January 2000 *Jacqueline Pirie v News Of The World*; Complaint dated 4th March 2000 *Lisa Carling v Daily Mail*; Complaint dated 11th November 2001 *Naomi Russell v Sunday Sport*; Complaint dated 15th July 2001 *Vanessa Feltz v Sunday Mirror*; Complaint dated 11th June 1999 *James Charters v The Sun*.

³⁹ Complaint dated 4th June 1998 *Elton John v Daily Star*.

⁴⁰ Complaint dated 1st May 2001 *Alex Kingston v Hello!*

⁴¹ Complaint dated 15th September 2000 *Anna Ford v Daily Mail*; (and see Complaints dated 12th January 2000 *Ian Stewart-Brady v The Mirror* and dated 6th June 1998 *Yvonne MacQuarrie v Scotland On Sunday*).

⁴² Complaint dated 4th June 2000 *Renate John v Sunday Mirror*.

⁴³ Complaint dated 16th July 2000 *A Well-Known Entertainer v Mail On Sunday*.

⁴⁴ Complaint dated 20th July 1999 *Blair v Mail On Sunday*; Complaint dated 8th December 2001 *Blair v Daily Telegraph*.

⁴⁵ Complaint dated 17th August 2001 *J.K Rowling v OK! Magazine*.

⁴⁶ Complaint dated 27th October 2000 *Stephen Lamport v OK! Magazine*.

of the Code. There is no formal power for the PCC to make adjudications in advance of publication or to prevent publication. However, in some cases, the PCC will issue "guidance" for the future conduct of the media. Such guidance usually relates to media coverage of the royal family.

- 6.26 There are a number of other procedural matters which should be noted:
- Unless there are special circumstances, the PCC will consider only complaints made within one month of publication or one month of the end of correspondence with the editor;
 - The PCC will not consider complaints where the complainant is also bringing legal proceedings against the publication;
 - The PCC does not hold hearings and, as a result, all representations are made in writing. Disputes of evidence cannot be resolved;
 - Any publication which is criticised by the PCC is required to print the adjudication in full and with due prominence. The PCC has no power to award compensation.
- 6.27 There is no procedure for appeal from a decision of the PCC. There is a strong argument, however, that, given its regulatory functions, the PCC is a "public authority" and as such susceptible to judicial review. The point was accepted as being "at least arguable" in *R v Press Complaints Commission, ex p Stewart-Brady*.⁴⁷ When the Human Rights Bill was being debated in the House of Lords, Lord Irvine LC expressed the view that PCC might well be a "public authority" under the Human Rights Act.⁴⁸ More recently, in *R (Ford) v Press Complaints Commission*⁴⁹ the PCC accepted that the point was clearly arguable. We suggest that, at least in the context of a claim under the HRA, the PCC will be treated as a "functional public authority" under section 6(3)(b). As a result, its decisions in "privacy" complaints could be subject to HRA challenge in the courts. This point is considered further below.
- 6.28 If a newspaper has been found to be in breach of the Code of Practice, the newspaper is bound by the Code to print the

⁴⁷ [1997] EMLR 185.

⁴⁸ Hansard HL, 24 November 1997, Cols 771-787.

⁴⁹ [2002] EMLR 95.

adjudication by the PCC in full and with due prominence. However, the PCC has no legal power to prevent publication of material, to enforce its rulings or to grant any legal remedy against the newspaper in favour of the victim.

Regulators and the courts

- 6.29 In the absence of statutory appeal procedures, the only remedy for a complainant or respondent who is aggrieved is to bring an application for judicial review or, since 2 October 2000, a claim under the HRA. There is no doubt that statutory media regulators are "public authorities" for the purposes of judicial review and HRA proceedings. Non-statutory regulators are probably similarly reviewable. Judicial review has conventionally been seen as a process of "second order" review in which the courts consider the lawfulness of the decision making process but not the merits of the decision. In general the courts would not substitute their decisions for those of public authorities, quashing a decision as unreasonable only if it is "so absurd that no sensible person could ever dream that it lay within the powers of the decision maker".⁵⁰ This *Wednesbury* doctrine gives decision-makers a very broad "margin of discretion". Provided a decision falls within this, the court will not interfere.
- 6.30 Where "fundamental rights" are involved, even in ordinary judicial review proceedings, the decision calls for "anxious scrutiny".⁵¹ Where a decision interferes with Convention rights, the Court applies an even more stringent test of "proportionality". This requires the court to examine:
- whether the legislative objective is sufficiently important to justify limiting the fundamental right;
 - whether the measures designed to meet the legislative objective are rationally connected to it; and
 - whether the means used to impair the freedom are no more than is necessary to accomplish that objective.⁵²

⁵⁰ *Associated Provincial Pictures v Wednesbury Corporation* [1948] 1 KB 223, 229.

⁵¹ See *R v Ministry of Defence, ex p Smith* [1996] QB 517.

⁵² See *R v Home Secretary, ex p Daly* [2001] 2 WLR 1622.

- 6.31 The Courts have made clear that the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. The proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.⁵³
- 6.32 In the *Ex parte Granada* and *Ex parte BBC* cases,⁵⁴ the courts applied the traditional *Wednesbury* judicial review test. However, in *R (Ford) v Press Complaints Commission*,⁵⁵ the application of the "proportionality" principle to media regulators was considered. Silber J took the view that, even after the HRA came into force, the courts should continue to defer to the views of bodies like the PCC. We suggest that such deference should, in future, be limited. Although the PCC purports to be a "specialist body" it was set up and is paid for by the print media themselves. As a result, the courts are entitled to approach its decisions with some caution. As a public authority, it is unlawful for the PCC to act in a way which is incompatible with Convention rights.⁵⁶ The Article 10 rights of the media and the Article 8 rights of complainants are both relevant. However, it is particularly important to bear in mind that Article 8 places public authorities under positive obligations to secure effective respect for private and 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 ... In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of individuals".⁵⁷

⁵³ See Lord Steyn in *Daly* at 1634-1636; see also *R (Samaroo) v Home Secretary* [2001] EWCA 1139; [2001] UKHRR 1150.

⁵⁴ See paras 6.6 and 6.7 above.

⁵⁵ [2002] EMLR 95.

⁵⁶ HRA s 6(1).

⁵⁷ *Botta v Italy* (1998) 26 EHRR 241, para 33; see generally K Starmer, 'Positive Obligations under the Convention' in J Jowell and J Cooper (eds), *Understanding Human Rights Principles* (Hart Publishing, 2001).

- 6.33 A good example of the court departing from the traditional *Wednesbury* approach and substituting its own view for that of the decision maker is provided by the decision of the Court of Appeal in *R (Quintavalle) v BBC*.⁵⁸ The case concerned an application for judicial review of broadcasters' decisions under the BBC Producers' Guidelines and the Programme Code of the ITC. The fundamental right in play was not privacy under Article 8 but freedom of expression under Article 10. The Court of Appeal categorised as "profoundly mistaken" the conventional approach taken by the first instance judge. He had regarded the reasonableness or rationality of the broadcaster as conclusive. The Court of Appeal held that the broadcasters' "margin of discretion" was constrained where freedom of political speech was concerned, and substituted its own view. A similar approach is arguably appropriate where regulators' decisions relate to the fundamental right to privacy under Article 8. A margin of discretion will still be allowed but the court will intervene and substitute its own view if it considers that the regulator has reached the wrong decision.
- 6.34 The extent of the positive obligation to secure respect for private life was considered in two United Kingdom cases in Strasbourg. In *Winer v United Kingdom*⁵⁹ the Commission of Human Rights held that the absence of an actionable right to privacy in the United Kingdom did not violate Article 8 because the applicant's right to privacy "was not wholly unprotected". No proper reasons are given for this conclusion and this admissibility decision can be accorded little weight. The case of *Spencer v United Kingdom*⁶⁰ concerned publication in tabloid newspapers of photographs and information about Countess Spencer being in a clinic for the treatment of an eating disorder and for alcoholism. Information about her personal and family problems was also published. The PCC had adjudicated in the complainant's favour, finding a breach of clause 3 of the Code. The Commission of Human Rights reviewed the common law development of the law of confidence. It found that although there was no general right of privacy, the applicant had the remedies of an injunction, damages or an

⁵⁸ [2002] EWCA Civ. 297.

⁵⁹ (1986) 48 DR 15 (E Comm HR).

⁶⁰ (1998) 25 EHRR CD 105.

account of profits available to protect privacy. As a result, the Commission dismissed the complaint, since the applicants had not "exhausted their domestic remedies".

6.35 Neither of these cases provides assistance in relation to potential HRA claims against a media regulator. It is suggested that potential claims might be brought in the following situations:

- If the regulator dismissed an application by an individual whose right to respect for private and family life had, by Article 8 standards, been infringed by the media. Such a dismissal would, arguably, be incompatible with that individual's Article 8 rights to have a public authority take positive steps to secure respect for private life;
- If the regulator found a violation of the Code but failed to provide the complainant with an effective remedy, then, once again, there might be a breach of Article 8. For example, a person whose privacy was seriously or repeatedly invaded might have a claim that the regulator should have in place a more powerful remedy against the media than an adverse "adjudication" - such as damages or an order restraining future publication.

Some conclusions

6.36 The adjudications of regulators whether published, broadcast or merely received have limited effect. Since regulators seek to avoid repeating the offending material, the adjudication tends to be cryptic. Some adjudications are anonymous. This means that they often have limited value in providing either vindication for the complainant or future guidance for the media. There is no doubt that the possibility of adverse decisions by regulators does have some deterrent effect on the media. Some BSC and ITC decisions must be broadcast. All adverse PCC decisions must be published. Broadcasters tend to take more steps to avoid invasions of privacy than newspapers do. The lack of any other remedies, such as fines or awards of compensation, in practice means that invasions of privacy occur in all forms of media. In general there is no prior restraint, or monitoring.

6.37 In short, although privacy is protected to a certain extent by regulators, their powers are limited, and the ability to challenge their decisions has, up to now, been very limited. It remains to be seen whether applications under the HRA will improve the position. The major flaw in the regulatory system as regards the protection of privacy is that the regulators have no power to stop broadcast or publication. The only remedy is adjudication, by which time the information has already been published and the damage done.