there will be no functional equivalents. For example, sooner or later couples in opposite-sex registered relationships like the Dutch registered partnerships or the French *pacte civil de solidarité* will seek recognition of their relationship and it will be interesting to see which position English courts will take.

JENS M. SCHERPE

VIOLATING ARTICLE 8

ANYONE seeking a reminder of Strasbourg's influence on English law need look no further than the European Court of Human Rights' (the "ECtHR") decision in *Wainwright* v. *United Kingdom* (App No 12350/04, 26 September 2006). Granting relief where the House of Lords had denied it (in *Wainwright* v. *Home Office* [2003] UKHL 53, [2004] 2 A.C. 406) the ECtHR held that the United Kingdom had breached its article 8 right "to respect for private… life" by subjecting the applicants to an unduly intrusive strip search.

The applicants, a Mrs Wainwright and her mentally and physically impaired son, were strip searched during a visit to Mrs Wainwright's other son in prison. A number of prison rules were breached during the search. Mrs Wainwright was searched in front of a window overlooking the street; both applicants were required effectively to strip naked; neither party was shown a consent form before the search began; and the officers put their fingers in the son's armpits, handled his penis and pulled back his foreskin (in spite of a rule that only a visitor's hair, mouth and ears should be touched). Both applicants were distressed by the search (the son developed post-traumatic stress disorder) and brought claims against the Home Office in battery, intentional infliction of emotional distress and breach of privacy. (The search took place before the Human Rights Act 1998 (the "HRA") was passed).

The Home Office conceded that the touching of the son's genitals was a battery, but the other two claims were unsuccessful in the House of Lords. In the leading judgment, Lord Hoffmann held that there was no general tort of invasion of privacy and that the requirements of *Wilkinson* v. *Downton* [1897] 2 Q.B. 57 were not satisfied. He also rejected the argument that failure to provide the Wainwrights with a remedy would leave the Government vulnerable to an adverse finding in Strasbourg. He had "no doubt" that the search was not serious enough to amount to "torture or… inhuman or degrading treatment or punishment" under Article 3 of the European Convention of Human Rights (the "Convention") and, although he accepted, *obiter*,

that Article 8 might justify compensation of distress caused by an *intentional* invasion of privacy by a public authority, he doubted whether damages for distress should be awarded if the act was merely negligent or accidental: "It is one thing to wander carelessly into the wrong hotel bedroom and another to hide in the wardrobe to take photographs" (para. [51]).

However, the ECtHR upheld the Wainwrights' claim that the strip searches breached Article 8 of the Convention. Having reiterated that the right to respect for private life includes a right to "physical and moral integrity", the ECtHR said that there was no doubt "that the requirement to submit to a strip-search will generally constitute an interference under the first paragraph of Article 8" (para. [43]). Further, although in this instance the searches were carried out "in accordance with the law" and pursued the "legitimate aim" of fighting drugs in the prison (as required by Article 8(2)), the ECtHR held that they were not proportionate to that aim. Prison authorities must comply strictly with procedures set down for searching visitors to a prison and "by rigorous precautions protect the dignity of those being searched from being assailed any further than is necessary" (para. [48]). The officers' failure to do so amounted to a breach of Article 8 for which each applicant was awarded €3,000 in compensation.

However, like Lord Hoffmann, the ECtHR held that the treatment did not reach the level of severity required to breach Article 3. In order to violate that article, the search must have "debasing elements which significantly aggravate[…] the inherent humiliation of the procedure" or have "no established connection with the preservation of prison security and prevention of crime and disorder" (para. [42]; see the successful claims in *Valašinas* v. *Lithuania* App No 44558/98, 24 July 2001, where officers obliged a male prisoner to strip naked in the presence of a female prison officer and touched his sexual organs with bare hands before handling his food, and *Iwańczuk* v. *Poland* App No 25196/94, 15 November 2001, where a strip search (submission to which was a condition of voting) was accompanied by verbal abuse and derision from guards). The ECtHR did however firmly reject the Government's contention – which, surprisingly, found favour in the House of Lords – that Mrs Wainwright's failure to ask for the blinds to be pulled down militated against liability (para. [45]).

In spite of all this, at first glance *Wainwright* v. *United Kingdom* has little practical impact on English domestic law – Article 8 was incorporated into English law before *Wainwright* v. *Home Office* was heard meaning that the particular problem identified by the ECtHR has been rectified. However, the decision is a reminder that the Convention right to respect for private life includes protection from unwanted touching and intimate observation and that Article 8 of the

HRA right should be interpreted accordingly. It also reminds us that the United Kingdom's positive obligations (to protect citizens from others' interferences with their Convention rights) extend beyond the protection of private information and hence beyond the scope of the developing breach of confidence action. Extension of the privacy interest (either through legislation or the development of an intrusion tort) will therefore be necessary if the United Kingdom is to avoid further litigation in Strasbourg.

Wainwright v. *United Kingdom* also calls into question Lord Hoffmann's *obiter* suggestion that the officers did not breach Article 8 because they did not "act intentionally". With respect, this is welcome. The officers can be readily distinguished from the actor in Lord Hoffmann's example who *accidentally* exposed someone by walking into the wrong hotel bedroom – it was not in dispute that the officers fully intended the Wainwrights to strip as they did, nor that their only inadvertence related to the breach of the prison rules. If an inadvertent breach of the rules were to render the entire search "negligent" or "accidental" then the state could only be liable for Convention breaches if its officers intended, not only to do what they did, but also to exceed their authority. Such an approach is surely too restrictive. *Wainwright* v. *United Kingdom* suggests that the ECtHR thinks so and that those authorised to make limited intrusions into people's private lives will therefore have to be mindful of both the rules and article 8 in the future.

N. A. MOREHAM

THE AGEING MODEL OF INDIRECT DISCRIMINATION

THE case law on indirect discrimination is in a "lamentable state of complexity and obfuscation" (per Mummery L.J. in *Rutherford (No.2)* v. *Secretary of State for Trade and Industry* [2004] I.R.L.R. 892). On appeal, the House of Lords' decision ([2006] UKHL 19, [2006] I.R.L.R. 551) offered little clarification.

Rutherford was dismissed on the grounds of redundancy but, at 67, could not claim unfair dismissal/redundancy because the Employment Rights Act 1996 prevented employees who had reached the age of 65 from bringing a claim. This statutory bar was, he argued, indirectly discriminatory against men on the grounds of *sex* contrary to Article 141 EC on equal pay. He could not argue age discrimination - which this case more naturally concerned - because the prohibition against age discrimination, introduced by Directive 2000/78, had not come into force at the time of the dismissal. The House of Lords rejected