HOUSE OF LORDS SESSION 2007–08

[2007] UKHL 52

on appeal from: [2006] EWCA Civ 817

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Countryside Alliance and others and others (Appellants)) *v* Her Majesty's Attorney General and another (Respondents)
R (on the application of Countryside Alliance and others (Appellants) and others) *v* Her Majesty's Attorney General and another (Respondents)
(Conjoined Appeals)

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

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LORD BINGHAM OF CORNHILL

My Lords,

1. Fox-hunting in this country is an emotive and divisive subject. For some it is an activity deeply embedded in the tradition, life and culture of the countryside, richly portrayed in art and literature, a highly cherished, skilful, healthy and useful form of communal outdoor exercise. Others find the pursuit of a small animal across the countryside until it is caught and destroyed by hounds to be abhorrent. Both these deeply held views were fully expressed in the discussions and debates which preceded the enactment of the Hunting Act 2004. The House of Lords in its legislative capacity was much involved in these discussions and debates, and the Act became law without its consent. But this appeal comes before the House in its judicial capacity. Our task is to decide the legal issues which have to be decided. We must perform that task without reference to whatever personal views or sympathies individual members of the committee may entertain. These are irrelevant to the legal judgment we are called upon to make.

2. The issue in these appeals is whether the prohibition of hunting wild mammals with dogs and of hare coursing imposed by the Hunting Act 2004 is incompatible with the European Convention on Human Rights or inconsistent with the Treaty establishing the European Community.

3. The first group of claimants, headed by the Countryside Alliance, contend that the Act infringes their rights under articles 8, 11 and 14 of and article 1 of the First Protocol to the European Convention, all of them provisions to which domestic courts are required to give effect by the Human Rights Act 1998. These claimants have conveniently been called the human rights, or HR, claimants.

4. The second group of claimants, headed by Mr Derwin, contend that the Act is inconsistent with articles 28 and 49 of the EC Treaty, and is accordingly invalid. They have conveniently been called the EC claimants.

5. The HR claimants' contentions apply to the hunting of foxes, deer and mink and the hunting (and coursing) of hares. The EC claimants' contentions apply to the hunting of foxes. Fox-hunting, even for the HR claimants, has been the main focus of argument and evidence, no doubt because of its much greater scale and prominence as compared with the other sports, and can best be used to test the strength of the HR claimants' submissions in the first instance, as well as those of the EC claimants.

6. The Attorney General and the Secretary of State for the Environment, Food and Rural Affairs, supported by the Royal Society for the Prevention of Cruelty to Animals as interveners, contend that the 2004 Act is not incompatible with the European Convention or the EC Treaty. They prevailed before the Queen's Bench Divisional Court (May LJ and Moses J: [2005] EWHC 1677 (Admin); [2006] EuLR 178) and also, on very similar but not identical grounds, before the Court of Appeal (Sir Anthony Clarke MR, Brooke and Buxton LJJ: [2006] EWCA Civ 817, [2007] QB 305). The claimants now challenge this judgment of the Court of Appeal. Both the courts below gave very full and helpful judgments, to which reference must be made for a more complete account of the background to these appeals than is given here.

7. The Divisional Court gave a succinct summary of the effect of the Act in paragraphs 5-10 of its judgment, which the Court of Appeal reproduced in paragraph 5 of its judgment. Further repetition is unnecessary. The Act makes it a criminal offence, punishable by a fine of up to £5000, to hunt a wild mammal with a dog or help another to do so, unless the hunting is exempt, or to participate in hare coursing. Conviction may lead to the forfeiture of any dog, vehicle or other article used for the purpose of prohibited hunting. Certain activities are exempt

from the statutory prohibition, including (in specified circumstances) the hunting of rats and rabbits, falconry, the retrieval of hares which have been shot and the stalking of a wild mammal or flushing it out of cover. A single dog may be used below ground to protect game birds for shooting. There is a further exemption for the hunting of a wild mammal with up to two dogs if the hunter reasonably believes that the mammal is or may be injured.

8. The Divisional Court recounted the parliamentary history of what eventually became the 2004 Act in paragraphs 12-21 of its judgment, which the Court of Appeal (with some addition) reproduced (paragraph 6). This account need not be further repeated. The salient points are these. The government had committed itself to a free vote on the banning of hunting. Measures introduced by private members failed for lack of time. In 1999 a committee chaired by Lord Burns was appointed to inquire into the practical aspects of hunting and the likely consequences of any ban. The committee reported in 2000, and its report (not seeking to address the ethical aspects of the subject) informed the subsequent debate. The Court of Appeal included excerpts of the report's summary and conclusions in Appendix II to its judgment. A bill was introduced in December 2000, but was lost in the following year on the calling of a general election. After the election the proposal was revived, and public hearings were held by the responsible minister, Mr Alun Michael MP, at Portcullis House. In December 2002 the government introduced the Hunting Bill 2002, known as "the Michael Bill". This prohibited the hunting of deer and hare coursing. But it permitted the hunting of foxes and mink with a dog if (but only if) the hunting was either exempt or registered. The grounds of exemption very largely foreshadowed those later enacted in the 2004 Act. Registration depended on satisfying a registrar that two conditions were satisfied: first, that the hunting was likely to make a significant contribution to the prevention or reduction of serious damage which the wild mammal to be hunted would otherwise cause to livestock, game birds, crops, growing timber or other property; second, that this result could not reasonably be expected to be made in a manner likely to cause significantly less pain, suffering or distress to the wild mammals to be hunted. This proposal proved acceptable to neither House of Parliament. In the Commons the Michael Bill was heavily amended, so as to substitute what is now the 2004 Act. It was rejected by the House of Lords. After prolonged debate and amid much controversy the 2004 Act received the royal assent, without the approval of the House of Lords, pursuant to the Parliament Acts 1911-1949.

The HR claims

9. The Divisional Court gave particulars of the individual HR claimants in paragraphs 32-41 of its judgment, reproduced by the Court of Appeal in Appendix 1 to its judgment. Its summary need not be repeated. The HR claimants fall into two broad groups. The first is composed of people professionally involved in hunting or hare coursing or activities closely related to these, dependent on the sport for their occupation, livelihood and continuing business (a professional huntsman of staghounds, the owner and manager of a livery business, a professional terrier man, a self-employed farrier, a trainer of hare coursing greyhounds). The second group comprises landowners and tenant farmers, masters of hunts and of a beagle pack, active participants in hunting who permit hunting across their land and, in one case, manage their land specifically for hunting. Common to some members of both groups is a strong psychological and social commitment to hunting as a traditional rural activity involving the individual, the family and the community more deeply than any ordinary recreation. The Divisional Court found (paragraph 135) and the Court of Appeal accepted (paragraph 38) that there are those for whom hunting is a core part of their lives.

10. The HR claimants relied, first, on article 8 of the Convention ("Right to respect for private and family life") which 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."

The content of this right has been described as "elusive" and does not lend itself to exhaustive definition. This may help to explain why the right is expressed as one to respect, as contrasted with the more categorical language used in other articles. But the purpose of the article is in my view clear. It is to protect the individual against intrusion by

agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose.

11. The HR claimants helpfully presented their article 8 case under four headings. The first was "private life and autonomy". The authorities principally relied on were *Pretty v United Kingdom* (2002) 35 EHRR 1, *PG and JH v United Kingdom* (Reports of Judgments and Decisions 2001-IX, p 195), *Peck v United Kingdom* (2003) 36 EHRR 719 and *Brüggemann and Scheuten v Germany* (1977) 3 EHRR 244. From the court's judgment in *Pretty* the claimants drew recognition (para 61) that "private life" is a broad term, not susceptible to exhaustive definition, but covering the physical and psychological integrity of a person, sometimes embracing aspects of an individual's physical and social identity, protecting a right to personal development and the right to establish relations with others in the outside world, and extending to matters within (paras 61, 62) the personal and private sphere. The court held the notion of personal autonomy to be an important principle. The court was not prepared to exclude the possibility (para 67) that denial of a right to procure her own death was an interference with the applicant's right to respect for private life. In *PG and JH* the court accepted (para 57) that a person's reasonable expectations as to privacy may be a significant, if not conclusive, factor. In *Peck* the court repeated (para 57) that article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world, potentially including activities of a professional or business nature. In *Brüggemann*, a 1977 decision of the Commission, reference was made (para 55) to private life as embracing a sphere within which the individual can freely pursue the development and fulfilment of his personality, but it was recognised (para 56) that not all laws having some immediate or remote effect on the individual's possibility of developing his personality by doing what he wants to do constitute an interference with the individual's private life within the meaning of the Convention.

12. The second heading advanced by the HR claimants under article 8 pertained to cultural lifestyle. They relied particularly on *G and E v Norway* (1983) 35 DR 30, which concerned Lapps working as reindeer shepherds, fishermen and hunters living and working in the far north of Norway, and *Buckley v United Kingdom* (1996) 23 EHRR 101 and *Chapman v United Kingdom* (2001) 33 EHRR 399 which concerned gipsies seeking to live in their caravans.

13. The HR claimants' third heading related to use of the home. They relied on the Commission's ruling in *Buckley* (p 115, para 63) that "home" in article 8 is an autonomous concept and on the Court's ruling in *Niemietz v Germany* (1992) 16 EHRR 97, paras 29 and 30, that the concept may extend to business premises and a professional person's office. Reference was made to the Court of Appeal's decision in *Sheffield City Council v Smart* [2002] EWCA Civ 4, [2002] LGR 467 and the decisions of the House in *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, and *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465.

14. The fourth heading advanced on was "loss of livelihood/home", and the authority mainly, and strongly, relied on was *Sidabras and Džiautas v Lithuania* (2004) 42 EHRR 104. This case concerned two men who had, some years before, been employed as KGB officers within the meaning of a 1998 statute. As a result they were dismissed from their jobs, were debarred from a very wide range of public and private sector employments and complained that they suffered constant embarrassment as a result of being publicly branded as former KGB officers. The court found (para 47) that a far-reaching ban on taking up private sector employment did affect private life. It did not rule on whether article 8 had been infringed (para 63), but found a breach of article 14 of the Convention (para 62) in conjunction with article 8.

15. Despite the careful argument of Mr Gordon QC for the HR claimants, I am not persuaded that their claims can be brought within the scope of article 8 under any of the four heads relied on:

(1) Fox-hunting is a very public activity, carried out in daylight with considerable colour and noise, often attracting the attention of on-lookers attracted by the spectacle. No analogy can be drawn with the very personal and private concerns at issue in *Brüggemann* and *Pretty*, nor with the interception of private telephone conversations (admitted to be an interference within article 8) in *PG and JH*, nor with the disclosure in *Peck* of closed circuit television pictures of the complainant preparing to commit suicide. It is not of course to be expected that there will be a decided case based on facts indistinguishable from those of the case in issue, but none of the decided cases is at all close. With their references to notions of privacy, personal autonomy and choice and the private sphere reserved to the individual, they are in my opinion so remote from the present case as to give no guidance helpful to the claimants.

(2) The Lapps in *G and E* and the gipsies in *Buckley* and *Chapman* belonged to distinctive groups, each with a traditional culture and lifestyle so fundamental as to form part of its identity. The hunting fraternity (in which I include the HR claimants and the many others dedicated to the sport of hunting) cannot plausibly be portrayed in such a way. The social and occupational diversity of this fraternity, often relied on as one of its strengths, leaves no room for such an analogy.

(3) "Home" has been accepted as an expression with an autonomous Convention meaning, and *Niemietz* shows that the expression can cover premises other than the place where a person lays his or her head at night. But it is one thing to recognise that the meaning of "home" should not be too strictly defined or circumscribed, and quite another to suggest that the expression can cover land over which the owner permits or causes a sport to be conducted and which would never, in any ordinary usage, be described as "home": see *Giacomelli v Italy* (2006) 45 EHRR 871, para 76. Some of the HR claimants complain of a threat to their continued occupation of the houses in which they live, and this of course brings them much closer to a complaint under article 8. But it is not the necessary or intended consequence of the 2004 Act that they should be put out of their homes; none of them is said to have been evicted as yet; and it may be that they never will be evicted.

(4) *Sidabras* was a very extreme case on its facts, since the statutory consequence of employment as KGB officers some years before was disbarment from employment in very many public and private employments, and the applicants complained of constant embarrassment. Effectively deprived of the ability to work, the applicants' ability to function as social beings was blighted. Such is not the lot of the HR claimants, to whom every employment is open save that of hunting wild mammals with dogs. But even on the extreme facts of *Sidabras* the court did not, as already noted, find a breach of article 8 but contented itself with finding a breach of article 14 in the ambit of article 8.

I judge the HR claimants' complaints in this case to be far removed from the values which article 8 exists to protect. But in case I am wrong in that conclusion, I shall address below the issue of justification.

16. The HR claimants relied, secondly, on article 11 of the Convention, which provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others,

including the right to form and join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

The essence of the HR claimants' case was that since the only purpose of their assembling or associating was to hunt foxes, the prohibition of such hunting effectively restricted their right to assemble and associate.

17. In advancing this argument the HR claimants relied on the Commission's observation in *Anderson v United Kingdom* (1997) 25 EHRR CD 172, 174, that "The right to freedom of assembly is one of the foundations of a democratic society and should not be interpreted restrictively", and also on the Court's observation in *Chassagnou v France* (1999) 29 EHRR 615, para 100, that

> "Freedom of thought and opinion and freedom of expression guaranteed by Articles 9 and 10 of the Convention respectively, would thus be of very limited scope if they were not accompanied by a guarantee of being able to share one's beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests."

Attention was also drawn to *Segerstedt-Wiberg and others v Sweden* (App no 62332/00, 6 June 2006, unreported). In that case the applicants successfully complained that information about them stored on a Secret Police register was an interference with their private life contrary to article 8. The Government argued (para 106) that the applicants' suspicions that the police were holding information on them did not appear to have had any impact on their opportunities to exercise their article 11 rights and the Court found that (para 107) the applicants had

adduced no specific evidence enabling the Court to assess how such registration in the concrete circumstances could have hindered the exercise of their rights under articles 10 and 11. But the Court concluded (para 107), without giving reasons, that the storage of personal opinions which was not justified under article 8(2) ipso facto constituted an unjustified interference with rights protected by articles 10 and 11. This would be an obvious conclusion if there were evidence that knowledge of the police practice deterred the applicants from assembling or expressing opinions, but it is puzzling in the absence of such evidence.

18. The Court of Appeal (para 107), in agreement with the Divisional Court (para 82) and Lord Brodie in *Whaley v Lord Advocate* 2004 SC 78, para 80, rejected the HR claimants' complaint under this head, holding that the effect of the hunting bans in England and Scotland respectively was not to prohibit the assembly of the hunt but to prohibit a particular activity once the claimants had assembled. This is so, but I question whether it is a sufficient answer. A right to assemble and protest is of little value if one is free to assemble but not, having done so, to protest. If people only assemble to act in a certain way and that activity is prohibited, the effect in reality is to restrict their right to assemble. I would not be content to treat article 11 as inapplicable on the present facts.

19. The HR claimants relied on article 1 of the first protocol to the Convention ("Protection of Property") which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

20. I do not think that the effect of the 2004 Act is to deprive any of the HR claimants of his or her possessions. This is not a confiscatory measure. But it seems to me indisputable that certain of the claimants have suffered a loss of control over their possessions: there are, for

instance, on the largely unchallenged evidence, landowners who cannot hunt over their own land or permit others to do so, those who cannot use their horses and hounds to hunt, the farrier who cannot use his equipment to shoe horses to be used for hunting, owners of businesses which have lost their marketable goodwill, a shareholder whose shares have lost their value, and so on.

21. Strasbourg jurisprudence has drawn a distinction between goodwill which may be a possession for purposes of article 1 of the first protocol and future income, not yet earned and to which no enforceable claim exists, which may not: see, for instance, *Ian Edgar (Liverpool) Ltd v United Kingdom* Reports of Judgments and Decisions 2000-I, p 465; *Wendenburg v Germany* (2003) 36 EHRR CD 154, 169. Thus in *Tre Traktörer AB v Sweden* (1989) 13 EHRR 309 revocation of a restaurant's licence to sell alcohol had adverse effects on the value and goodwill of the restaurant and so was held to be a possession because an economic interest connected with running the restaurant. The distinction was less clearly applied in *Karni v Sweden* (1988) 55 DR 157 where a doctor's vested interest in his medical practice was regarded as a possession, *Van Marle v Netherlands* (1986) 8 EHRR 483 where an accountant's clientele was held to be an asset and hence a possession, and *Wendenburg*, above, at CD 170, where the same rule was applied to law practices: in these cases no finding was made that the assets were saleable, although this may have been assumed. In *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, [2007] 1 WLR 2092, the Court of Appeal held that the inclusion of Dr Malik's name on a list of those qualified to work locally for the NHS was in effect a licence to render services to the public and, being non-transferable and non-marketable, not a possession for purposes of article 1. While I do not find the jurisprudence on this subject very clear, I consider that the Court of Appeal reached a correct conclusion in that case basing itself as it did on the very convincing analysis of Mr Kenneth Parker QC in *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792, [2007] 1 WLR 2067, paras 70-76.

22. Since this article is in my opinion clearly applicable to the complaints of certain of the HR claimants, it is necessary to consider whether the interference imposed by the Act is justifiable, an issue addressed below.

23. Article 14, on which, lastly, the HR claimants relied, provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

As the language of this article makes clear, and as has often been held, this is not a free-standing provision. But nor does it require that any other article should be shown to have been violated. It is enough that there should have been discrimination on a proscribed ground within the ambit of another article of the Convention. The HR claimants say that they are subject to adverse treatment as compared with those who do not wish to hunt and are in no way involved in hunting. This, they say, is on the ground of their "other status".

24. The expression "other status" is plainly incapable of precise definition. The Strasbourg court in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 56, spoke of "discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other". The House adopted this test in *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1WLR 2196, para 48, and again in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484, paras 27-28, and imprecise though it is it may be hard to formulate any test which is more precise. In the present case, assuming in the HR claimants' favour that they are the subject of adverse treatment as compared with those who do not hunt and are in no way involved in hunting, and assuming further that their complaints fall within the ambit of one or more articles of the Convention, I cannot link this treatment to any personal characteristic of any of the claimants or anything which could meaningfully be described as "status".

The EC claims

25. The Divisional Court gave particulars of the individual EC claimants in paragraphs 43-52 of its judgment, also reproduced by the Court of Appeal in its Appendix I. They include Irish breeders of and dealers in hunters and greyhounds which they formerly sold into the English market; providers in this country of hiring and livery services and hunting-based holidays for customers visiting from other EU member states and elsewhere; visitors from other EU member states

coming to this country to hunt and keeping or hiring hunters here for the purpose; and English dealers buying hunters in Ireland and selling on to English and other EU customers. The evidence of those in business is that the Act has had a very severe adverse effect. The evidence of the foreign visitors is that they will no longer come to this country to hunt if the ban remains in force.

26. The EC claimants relied, first, on article 28 (formerly 30) of the EC Treaty. This provides:

> "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

This article can readily be recognised as laying down a fundamental condition of the common market which the Treaty of Rome sought to establish, since if member states were free to introduce or maintain national measures which, whether by design or not, protected their own products and impeded the entry of goods from other member states, the free movement of goods between member states would be to that extent impeded.

27. No doubt because of its fundamental importance, article 28 was generously interpreted by the European Court of Justice. In Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837, 852, para 5, the court laid down what has since been accepted as the governing principle:

> "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."

This principle was applied in later cases. But the court came to appreciate that, taken entirely literally, the principle was being applied to cases to which it should not be applied. So in Joined Cases C-267/91 and C-268/91 *Bernard Keck and Daniel Mithouard* [1993] ECR I–6097, 6131, paras 14-17, the court modified its earlier ruling:

"14 In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.

15 It is established by the case-law beginning with 'Cassis de Dijon' (Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

16 By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

17 Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty."

28. The distinction between product rules and selling arrangements has been explored in a number of later cases to which the House was referred, among them Case C-12/00 *Commission of the European Communities v Kingdom of Spain* [2003] ECR 1-459 and Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR 1-3025.

29. The EC claimants contended that the ban on hunting imposed by the 2004 Act impeded the free movement of goods from Ireland to the UK and was not a selling arrangement within the *Keck* exception. That the impediment is minor is irrelevant, there being (as is accepted) no *de minimis* principle in this aspect of Community law. Therefore the ban fell within the *Dassonville* prohibition.

30. I would for my part accept that the ban on hunting cannot be characterised as pertaining to selling arrangements. But I have difficulty in recognising it as a trading rule or a product rule either. The same could have been said, however, of the provisions considered in Case C-67/97 *Ditlev Bluhme* [1998] ECR I-8033 and Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs – GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I – 9609, or that discussed by the advocate-general in Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* (14 December 2006), yet in these cases article 28 was held to apply or to be potentially applicable.

31. Both the Divisional Court (para 228) and the Court of Appeal (para 146) reached the clear conclusion that the 2004 Act does not engage article 28 of the EC Treaty. I would incline to the same conclusion, for the detailed reasons which those courts respectively gave. But I find it hard to say, on the present state of the ECJ authorities as I understand them, that this conclusion is clear beyond the bounds of reasonable argument. If, therefore, it is necessary to decide this question to enable the House to give judgment, I would regard it as incumbent on the House, as the final domestic court of appeal, to seek a definitive ruling from the ECJ.

32. The EC claimants relied, secondly, to article 49 (formerly 59) of the EC Treaty which, so far as relevant, provides:

> "Within the framework of the provisions set out below, restrictions on freedom to provide services within the

> Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

This provision, it was contended, plainly applied, since some of the EC claimants are restricted in their freedom to provide services for nationals of other EU states. There is, again, no *de minimis* exception. And whatever doubt might attach to article 28, there was no room for doubt here, since in relation to services there is no *Keck* exception.

33. The principle on which the EC claimants relied was that stated by the ECJ in Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-1795, 1828, paras 37-39:

> "37 In that regard, as the Court has frequently held, the right to provide services may be relied on by an undertaking as against the Member State in which it is established if the services are provided to persons established in another Member State (see, in particular, Case C-18/93 *Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, paragraph 30, and Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 30).
>
> 38 That is particularly so where, as in the case before the referring court, the legislation of a Member State restricts the right of press undertakings established in the territory of that Member State to offer advertising space in their publications to potential advertisers established in other Member States.
>
> 39 A measure such as the prohibition on advertising at issue in the proceedings before that court, even if it is non-discriminatory, has a particular effect on the cross-border supply of advertising space, given the international nature of the advertising market in the category of products to which the prohibition relates, and thereby constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty (see, in that regard, *Alpine Investments*, cited above, paragraph 35)."

Similar rulings are to be found in other authorities cited to the House, among them Case C-224/97 *Erich Ciola v Land Vorarlberg* [1999] ECR I-2517, 2535, para 11; and Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, 6318, [2003] QB 416, 439, para 29.

34. The Divisional Court, for reasons which it gave in paragraphs 231-243 of its judgment, held that the hunting ban did engage article 49. The Court of Appeal (paras 147-157) differed. But it considered (para 157) that the jurisprudence leading to this conclusion was not entirely clear, and considered that a reference under article 234 might be called for if it were not of the clear opinion that the ban on hunting could be justified in Community terms.

35. I would for my part incline to share the view of the Divisional Court, strange though I find this result in the case of a measure not directed to the regulation of any form of commercial activity and wholly non-discriminatory, since bearing more hardly on people and undertakings in this country than on people and undertakings elsewhere. But I do not regard the matter as acte clair and would think it necessary to refer if resolution of this question were necessary to the decision of the House.

Justification and proportionality

36. In paragraph 47 of its opinion in *Adams v Scottish Ministers* 2004 SC 665, the Inner House of the Court of Session said, with reference to the Scottish Parliament's moral judgment expressed in the Protection of Wild Mammals (Scotland) Act 2002,

> "The starting point on this issue, in our opinion, is that the prevention of cruelty to animals has for over a century fallen within the constitutional responsibility of the legislature. The enactment of every statute on the subject has necessarily involved the making of a moral judgment. In our view, the 2002 Act should be seen as a further step in a long legislative sequence in which animal welfare has on numerous occasions been promoted by legislation related to contemporary needs and problems."

This succinct statement is, as I respectfully think, entirely correct.

37. As recounted in *Animal Welfare in Britain: Regulation and Responsibility*, (M Radford, 2001, chapter 3), parliamentary efforts to protect the welfare of animals began in 1800 with a measure seeking to prohibit bull-baiting. These attempts were unsuccessful, *The Times* applauding the rejection of the first bill in 1800 (see Radford, p 34):

> "It should be written in letters of gold that a Government cannot interfere too little with the people; that laws, even good ones, cannot be multiplied with impunity; and that whatever meddles with the private personal disposition of a man's time or property is tyranny."

But the tide of opinion gradually changed. Martin's Act, "to prevent the cruel and improper treatment of cattle" (expressed to include horses and sheep), was passed in 1822. The Society for the Prevention of Cruelty to Animals, founded in 1824 to secure "the mitigation of animal suffering, and the promotion and expansion of the practice of humanity towards the inferior classes of animated beings" (see Radford, p 41), added "Royal" to its name, by permission of Queen Victoria, in 1840. Measures to protect the welfare of animals and prevent the causing of suffering to them were enacted in 1833, 1835, 1837, 1844, 1849, 1850, 1854 1876 and 1894. In 1900 the Wild Animals in Captivity Protection Act was passed. It applied to any confined bird, beast, fish or reptile not included in the 1849 and 1854 Acts, and made it an offence wantonly or unreasonably to cause or permit any unnecessary suffering or cruelty to any of these creatures or to abuse, infuriate, tease or terrify it. By section 4, insisted upon, it is said (Radford, p 85), by the House of Lords, the Act was not to apply to the hunting or coursing of any animal which had not been liberated in a mutilated or injured state in order to facilitate its capture or destruction. During the twentieth century the stream of legislation continued, with statutes directed to the welfare, protection and preservation of animals passed in (among other years) 1909, 1911, 1912, 1921, 1925, 1927, 1928, 1933, 1949, 1951, 1952, 1954, 1962, 1973, 1981, 1986, 1987, 1988, 1991, 1992, 1993 and 1996. The familiar suggestion that the British mind more about their animals than their children does not lack a certain foundation of fact. Whatever one's view of the 2004 Act, it must be seen as the latest link in a long chain of statutes devoted to what was seen as social reform. It may be doubted if any country has done more than this to try and prevent the causing of unnecessary suffering to animals.

38. The controversy surrounding the 2004 Act was protracted and remains acute. But it cannot be too clearly stated that it is not and never has been a contest between those who oppose cruelty to animals and those who support it. These appellants have not sought to impugn the motives of the proponents and supporters of the Act, who must therefore be taken to believe that fox-hunting in its traditional form causes a degree of suffering to the fox which should not be permitted as a recreational activity. The Attorney General for her part has not suggested, and could not suggest, that the appellants and those who support fox-hunting are in any way tolerant or unmindful of cruelty to animals. They include very many people imbued (unlike many of their urban critics) with a deep knowledge and love of the countryside and the natural world, who would shrink from any act of what they saw as cruelty. But they believe that foxes are a pest; that the fox population must be regularly culled; and that hunting is a more humane means of destruction than the alternatives. They contrast the quick and certain death of a fox caught by hounds with the suffering of a fox which is wounded but not killed by shooting; with the death by starvation of cubs whose mother is shot, there being no close season for shooting as for hunting; and with the slow torture of a fox caught in a snare and not dispatched or released.

39. Certain facts pertinent to the issues we have to decide may, I think, be taken as agreed or not effectively disputed in these proceedings:

(1) The fox population in England and Wales is about 217,000. It doubles during the breeding season and reverts to its starting level as a result of natural and unnatural causes, many foxes being killed on the road (Divisional Court judgment, para 24; Court of Appeal judgment, para 7).

(2) Foxes are a pest and the fox population has to be culled (Court of Appeal judgment, para 23).

(3) Traditional means of culling have included hunting with hounds, shooting and snaring.

(4) In the period before the 2004 Act, some 21,000-25,000 foxes were killed by hunting each year (roughly 10% of those who died from all causes), up to 11,000 of these being dug out by terriers (Divisional Court judgment, para 24; Court of Appeal judgment, para 7).

(5) Of those foxes which are not killed each year by hunting or on the road, the great majority, perhaps 80,000, are shot. Even in upland Wales, more foxes are culled by shooting than by hunting (Divisional Court judgment, para 24; Court of Appeal judgment, para 7).

(6) The most humane way of killing a fox is by a well-directed shot from a suitable weapon at an appropriate range. By "humane" in this context is meant that death is inflicted in a way that causes minimum suffering to the fox.

(7) If a fox is shot, and is wounded but not killed, and is permitted to escape, it may very well endure suffering.

(8) If a fox is snared, and is not promptly killed or released, it may very well suffer.

(9) No scientific evaluation has been made of the psychological and physiological effects on a fox of its being pursued by a pack of hounds over what may be a considerable distance and for what may be a considerable period of time before it is caught and killed (if it is) by the hounds. But this process compromises the welfare of the fox and probably falls short of standards we would expect for humane killing (Burns Report, paras 6.49, 6.52; Lord Burns, Hansard HL Debates, 12 March 2001, col 533).

(10) A fox which is caught by a pack of hounds will not be wounded and escape but will be quickly, if not necessarily instantaneously, destroyed (Burns Report, para 6.49).

40. There has been much argument in the House and below about the aim of the legislature in enacting the 2004 Act. The Divisional Court set out its conclusion in paragraph 339 of its judgment, which the Court of Appeal fully accepted (para 56) and which calls for repetition:

> "339 We discern from evidence admissible on the principles in *Wilson* that the legislative aim of the Hunting Act is a composite one of preventing or reducing unnecessary suffering to wild mammals, overlaid by a moral viewpoint that causing suffering to animals for sport is unethical and should, so far as is practical and proportionate, be stopped. The evidential derivation for this legitimate aim comprises the terms of the legislation and the admissible contextual background. This background includes the Burns Report, the Portcullis House hearings, the ministerial basis for and the terms of the original Michael Bill, the obvious inference that the majority of the House of Commons considered the original Michael Bill inadequate, and the well-known opposing points of view in the prolonged and much publicised hunting controversy."

Plainly, as I think, the Divisional Court was entitled to have regard to the materials listed, for the reasons it gave at greater length in paragraph 269 of its judgment, and its approach was not challenged, save (by the Attorney General) to suggest that it could have taken account of other parliamentary materials. I consider that the courts below accurately expressed the rationale of the Act. The appellants did not accept this. They pointed out, correctly, that this rationale was nowhere expressed in the Act, that this did not reflect the government's intention in introducing the bill and that virtually no parliamentary statement expressed the rationale in this way. But, as the Divisional Court recorded in paragraph 12 of its judgment, endorsed by the Court of Appeal in paragraph 6, the Labour Party in 1997 had advocated new measures to promote animal welfare, including a free vote in Parliament on whether hunting with hounds should be banned. So concern for animal welfare was the mainspring of the legislation. It was originally proposed by the government, in the Michael Bill, to achieve that end by prohibiting deer hunting and hare coursing but permitting fox, hare and mink hunting subject to regulation according to the principles of utility and least suffering already noted. But the latter proposal, although enjoying a measure of support in the House of Lords, was plainly unacceptable to a majority in the House of Commons, who did not feel that it went far enough. Why not? I do not think the appellants proffered any answer to this question. The only answer can, I think, be that it was felt to be morally offensive to inflict suffering on foxes (and hares and mink) by way of sport.

41. The appellants resist this conclusion by pointing out, again correctly, that the Act is very selective: while prohibiting hunting of foxes, deer, hares and mink it permits the hunting of rabbits and rats, is protective of game birds reared for shooting, and does not extend to shooting, fishing or falconry. This selectiveness is relied on as showing that the rationale of the Act cannot be that found by the courts below, for if it were consistency would have required a more far-reaching measure. This is a traditional argument. Thomas Erskine's unsuccessful Cruelty to Animals Bill of 1809 was attacked by its principal opponent on the ground (see Radford, p 37) that if Parliament were to pass legislation which imposed a punishment for cruelty, while "we continued to practise and to reserve in great measure to ourselves the sports of hunting, shooting, and fishing, we must exhibit ourselves as the most hardened and unblushing hypocrites that ever shocked the feelings of mankind". For nearly two hundred years, the legislative practice in this field has been to address whatever seemed at any given time to the current parliamentary majority to be the most pressing problem. It seems to me clear that this Act was based upon a moral principle, whether one agrees with that principle or not, and I do not think that doubt can be

thrown on the rationale of the Act, as expressed by the courts below, by showing that the underlying principle, if carried to its logical extremes, would have justified a much more far-reaching measure.

42. The real crux of the appellants' argument is that the prohibition of hunting is not shown to reduce the overall level of suffering endured by foxes as compared with the situation which pertained before the Act. This argument does not of course touch the great majority of foxes comprised within the annual cull which before the Act were either run over on the roads or shot. It concerns the minority of foxes, roughly 10%, which were either pursued or dug out and killed in the course of hunting, and within that minority those which will now, through inexpert shooting, endure a more painful death. I do not for my part think that it is possible to construct any precise calculus of relative suffering. Even if more scientific evidence were available I question if this could be done. There is, however, a body of reputable professional opinion which accepts that the pursuit and digging out of foxes, and their killing by hounds, imposes a degree of suffering. This accords with common sense. To suppose that the contrary is generally true strains one's credulity to breaking point. The degree of suffering is, I think, unknowable. Unknowable also is the future incidence, in a society increasingly sensitive to animal suffering, of foxes wounded by inexpert shooting and left to die. The exemption in the Act which permits the hunting and destruction by two hounds of wounded foxes is clearly designed to reduce this risk, as is the Secretary of State's approval of a code of shooting practice intended to encourage effective shooting and so reduce wounding rates. There are detailed statutory provisions governing, for example, the use of snares: see Wildlife and Countryside Act 1981, s 11. Into the calculation must further be injected the element of moral judgment already repeatedly mentioned: there are many people who would accept such minimum suffering as is inherent in the properly conducted humane slaughter of animals for human consumption but would not accept the infliction of any suffering by way of sport.

43. As is evident from the terms of articles 8 and 11 of the Convention (cited in paras 10 and 16 above respectively) what would otherwise be impermissible interferences with protected rights may be justified if three conditions are met. The first of these, that the interference should be "in accordance with the law" or "prescribed by law" is clearly met, since it is the law of which the HR claimants complain.

44. The second condition is that the interference for which the law provides should be directed towards one or more of the objects or aims specified in the second paragraph of the respective articles. Relevant in each of these cases is "for the protection of…morals". This was in my opinion the aim of this Act, since the majority judged that the hunting of wild mammals (with the exceptions already noted) and the coursing of hares by greyhounds was morally objectionable and moral ends would be served by bringing the practice to an end. This does not fall outside the aims permitted under these articles.

45. The third condition is that the interference in question is necessary in a democratic society, raising the familiar questions whether there is a pressing social need for it and whether it is proportionate to the legitimate aim pursued. There are of course many in England and Wales who do not consider that there is a pressing (or any) social need for the ban imposed by the Act. But after intense debate a majority of the country's democratically-elected representatives decided otherwise. It is of course true that the existence of duly enacted legislation does not conclude the issue. In *Dudgeon v United Kingdom* (1981) 4 EHRR 149 and *Norris v Ireland* (1988) 13 EHRR 186 legislation criminalising homosexual relations between adult males was found to be an unjustifiable interference with the applicants' rights under article 8. But the legislation under attack had been enacted in each case in 1861 and 1885 and was not enforced in either Northern Ireland or Ireland. During the intervening century moral perceptions had changed. Here we are dealing with a law which is very recent and must (unless and until reversed) be taken to reflect the conscience of a majority of the nation. The degree of respect to be shown to the considered judgment of a democratic assembly will vary according to the subject matter and the circumstances. But the present case seems to me pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.

46. If, as has been held, the object of the Act was to eliminate (subject to the specified exceptions) the hunting and killing of wild animals by way of sport, no less far-reaching measure could have achieved that end. As already noted, the underlying rationale could have been relied on to justify a more comprehensive ban. The Michael Bill was rejected because it did not go far enough. I am of the opinion that the 2004 Act is proportionate to the end it sought to achieve.

47. Article 1 of the first protocol, as noted above (para 19), is not to impair in any way the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. The 2004 Act is a law to control the use of property. It is, in the first instance, for Parliament to decide what laws are necessary in accordance with what it judges to be the general interest. It has decided that the 2004 Act is necessary in accordance with the general interest. As already pointed out, Parliament's judgment is not immune from challenge. The national courts in the first instance, and ultimately the Strasbourg court, have a power and a duty to measure national legislation against Convention standards. But for reasons already given, respect should be paid to the recent and closely-considered judgment of a democratic assembly, and no ground is shown for disturbing that judgment in this instance.

48. Article 28 of the EC Treaty is qualified by article 30 which, so far as relevant, provides:

> "The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants …Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

Article 46, applicable to article 49 by virtue of article 55, provides so far as relevant:

> "The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

Common to both provisions is the possibility of justifying an impugned measure on grounds of public policy, although article 30 makes reference also to public morality and protection of the health or life of animals.

49. The test of justification under Community law is a strict one and is subject to the overall control of the ECJ. The relevant principles are conveniently set out by the court in its recent judgment in *Omega*, above, paras 28-31:

> "28 Concerning justification for the restriction of the freedom to provide services imposed by the order of 14 September 1994, Article 46 EC, which applies here by virtue of Article 55 EC, allows restrictions justified for reasons of public policy, public security or public health. In this case, the documents before the Court show that the grounds relied on by the Bonn police authority in adopting the prohibition order expressly mention the fact that the activity concerned constitutes a danger to public policy. Moreover, reference to a danger to public policy also appears in Paragraph 14(1) of the OBG NW, empowering police authorities to take necessary measures to avert that danger.
>
> 29 In these proceedings, it is undisputed that the contested order was adopted independently of any consideration linked to the nationality of the providers or recipients of the services placed under a restriction. In any event, since measures for safeguarding public policy fall within a derogation from the freedom to provide services set out in Article 46 EC, it is not necessary to verify whether those measures are applied without distinction both to national providers of services and those established in other Member States.
>
> 30 However, the possibility of a Member State relying on a derogation laid down by the Treaty does not prevent judicial review of measures applying that derogation (Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 7). In addition, the concept of 'public policy' in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, by analogy with the free movement of works, *Van Duyn*, paragraph 18; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 33). Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a

> fundamental interest of society (Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, paragraph 17).
>
> 31 The fact remains, however, that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty (*Van Duyn*, paragraph 18, and *Bouchereau*, paragraph 43)."

In paragraph 36 the court added:

> "However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures …"

50. I approach the issue of justification on the assumption that articles 28 and 49 apply, but also on the basis that the measure to be justified is a measure of social reform, not directed to the regulation of commercial activity, of which any impediment to the intra-Community provision of goods or services is a minor and unintended consequence and which bears more hardly on those within this country than outside it. In *Omega*, para 32, the German authorities considered, and the ECJ accepted (para 40), that "the exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity". Here, Parliament considered that the real killing of foxes, deer, hares and mink by way of recreation infringed a fundamental value expressed in numerous statutes and culminating in the 2004 Act. For reasons already given, I am of the clear opinion, in agreement with the Divisional Court (paras 350-351) and the Court of Appeal (para 193) that the 2004 Act is justifiable in Community law. No ruling by the ECJ is necessary to enable the House to decide this appeal.

51. No distinction is to be drawn between the hunting of foxes on the one hand and the hunting of deer, hares and mink, or the coursing of hares, on the other. My conclusions, if accepted by my noble and

learned friends, make it unnecessary to distinguish between the individual HR and EC claimants.

52. For those reasons I would dismiss both appeals. The parties are invited to make submissions on costs within 14 days.

LORD HOPE OF CRAIGHEAD

My Lords,

53. I cannot improve on my noble and learned friend Lord Bingham of Cornhill's masterly introduction to the facts of this case and his description of the historical background, which I have had the privilege of reading in draft and adopt with gratitude. I wish to concentrate on the questions of law that are before us. As my Lord points out, it is the answer to those questions that must determine whether the prohibitions in the Hunting Act 2004 are incompatible with the claimants' Convention rights or with Community law.

The HR claims

54. I agree that the claims of the HR claimants cannot be brought within the scope of article 8 of the Convention. We are not concerned in this case with personal autonomy in the sense referred to in *Pretty v United Kingdom* (2002) 35 EHRR 1, paras 61 and 66. This case is not about the choices that a person makes about his or her own body or physical identity. It is not about respect for the home as the place where a person is entitled to be free from arbitrary interference by the public authorities: see *Harrow London Borough Council v Qazi* [2004] 1 AC 983, para 50. In *Giacomelli v Italy* (2006) 45 EHRR 871, para 76, the European Court said that a home will usually be the place, the physically defined area, where private and family life develops and that the individual has a right to the quiet enjoyment of that area. But that is not what this case is about either. It is about the claimants' right to establish and develop relationships with other human beings and the outside world. But this right is protected only "to a certain degree": *Niemietz v Germany* (1992) 16 EHRR 97, para 29.

55. As the Lord Justice Clerk (Gill), delivering the opinion of the court, said in *Adams v Scottish Ministers*, 2004 SC 665, para 63, it is fallacious to argue that, because a certain activity establishes and develops relationships with others, it is on that account within the scope of private life. For many people hunting with hounds is a way of life. This is not just about how people spend their own time when they wish to be left alone. It affects how they behave with other people too. Not all activities of that kind lie outside the scope of protection. But in this case it is possible to distinguish very clearly between what is public and what is private. Hunting with hounds, by its very nature, is carried on in public and it has many social aspects to it which involve the wider community. Moreover the prohibition is directed at activities that are carried on in public, not what people who hunt do in private when they are not hunting. They lie outside the private sphere of a person's existence which is protected by article 8. Of course, it has a rich cultural tradition of its own which has been built up over many years. The customs and beliefs which are shared by those who participate in it are different from those shared by others in the population generally. But they are a minority in numerical terms only. They are not part of a recognised ethnic or national group such as the Saami people in the north of Norway to whose traditional activities article 8 extends its protection: *G and E v Norway* (1983) 35 DR 30. So it is not applicable on that ground in this case.

56. I have reached the same conclusion on the question whether their claims can be brought within article 11 of the Convention. The principles on which the right of assembly has evolved have largely been developed in the context of political demonstrations: Clayton and Tomlinson, *The Law of Human Rights* (2000), para 16.57. The two freedoms referred to in article 11 – the freedom of peaceful assembly and the freedom of association with others– may overlap, as where people assemble or move in procession in support of their right to belong to a trade union. The right to exercise these freedoms, combined with the protection to hold opinions and the freedom to express them guaranteed by article 10, is essential to the proper functioning of a modern democracy. Taken together they provide protection for persons who, without belonging to any particular association or without any previously conceived plan or purpose, assemble for the purposes of a demonstration on a matter of public interest.

57. As Lord Bingham has noted, the courts below, in agreement with the Lord Ordinary (Lord Brodie) in *Whaley v Lord Advocate*, 2004 SC 78, para 80, with whom the Inner House in its turn also agreed in *Friend v Lord Advocate* [2005] CSIH 69; 2006 SC 121, para 21, rejected the

claims on the ground that the effect of the hunting ban was not to prohibit the assembly of the hunt but to prohibit a particular activity which the hunt might engage upon once it had assembled. I agree that this is not a sufficient answer to the argument that the claimants are within the protection of article 11. In the field of public protest, for example, it would be wrong to say that the article had no application because the activity on which the participants were engaged did not begin until after they had assembled.

58. That argument having been rejected, however, the question remains whether article 11 is nevertheless engaged. But here again, as in the case of article 8, there are limits. There is a threshold that must be crossed before the article becomes applicable. The essence of the freedom of assembly that article 11 guarantees is that it is a fundamental right in a democracy and, like the right to freedom of expression, is one of the foundations of such a society: *Rassemblement Jurassien et Unité Jurassienne v Switzerland* (1979) 17 DR 93, p119. The situations to which it applies must relate to activities that are of that character, of which the right to form and join a trade union which article 11 refers to is an example. The purpose of the activity provides the key to its application. It covers meetings in private as well as in public, but it does not guarantee a right to assemble for purely social purposes. The right of assembly that the claimants seek to assert is really no more than a right to gather together for pleasure and recreation, which the Strasbourg Court, agreeing with the Commission at para 105, has held their activity to be: *Chassagnou v France* (1999) 29 EHRR 615, para 108. I agree with Lord Bingham that, where the activity which brings people together is prohibited, the effect is in reality to restrict their right to assemble. But the claimants' position is no different from that of any other people who wish to assemble with others in a public place for sporting or recreational purposes. It falls well short of the kind of assembly whose protection is fundamental to the proper functioning of a modern democracy and is, for that reason, guaranteed by article 11. No decision of the Strasbourg Court has gone that far. I would hold that this article too is not applicable.

59. As for article 14, the Grand Chamber of the Strasbourg Court has held that it complements the other substantive provisions of the Convention and the Protocols. It has no other independent existence since, according to its own terms, it has effect solely in relation to the enjoyment of the rights and freedoms guaranteed by those provisions. But it does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary, but also sufficient, for the facts of the case to fall within what has been described

as "the ambit" of one or more of the Convention articles: *Stec v United Kingdom* (2005) 41 EHRR SE 295, para 38. The Grand Chamber added this explanation in para 39:

> "The prohibition of discrimination in article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each state to guarantee. It applies also to those additional rights, falling within the scope of any Convention article, for which the state has voluntarily decided to provide."

60. As Lord Bingham of Cornhill said in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, para 13, expressions such as "ambit" are not precise and exact in their meaning. As he put it:

> "They denote a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed."

That will be so if, for example, the state, having set up an institution such as a school or other educational establishment in unilingual regions, takes discriminatory measures within the meaning of article 14 read with the right to education in article 2 of the First Protocol which are based on differences in the language of children attending these schools: see *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, para 32. *Clift's* case provides another example closer to home. It was held that a scheme which had been set up by legislation which gave the right of early release of prisoners fell within the ambit of the right to liberty in article 5 of the Convention. Differential treatment of prisoners otherwise than on the merits gave rise to a potential complaint of discrimination under article 14.

61. But to attract the protection of the article the discrimination must also be on some ground which falls within the list which the article sets out. This list is not exhaustive, but the words "or other status" at the end of the list show that it is not unlimited: *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, para 48, per Lord Steyn. It does not preclude discrimination on any ground whatever. The principle was explained in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 56, where the Strasbourg court said:

> "Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other. However, there is nothing in the contested legislation which can suggest that it envisaged such treatment."

62. The words "envisaged such treatment" in the last sentence (omitted from the quotations from this paragraph in *Clift*, paras 27 and 56) are important. They suggest that the words "personal characteristic" are sensitive to the context in which the issue arises. Something which might not strike one as a personal characteristic in the abstract may become apparent if it is the reason why the state decides to treat some people differently from other people in similar factual circumstances. It was on this part of his case that the argument broke down in *Clift's* case. He was unable to show that the length of his sentence conferred a status, or personal characteristic, on him within the meaning of the article because of which he was treated differently. But I would regard that case as lying close to the borderline.

63. The question is whether, applying these principles, the Act is incompatible with article 14. In my opinion the argument that it is fails on both points. For the reasons already given, I do not think that article 8 or article 11 is engaged. Article 14 would be if the claimants could show that their case nevertheless fell within, or was at least close to, the core of the values guaranteed by either of those articles. But this is not something that can be plucked out of the air. It must be related to a right that, as it was put in *Stec v United Kingdom* (2005) 41 EHRR SE 295, para 39, the state has decided voluntarily to provide. Having done so, it cannot limit access to that right, restrict it or take it away on grounds that would conflict with any of the core values. That however is not this case. The 2004 Act is not directed at anything that the state itself has provided or seeks to provide. Its sole purpose is to restrict an activity in which persons can engage if they wish but in which the state itself is not involved at all.

64. That is the principal reason why I would hold that the claimants' case is not within the ambit of any of the rights guaranteed by the Convention. But I would also hold that the discrimination of which they complain is not directed at them on any of the grounds mentioned in article 14. As the Lord Justice Clerk said in *Adams v Scottish Ministers*, 2004 SC 665, paras 113-114, it is the activity of hunting with hounds for

sport that has been singled out for differential treatment, not participation in it by a particular sort of people or by people having a particular characteristic. Moreover, looking at the matter from the point of view of the HR claimants as individuals, it is not on the ground of their political or other opinion or any other status that they are able to identify that this action has been taken. The real reason for it lies in the nature of the activity, not in the personal characteristics of the many people of all kinds and social backgrounds who participate in hunting.

65. For all the reasons that Lord Bingham gives, however, I agree that article 1 of Protocol 1 is clearly applicable to the complaints of some of the claimants and that for this reason it is necessary to consider whether the interference imposed by the Act can be justified and is proportionate.

The EC claims

66. The EC claimants do not suggest that the issues of Community law are capable of being resolved, without any element of doubt, in their favour. Their position is that the issues which they have raised should be referred to the European Court of Justice for a preliminary ruling under article 234(3) EC. They point out that there is an obligation on your Lordships' House, as a court from whose decisions there is no judicial remedy, to refer any question of Community law which it is necessary to decide which is not *acte clair*: Case C-283/81 *CILFIT v Ministero della Sanità* [1982] ECR 3415, paras 16-20.

67. As for the scope of that obligation, in Case C-99/00 *Lyckeskog* [2002] ECR I-4839, para 64, Advocate General Tizzano pointed out that *CILFIT* was not the outcome of an extempore decision by the court but was set out directly in precise and formal terms in the Treaty, and that it was one of the fundamental and essential principles of the Community legal system. It is sometimes suggested that it has been over-stated, leading to an excessive use of the procedure. But Sir David Edward, "Reform of Article 234 Procedure: the Limits of the Possible", D O'Keeffe (ed) *Judicial Review in European Union Law* (2000), pp 122-123, has explained that the problem lies not in *CILFIT* but in the texts. Article 234 leaves no room for any other limitation of the obligation to refer unless there is, in reality, no question on which a decision is necessary to enable the national court to give judgment. In his Mackenzie-Stuart Lecture of 18 October 2002, *National Courts – the Powerhouse of Community Law*, The Cambridge Yearbook of European

Legal Studies, vol 5, 2002-3, 1, 7, Sir David said that the Treaty was, after all, unambiguous and that it seemed to him very odd to suggest that the Court should relax *CILFIT* when that judgment represented a substantial (even "activist") relaxation of what the Treaty requires.

68. The first question that the EC claimants ask to be referred is whether a national measure prohibiting the economic activity of hunting within the territory of a Member State engages the application of article 28 EC in circumstances where the prohibition has the predictable effect of extinguishing or diminishing the market for a product used wholly or mainly for that activity and thereby eliminates or reduces both cross-border and domestic trade in that product. I agree that it is not clear beyond the bounds of reasonable argument that the 2004 Act does not engage that article. The only basis on which it was said by the Court of Appeal not to be applicable was that Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097 consciously made a new start in the application of the *Dassonville* principle (Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837) in the case of rules that were not "aimed at" products from other member states: [2007] QB 305, para 144. According to that principle, although the measure may not be intended to govern trade in goods between Member States, the decisive factor is its effect on intra-Community trade, whether actual or potential. It is true that in *Keck*, para 14, the European Court of Justice said that it was necessary to re-examine and clarify its case law on this matter. This was because of the increasing tendency of traders to invoke what is now article 28 EC as a means of challenging any rules whose effect was to limit their commercial freedom "even where such rules are not aimed at products from other Member States." But the Court's case law after *Keck* has limited its application to "selling arrangements" in the narrow sense of that expression – such as the places and times at which products may be sold and the way in which they may be advertised for sale and marketed: eg Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025, para 38; Joined Cases C-158/04 and 159/04, the *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE* case, 14 September 2006, para 17, 18. I think that it is clear from these developments that the *Keck* exception does not apply in this case because the ban on hunting is not of that character.

69. But that is not an end of the matter. The ban is non-discriminatory. It affects domestic goods used for or in connection with hunting just as much as it affects foreign products that are used for or in connection with these purposes – horses bred in Ireland for sale to customers in England, for example. Nor would it be realistic to say that

this is a disguised restriction on trade between Member States within the meaning of the article: Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4151, para 25. There is nothing either in the terms of the Act or any part of its legislative history that indicates that protectionism of that kind was to even the slightest degree in the minds of the legislators. These facts suggest non-applicability. But it is common ground that article 28 applies irrespective of whether the measure in question was intended to restrict or regulate trade between Member States. Can it be said then that, although discrimination on grounds of nationality was not the aim, article 28 is engaged because the legislation prevents or substantially restricts access to the English market by Irish breeders and dealers and restricts access to Irish products by English purchasers?

70. Two recent opinions by the Advocate General in cases that still await judgment suggest that it is unclear what answer that the European Court would give to that question: Advocate General Léger in Case C-110/05 *Commission of the European Communities v Italian Republic,* 5 October 2006, para 40; Advocate General Kokott in Case C-142/05 *Åklagaren v Mickelsson*, 14 December 2006, paras 66-67. *Commission of the European Communities v Italian Republic* was initially allocated to a chamber of three judges, but after the Advocate General had given his opinion it was re-allocated to the Grand Chamber which ordered on 7 March 2007 that an oral hearing should take place. Parties were invited to submit written pleadings on the question to what extent should national measures which govern the use of products – which is this case – be considered to be measures having equivalent effect to quantitative restrictions on imports within the meaning of article 28 EC. As matters stand, pending a decision by the Grand Chamber in that case, the issue cannot be regarded as *acte clair*.

71. The EC claimants also seek a preliminary reference on the question whether a national measure prohibiting the economic activity of hunting within the territory of a Member State engages article 49 in circumstances where as a predictable consequence of the prohibition providers of hunting-related services are prevented from providing such services and recipients of hunting-related services (whether established in that Member State or in other Member States) are prevented from receiving them. I think that the position is just as, if not more, unclear in the case of this article. It is common ground that there is no *Keck* exception in the case of services: see the opinions of Advocate General Stix-Hackl in Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt*

Bonn [2004] ECR I-9609, para 36-37 and Advocate General Jacobs in Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-1795, para 71. And it is clear too that discrimination, or an intention to discriminate, is not the test. In Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, para 43 the Court said that according to its case law national legislation may fall within the ambit of what is now article 49 EC "even if it is applicable without distinction" when it is liable to prohibit or otherwise impede the activities of a provider of services in another Member State where he lawfully provides similar services. The *Omega* case and Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279 provide examples of cases where a non-discriminatory impediment was held to engage article 49 EC.

72. The Court of Appeal held that the hunting ban did not engage article 49 EC because it did not have a "direct inhibiting" effect on the rights to provide services: see Robert Walker LJ's formulation of the test in *R (Professional Contractors Group Ltd) v Inland Revenue Commissioners* [2002] STC 165. What it did was to render the market for such services less attractive. But it is at least arguable that this is too severe a test. There are indications in the Court's case law that all that is required is a foreseeable and logical link between the measure at issue and trade between Member States, something that is likely to deter free movement: opinion of Advocate General Cosmas in Case C-134/94 *Esso Española SA v Comunidad Autónoma de Canarias* [1995] ECR I-4223, para 19; *Omega*, para 25. So I do not think that the position can be said to be *acte clair* against these claimants. Nor is the jurisprudence sufficiently clear in its application to the facts of this case, where a measure which was not to the slightest degree meant to be discriminatory has had an effect on the provision of services between Member States which is so minimal, for it to be *acte clair* in their favour either.

73. But no good purpose would be served by seeking a preliminary ruling on these matters if it was clear that we would be bound to hold, applying the relevant test, that any such restrictions as result from the ban imposed by the Act were justified on grounds of public policy under article 30 EC in the case of goods, and under article 46 EC read with article 55 EC in the case of services, respectively and were proportionate.

Justification and Proportionality

74. These then are the crucial questions. Although there is a degree of overlap, it is best to examine the cases of the HR Claimants and the EC Claimants separately.

75. I deal first with the case for the HR Claimants. The first paragraph of article 1 of Protocol 1 provides that no-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The second provides that the preceding provisions shall not in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. Both deprivation and control are in issue in this case. It is not for your Lordships to say, as a matter of fact, whether the ban on hunting which has these effects was or was not in the public interest or the general interest. This was a question for the democratically elected members of the House of Commons to decide. The questions for your Lordships are whether it was open to them to take that view and whether the prohibitions that were enacted were proportionate.

76. I do not find it possible to answer either of these questions in the negative. The legislators' objective was based partly on the view that causing cruelty to animals was morally objectionable and partly on the view that the activities which they wished to prohibit did in fact cause cruelty. Whether there was a pressing social need to give effect to those views involved a question of balance between competing interests. This raises the familiar question as to where the margin lies between the area of the discretionary judgment that the court will accord to a democratically elected assembly in matters of social policy and those areas where the court can legitimately intervene on the ground that it is especially well placed to assess whether an interference is needed and is proportionate.

77. There was plainly a choice to be made between acutely competing interests – between those who wished to continue to participate in these activities and those who wished to prohibit them. They were wholly at odds as to whether there was a factual justification for the interference with the HR claimants' article 1 protocol 1 Convention right. The claimants said that those in favour of the prohibition had failed to address the issue of relative suffering. It had not been shown that hunting for foxes with hounds was less humane

than other methods of killing them. The respondents said that the justification was to be found in the objectives of reducing suffering, reducing instances of disorder associated with hunting and dealing with the criminality associated with hare coursing, and that the issue of relative suffering was not determinative.

78. If relative suffering had been the determinative issue, a close and careful examination of the factual basis for that decision would have been necessary to judge whether there was a sufficient justification for impairing the Convention right: *R v Shayler* [2003] 1 AC 247, para 61. But in my opinion it was not necessary for those who were promoting the legislation to deal with the issue in that way. It was open to them to focus on the nature of the activities without comparing them with others, bearing in mind that they were being engaged in for sport and recreation. It was open to them to form their own judgment as to whether they caused a sufficient degree of suffering in that context for legislative action to be taken to deal with them. Having decided that there was a sufficient degree of suffering in that context, it was open to them too to decide that prohibiting these activities in the manner laid down by the 2004 Act was proportionate.

79. I turn then to the case for the EC Claimants, assuming for this purpose that the restrictions that are in issue engage articles 28 and 49 EC. It is well understood that measures which are liable to constitute restrictions on the free movement of goods or services may be justified if they pursue legitimate aims and they are proportionate to those aims. In his opinion in *Commission of the European Communities v Italian Republic*, paras 34-35, Advocate General Léger said that a national rule which hinders the free movement of goods is not necessarily contrary to Community law if it may be justified by one of the public interest grounds set out in article 30 EC, but that any derogation from the fundamental principle of the free movement of goods must be viewed restrictively. The qualifications in article 30 EC as to goods, and in article 46 EC read with article 55 EC as to services, both permit prohibitions or restrictions on grounds of public policy. But where this ground is relied on the national authorities must be able to demonstrate, first, that their rules are necessary in order to attain the public policy objective and, second, that those rules are proportionate to the aim. The test was laid down by the European Court in the *Omega* case, para 36, in these terms:

> "…measures which restrict the freedom to provide services may be justified on public policy grounds only if

> they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be maintained by less restrictive measures."

80. The first question which the national court must address is to identify the object that the 2004 Act was intended to achieve. The Divisional Court and the Court of Appeal both held that it was a composite one: to prevent or reduce unnecessary suffering to wild animals, overlaid by a moral viewpoint that causing suffering to animals for sport was unethical and should, so far as was practical and proportionate, be stopped: Divisional Court, para 339; Court of Appeal, para 56. The EC Claimants criticised both branches of the concurrent findings of fact which these courts made on this issue.

81. The claimants submitted that, while preventing unnecessary suffering was a legitimate objective, the moral overlay had no basis in the statute. Moreover the nature of the overlay and its relationship with the objective of preventing unnecessary suffering was uncertain and unsatisfactory. The European Court had placed strict limits on the ability of governments to escape judicial review by asserting a moral justification for their laws. In Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR I-3851, para 29, Advocate General van Gerven had stressed that the Court must exercise some control over what was regarded by a Member State as falling within the concept of public morality. That there was such an overlay was highly questionable, as the terms of the Act showed clearly that it was not motivated by a general disapproval of killing animals for sport. It had gone out of its way to accommodate the practice of field sports such as shooting and falconry.

82. They submitted that these considerations gave rise to two questions of principle on which a preliminary ruling should be sought: (1) what, if any, limits apply to the right of a Member State to invoke public morality as an additional justification for a measure engaging the application of articles 28 and 49 EC, in circumstances where the primary justification is the prevention of unnecessary suffering to animals; and (2) where a national court considers a national measure to have a composite objective (preventing unnecessary suffering to animals and public morality), must the proportionality test be satisfied in relation to both parts of the objective, or may the measure be justified on the basis that it is proportionate to the second part of that composite objective only.

83. It would have been difficult to avoid a reference to the European Court for a preliminary ruling on these questions if it had been necessary to answer them in order to arrive at a decision in this case. But I do not think that it is necessary to descend to that detail of analysis in order to deal with what is really a quite straightforward issue. The findings of the courts below as to the legislative object of the 2004 Act which invited such detailed questions were, for the purpose of deciding this issue, unnecessarily elaborate. The Inner House in *Adams v Scottish Ministers* held that the broad legislative aim of the Protection of Wild Mammals (Scotland) Act 2002 (asp 6) was to prevent cruelty to animals: 2004 SC 665, paras 30-52. Mounted foxhunting with hounds was considered by the Scottish Parliament to be cruel, as killing foxes by this method was done predominantly for sporting enjoyment and because there were thought to be other more effective and no more painful forms of pest control. There are significant differences of detail between the two Acts, but in my opinion the prevention of cruelty to animals is equally sound as a description of what in essence the House of Commons was seeking to achieve when it passed the 2004 Act. Simplifying the aim in this way helps to answer the issues that the EC Claimants have raised.

84. To return to the *Torfaen* case, the Advocate General said that the public policy objection required the existence of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society. The Court repeated this formulation of the principle in the *Omega* case, para 30. It also made the point that, as a justification for derogating from the fundamental principle of the freedom to provide services, the words "public policy" had to be interpreted strictly. But it added these important qualifications in para 31:

> "The fact remains, however, that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty."

In Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Grogan* [1991] ECR I-4685, para 26 Advocate General van Gerven referred to choices of a moral and philosophical nature the assessment of which fell within the sphere in which each Member State possesses an area of discretion "in accordance with its own scale of

values and in the form selected by it": Case C - 121/85 *Conegate v H M Customs and Excise* [1986] ECR 1007, para 14.

85. The history of legislation in the United Kingdom for the prevention of cruelty to animals leaves no room for doubt that in this country, whatever may be the case elsewhere, the subject is deeply rooted in public policy. It has been for a long time regarded as one of the fundamental interests of society about which Parliament is expected, when the need arises, to legislate. So I see no need for a reference to the European Court on the additional questions about public morality which the EC Claimants have suggested to decide this issue. It was within Parliament's margin of discretion to address the widespread concerns that had been raised about the hunting of foxes and the other sporting activities referred to in the 2004 Act and, if it judged that it was necessary to deal with these concerns by legislation, to proceed to do so "within the limits imposed by the Treaty". Whether the legislation was within those limits depends on whether the conditions of justification and proportionality are satisfied.

86. The crucial question is whether it was open to the legislators to conclude that the activities that were to be prohibited by the 2004 Act were cruel if engaged in for sport. If it was, I do not see how it can be doubted that they were entitled to conclude that prohibition of those activities was necessary in order to prevent them from being carried on by those who wished to do so. For the reasons that I have already given in the case of the HR claimants, I consider that it was open to them to conclude that they gave rise to unnecessary suffering and that, if they were engaged in for sport, they were cruel. That is sufficient to meet the condition of justification. There remains the question whether the restrictions on free movement of goods and freedom to provide services were out of proportion to the aim sought by or the result brought about by the national rule: Advocate General van Gerven in *Society for the Protection of Unborn Children Ireland Ltd v Grogan*, para 27. It is for the national court to rule on this issue within the limits of Community law: ibid, para 28.

87. Various factors come into play at this point. Although it is common ground that the question whether there is a restriction within the meaning of the Treaty is not subject to the *de minimis* principle, the extent of the restriction has a part to play in the assessment of proportionality: Advocate General van Gerven in *Society for the Protection of Unborn Children Ireland Ltd v Grogan*, para 29. So too is the fact that it is not discriminatory: Case C-275/92 *HM Customs and*

Excise v Schindler [1994] ECR I-1039, para 61. There is no indication whatever that the restrictions that have been enacted in this case were aimed at intra-Community trade. They were aimed entirely at activities carried on within our own Member State, as a measure of social policy. Such interference as there has been and is likely to be with the free movement of goods and the free provision of services between other Member States is purely incidental. It is trivial in comparison with the widespread interference in these respects within the domestic market. It was not suggested that the legislative aim could have been achieved by measures which were less restrictive of intra-Community trade. Due weight must of course be given to the freedoms guaranteed by the Treaty. But I am in no doubt that, taken overall, the prohibitions satisfy the requirement of proportionality in accordance with Community law.

88. So I would hold that a preliminary ruling on the question whether these measures engage article 28 and 49 EC and on the two further questions which have been proposed on the issues of justification and proportionality would serve no useful purpose in this case, and that a reference to the European Court is unnecessary.

Conclusion

89. For the reasons given by Lord Bingham and by my noble and learned friend Baroness Hale of Richmond, and these additional reasons of my own, I would dismiss both appeals.

LORD RODGER OF EARLSFERRY

My Lords,

90. I agree with your Lordships that these appeals should be dismissed. In particular, I agree with the reasons to be given by my noble and learned friend, Lord Brown of Eaton-under-Heywood. I therefore confine myself to some additional observations on the application of article 8(1) – the point which seems to me to be of most general importance.

91. Undoubtedly, the early decisions of the European Court on "private life" in article 8(1) tended to concern sexual and emotional relationships within an intimate circle – for which people want privacy. Article 8(1) guarantees a prima facie right to such privacy. If someone complains of a violation of that right, the essential touchstone may well be whether the person in question had a reasonable expectation of privacy: *Campbell v MGN Ltd* [2004] 2 AC 457, 466, para 21, per Lord Nicholls of Birkenhead.

92. But the European Human Rights Commission long ago rejected any Anglo-Saxon notion that the right to respect for private life was to be equated with the right to privacy. In *X v Iceland* (1976) 5 DR 86 the applicant complained that a law prohibiting the keeping of dogs in Reykjavik violated his article 8(1) rights. The European Court held that the right to respect for private life did not end at a right to privacy, but comprised also, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's own personality. Sadly, it did not extend to developing relationships with dogs and so the Commission rejected his application as inadmissible.

93. It soon became clear that article 8 was not concerned merely to protect relationships in a narrow domestic field. In *Niemietz v Germany* (1992) 16 EHRR 97, 111, para 29, the Court held:

> "it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."

So article 8(1) had been violated by a search of the office where the applicant pursued his profession as a lawyer, since "it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world."

94. In *Pretty v United Kingdom* (2002) 35 EHRR 1, 35, para 61, the European Court pointed out that "private life" in article 8(1) is "a broad

term". The Court also said that the notion of "personal autonomy" is an important principle underlying the interpretation of the various guarantees, including the right to "personal development", in that aspect of article 8(1).

95. In *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, 383, para 9, commenting on the reference in *Pretty* to the right to "personal development" and to establish relationships, my noble and learned friend, Lord Bingham of Cornhill, spoke of "private life" in article 8 "extending to those features which are integral to a person's identity or ability to function socially as a person."

96. Among the appellants, as the Divisional Court found, at para 135, are people for whom "hunting is a core part of their lives and perhaps has been a core part of the community in which they have lived all their lives." For them at least, should hunting be regarded as integral to their identity and so as part of their "private life" for purposes of their article 8(1) Convention right?

97. It happens to be hunting that lies at the core of their lives. For other people some completely different interest or activity fills that place. When pursuing that interest or activity, they really "come alive". It is crucial to their sense of their own identity. Some will be fortunate enough to find this kind of fulfilment in their job, but others will pursue it in their leisure hours. They may even choose an undemanding job in order to have more time and energy to devote to, say, playing a musical instrument or singing. Mountaineering, too, has many devotees. But talents and interests come in many different forms. For example, Michael Ventris was an architect by profession, but the animating obsession of his life was his "hobby" of using his linguistic and puzzle-solving skills to decipher Linear B. It shaped who he was and how he felt he had to live his life.

98. The activities which I have mentioned are simply examples of "features which are integral to a person's identity", of ways in which people give expression to their individuality – in which you can see what really makes them tick. For many people the right to express themselves in these ways may be of far more practical importance than, for instance, the right to express some aspect of their sexual identity. It would be strange indeed if such activities were not regarded as part of an individual's private life and worthy of respect in terms of article 8(1), when they are central to the individuals' lives and often determine how

they relate to their families, their friends and the outside world. Could Parliament really ban an activity such as mountaineering without infringing its devotees' article 8(1) rights?

99. Sometimes the individuals can pursue the activity by themselves in their own home. But many activities involve other people. An amateur violinist may find the best outlet for her talents in playing in an amateur string quartet, the singer in being a member of a choir. These occasions may also be the ideal setting for forming relationships with congenial companions. While that may be an additional reason for saying that the activities form part of the individuals' private life for purposes of article 8(1), the position of the pianist who plays by herself is surely equally deserving of respect. Indeed, for that very reason, it seems to me, article 11 can add nothing for present purposes.

100. On the other hand, some solo activities may be hard to conduct in private. An organist in his organ loft, for example, may well find it difficult to practise without being heard by casual visitors to the church or hall. A skilled and dedicated ice skater will often have to share the rink with others who are just out for a bit of fun. That can't be helped and is really irrelevant. Even though other people are present, when pursuing their passion, the organist and skater may well be "in a world of their own", "dans un monde à part". All they ask is to be left alone to get on with it.

101. My Lords, in choosing these examples of people who give expression to their personality in different ways and arguing that article 8(1) is engaged in those circumstances, I have taken my cue from the idea that article 8(1) protects those features of a person's life which are integral to his identity. For those for whom it is a core part of their lives, hunting, too, can be said to be integral to their identity. Therefore, but for one point, to which I shall return shortly, I would have held that the legislation banning hunting did interfere with their private life for purposes of article 8(1).

102. Confining the protection of article 8(1) to those for whom an activity is a core part of their lives may be to set the bar too high, however. The landmark decision of the European Court in *von Hannover v Germany* (2004) 40 EHRR 1, which was not cited by counsel, suggests that the scope of the protection afforded by article 8(1) is considerably wider.

103. The applicant, Princess Caroline of Monaco, complained that her right to the protection of her private life had been violated by the publication of pictures of her in various German magazines. As the Court explained, 40 EHRR 1, 23, para 49, the pictures showed her, for instance, on horseback, leaving her Paris home on her own, shopping on her own, alone on a bicycle, with her bodyguard at a market, dining in a restaurant with a male actor, and playing tennis with Prince Ernst August von Hannover. According to the Court, at p 26, para 61, the photographs showed her "in scenes from her daily life, thus involving activities of a purely private nature." The Court held, at p 24, para 53, that "there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life." The Court went on to hold, at p 29, para 80, that German law had not afforded sufficient protection for the applicant's private life and that there had been a breach of article 8.

104. Of course, the *von Hannover* case concerned a claim to privacy, to being free from press intrusion. By contrast, the appellants claim a right to be free to hunt without the arbitrary interference of the legislature. But both claims are based on the same essential right to respect for, and protection of, private life in article 8(1). In *von Hannover*, 40 EHRR 1, 23, para 50, the Court confirmed its jurisprudence that

> "the guarantee afforded by article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings…. 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'."

Similarly, at p 27, para 69, the Court reiterated:

> "the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection – as stated above – extends beyond the private family circle, and also includes a social dimension."

105. If, as the European Court held, article 8(1) was engaged so as to give Princess Caroline a prima facie right to protection from the press publishing pictures of her when she was out riding on horseback, or riding a bicycle, or playing tennis or going to the market, then surely the article would have been equally engaged if the legislature had passed a law banning her from pursuing any of these activities? If publishing photographs of her doing these various things was liable to interfere with the "flowering" (épanouissement) of her personality (para 69 in the original French text), a law banning her from riding her horse or her bicycle or from playing tennis or going to the market would constitute an immeasurably greater interference.

106. Princess Caroline wanted to enjoy personal autonomy. Less grandly, she was claiming – and successfully claiming - a right to be herself, to go about in the world, free from the attentions of the paparazzi. Similarly, the appellants say, when they are out on horseback following the hounds, they too have a right under article 8(1) to be themselves, to go about in the world, free from the arbitrary interference of the legislature. Again, but for one aspect of their situation, I would have accepted that contention.

107. Princess Caroline succeeded in her claim for protection for her private life because she was riding or cycling or playing tennis simply for her own enjoyment – for the development of her personality, to put it in formal terms. So, even though she was doing these things "in a public context", they fell within the scope of her "private life": *von Hannover*, 40 EHRR 1, 23, para 50. In my view, the position would have been different if, say, she and her tennis partner had taken part in a charity tennis tournament where spectators would come to watch them. Even if taking part had given them great pleasure, they would no longer have been doing it for their own fulfilment alone. They would have stepped outside the sphere of their private life in order to pursue a public purpose. The mere fact that a diva may develop her personality singing at Covent Garden does not mean that singing there is part of her private life. On the contrary, she is putting on a performance for the public - and getting well paid for it. Similarly, at a humbler level, if the amateur choir were giving a concert, or the organist were playing for the pleasure of those in the hall or church, or the skater were performing for the spectators at the rink, in my view the individuals would no longer simply be pursuing the development of their personality. They would have left the sphere in which they would be entitled to the protection of article 8.

108. In giving the judgment of the Second Division in *Adams v Scottish Ministers* 2004 SC 665, 680, para 66, the Lord Justice Clerk listed a number of aspects which, in the court's view, prevented foxhunting from being part of the private life of the participants. I need only mention his comment that "When followers are taken into account, the hunt takes on the character of a spectator sport. It is also a public spectacle." Lord Bingham similarly comments, at para 15, that foxhunting "is carried out in daylight with considerable colour and noise, often attracting the attention of onlookers attracted by the spectacle." These descriptions of hunting reflect the reality. They also explain why there are countless paintings and prints of hunts and, in part at least, why many people, who have never themselves taken part in hunting, feel that any ban tends to impoverish our national life. The huntsmen and women are taking part in what they know is not just a private activity, but a much admired public spectacle. I therefore conclude that they are not entitled to the protection for their private life in article 8(1).

109. For that reason alone, I have come to the view that, whether on a narrower or broader view of the scope of article 8(1), the appellants' Convention right is not engaged.

BARONESS HALE OF RICHMOND

My Lords,

110. "The spirit of liberty is that spirit which is not too sure that it is right; the spirit of liberty is that spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias;..." (Learned Hand, 'The spirit of liberty', in *The Spirit of Liberty*, *Papers and Addresses of Learned Hand*, edited by Irving Dilliard, 3rd ed, 1960, p 190). That, it seems to me, is the spirit in which to approach the issues in this case, and particularly those upon which your lordships are not all of exactly the same mind. There are some large questions of principle here which go way beyond the specific question of banning hunting with hounds.

111. When does the freedom to do as one pleases become a human right? How broadly should we construe the scope of the rights and fundamental freedoms guaranteed to us all in the European Convention

on Human Rights? How strictly should we approach the justifications for restricting those rights? In my view there is no human right to be left alone to do as one likes; the Convention has defined some specific rights which can only be interfered with in specified circumstances; there is a good deal of flexibility and room for development on both sides of the scales; but the more broadly one construes the right, the greater the latitude one must allow the democratically elected legislature to strike the balance between the interests of those who wish to pursue a particular activity and the interests of those who wish to prevent them.

112. "It's a free country, i'n'it?" So say we all if we object to being told what we may or may not do. And so it is. But until the Human Rights Act 1998 came into force, all this meant was that we could do what we liked as long as there was no law forbidding or preventing us. We may have had a national antipathy to regulation. Many of us may agree with John Stuart Mill that "The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." (*On Liberty*, 1859, Penguin 1974, p 68). But many others might take a different view on a particular issue, and if that view prevailed in Parliament, then it became the law and the courts would have to enforce it.

113. The Human Rights Act 1998 has for the first time (outside the particular territory of European Community law, of which more anon) given us all rights against the state. Public authorities and officials must not act incompatibly with our Convention rights: s 6(1). If Parliament makes laws which might be incompatible with our Convention rights, the courts and others applying those laws must, so far as possible, read and give effect to them in a way which is compatible with the Convention rights: s 3(1). If Parliament makes a law which cannot be read compatibly with the Convention rights, the courts and others must still give effect to it, but the higher courts may declare that it is incompatible: that is what we are being asked to do in this case: s 4. Such declarations have proved powerful incentives to Government and Parliament to put the matter right; for if the court is right, the United Kingdom is in breach of its international obligations in maintaining such a law on the statute book.

114. This is all elementary now. But it is worth repeating because the purpose of such human rights instruments is to place some limits upon what a democratically elected Parliament may do: to protect the rights and freedoms of individuals and minorities against the will of those who

are taken to represent the majority. Democracy is the will of the people, but the people may not will to invade those rights and freedoms which are fundamental to democracy itself. To qualify as such a fundamental right, a freedom must be something more than the freedom to do as we please, whether alone or in company with others.

115. The right to respect for our private and family life, our homes and our correspondence, guaranteed by article 8, is the right most capable of being expanded to cover everything that anyone might want to do. My noble and learned friend, Lord Rodger of Earlsferry, has made a powerful case for article 8 to include almost any activity which is taken sufficiently seriously by the people who engage in it. If any of us were in any doubt about how seriously and deeply some members of the hunting community take their sport, those doubts were dispelled by the eloquence and obvious sincerity of Mr Friend, who appeared as a litigant in person in the related case of *Whaley v Lord Advocate* [2007] UKHL 53). Many hunt supporters would no doubt share of their sport Bill Shankly's view of the importance of association football.

116. As yet, however, as my noble and learned friend Lord Bingham of Cornhill has shown, the Strasbourg jurisprudence has not gone so far in its interpretation of the rights protected by article 8; and for the reasons given above, I am not sure that I share the desire of my noble and learned friend Lord Brown of Eaton-under-Heywood that it should. Article 8, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly. Families are subversive. They nurture individuality and difference. One of the first things a totalitarian regime tries to do is to distance the young from the individuality of their own families and indoctrinate them in the dominant view. Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them. But that falls some way short of protecting everything they might want to do even in that private space; and it certainly does not protect things that they can *only* do by leaving it and engaging in a very public gathering and activity.

117. Article 11, on the other hand, is very much concerned to protect such gatherings. It is about people getting together, whether in public or in private, in pursuit of a common aim. Why then should it not protect the right of hunting people not only to get together but also to pursue their sport together? It is not enough, it seems to me, to draw a distinction between the activity and the gathering and to say that the one may be banned but the other may not without a good reason. Article 11expressly protects the right of a person "to form and to join trade unions for the protection of his interests". That must protect, not only the existence of trade unions, and political parties and pressure groups, but also some of the things they do.

118. One answer could be that article 11 should be read along with article 10. Article 9 protects freedom of thought, conscience and religion. It also expressly protects the right to manifest that religion or belief, "either alone or in community with others and in public or in private". Article 10 protects freedom of expression, the freedom to hold opinions and to receive and impart information and ideas. But it does not expressly protect the right to meet or associate with other people in order to do this. This, it might be said, is separately provided for in article 11. It protects the freedom to meet and band together with others in order to share information and ideas and to give voice to them collectively. While democracy values each individual, it also knows that individuals cannot get much done unless they band together. These articles, then, are designed to protect the freedom to share and express opinions, and to try to persuade others to one's point of view, which are essential political freedoms in any democracy. On this view, the right of the hunt and its followers to gather together publicly to demonstrate in favour of their sport and against the ban, perhaps even by riding over the countryside to demonstrate what they do, is protected by article 11. But the right to chase and kill the fox or the stag or the mink or the hare is not.

119. I am attracted by this view of the relationship between articles 10 and 11 because it seems to me to be consistent with the democratic values underlying this whole group of articles. It is consistent with the observation quoted by Lord Bingham in para 17 above from the case of *Chassagnou v France* (1999) 29 EHRR 615. However, that case, in protecting the freedom of those who did *not* want to join a hunting association, might be thought conversely to protect the freedom of those who *did*. But the essence of the case was a discriminatory interference with the rights of landowners to control the use of their own property, not to stop them from doing something on it which they wanted to do, but to oblige them to do on it something which they did not wish to do.

It would probably be unwise to draw too many conclusions from it about the scope of the collective activities protected by article 11. I therefore incline to the view that the ban on hunting with hounds does not engage article 11 at all.

120. If it be the case that the rights protected by article 8 or article 11 are not engaged by the ban, then there is no need to address the particular qualifications to those rights laid down in article 8.2 and article 11.2. Each follows the familiar pattern: the interference with or restriction of the right must be in accordance with or prescribed by law, as this undoubtedly is following the decision of this House in *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262; it must pursue one of the legitimate aims listed; and it must be "necessary in a democratic society", that is, it must meet a pressing social need and be proportionate to the legitimate aim pursued. The aims listed in article 8.2 are "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". The aims listed in article 11.2 are identical, except that "the economic well-being of the country" is not included.

121. As Lord Brown points out, these requirements are much stricter and more precise than the "public interest" or "general interest" justifications required by article 1 of Protocol No 1. This reinforces my view of the scope of articles 8 and 11. They are indeed flexible and capable of development as thinking within the Council of Europe also grows and develops. In difficult or borderline cases, there is much to be said for taking a broad view of the scope of the right and requiring the state to justify its interference. But the qualifications in articles 8.2 and 11.2 were drafted in the light of the understanding of the scope of the rights as they were originally drafted. If a right is expanded beyond its original scope it may be necessary also to expand the scope of the qualifications – both as to the meaning of the legitimate aims and as to the requirement that the interference be "necessary in a democratic society". Otherwise it may become difficult to strike a fair balance between the rights of individuals and groups on the one hand and the democratic decisions of the majority on the other.

122. Hunting might be a case in point. The most plausible of the legitimate aims listed in articles 8 and 11 is the protection of morals (although there is a certain amount of disorder and crime associated with some of the activities covered by the Act, it is certainly not common to

them all). The protection of morals is a difficult and controversial aim, especially when the aim is to protect the morals of the person whose rights are being interfered with (it is less difficult if the aim is to protect the morals of other people). What right have I to thrust my views of morality down the throats of others? Some people take the view that it is wrong to cause an animal any suffering at all. For them the fact that the human race is omnivorous and has always killed animals for food does not justify its going on doing so. Nor would some people accept that animals might be killed for other purposes, such as clothing or shoes. Others might accept that rearing and killing animals humanely for such practical purposes was not immoral. They might also accept the morality of humane pest control. But they might draw the line at methods of pest control which caused more suffering than others. They might also draw the line at causing any sort of suffering for sport rather than for the practical benefits it could bring.

123. But it is not suggested that hunting degrades or corrupts the hunters. It is not suggested that they get sadistic pleasure out of causing the quarry to suffer. It cannot be compared with bear-baiting or cock-fighting. The pleasure they get is from the excitement and unpredictability of the chase, the challenge to the horsemanship of the riders, the spectacle for the followers, or in hare coursing gambling on the performance of the dogs. Fox, mink and stag hunters are also contributing, albeit in a comparatively small way, to the control of an undoubted pest. What they are doing is useful to the whole community. They can also plausibly say, as Mr Friend has said, that at the end of the hunt the fox is either dead or free: not wounded or lost.

124. I say all this, not to take sides in the debate which so exercised the members of both Houses of Parliament, but to sympathise with Mr Friend's difficulty in understanding how the ban could be said to be "necessary in a democratic society" or in pursuit of any of the listed aims. My answer to him would be that when the Convention was written it would not have crossed anyone's mind that there might be a prima facie right to hunt wild animals with dogs. If the Convention has to be expanded to encompass such a right, then the qualifications have to be expanded too. The concept of what may be "necessary in a democratic society" has to take into account the comparative importance of the right infringed in the scale of rights protected. What may be a proportionate interference with a less important right might be a disproportionate interference with a more important right. The concept of what is "necessary in a democratic society" also has to accommodate the differing importance attached to certain values in different member states. As Lord Bingham has shown, the British have traditionally

attached more importance to protecting animals from harm than they have to protecting children from harm (although it is to be hoped that the children have now caught up). This is where the so-called "margin of appreciation" allowed to each Member State comes in. And this is where respect for the recently expressed views of the democratically elected legislature comes in.

125. I do not, however, think that it is open to us to wash our hands of such difficult issues on the ground that this is a matter for Parliament. For better or worse, Parliament has entrusted us with the task of deciding whether its legislation is compatible with the Convention rights. If it is not, it is our duty to say so. The fact that the issue raises moral questions on which views may legitimately differ does not let us off the hook. *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 raised a difficult moral issue about the rights of trans people to be recognised in their reassigned gender identity. *Goodwin v United Kingdom* (2002) 35 EHRR 447 had left the House in no doubt that UK law was incompatible with the Convention rights. The House made a declaration to that effect. *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 raised a difficult moral issue about the rights of same sex couples to be treated in the same way as opposite sex couples. The Court of Appeal correctly anticipated the position which Strasbourg would soon after take in *Karner v Austria* [2003] 2 FLR 623. The only real question for the House was whether the incompatibility could be interpreted away or whether we would have to declare the legislation incompatible. When we can make a good prediction of how Strasbourg would decide the matter, we cannot avoid doing so on the basis that it is a matter for Parliament. Strasbourg will be largely indifferent to which branch of government was responsible for the state of the domestic law.

126. But when we can reasonably predict that Strasbourg would regard the matter as within the margin of appreciation left to the member states, it seems to me that this House should not attempt to second guess the conclusion which Parliament has reached. I do not think that this has to do with the subject matter of the issue, whether it be moral, social, economic or libertarian; it has to do with keeping pace with the Strasbourg jurisprudence as it develops over time, neither more nor less: see *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20 .

127. In this case, I seriously doubt whether Strasbourg would regard the right to hunt wild animals with hounds as falling within either article 8 or article 11; but if it did, I believe that the ban would fall within the

margin of appreciation it would allow to the United Kingdom on a matter such as this. Even if I were eventually to be proved wrong on both points, I would not think that the 1998 Act now required us to declare the Hunting Act 2004 incompatible.

128. As to the interference with property rights, much the same applies. This is not a confiscatory measure. It does not deprive anyone of his possessions. It does restrict the use to which certain property can be put. It has also resulted in a diminution in business for certain trades and may result in some loss of jobs. There is no Convention right to continue to enjoy a particular level of trade. There is no Convention right to retain one's job beyond the "right to a job" which is recognised by domestic law. The Convention does not guarantee the right to acquire property: see *J A Pye (Oxford) Ltd v United Kingdom* (App no 44302/02) (unreported) 30 August 2007, para 61. All sorts of laws may reduce demand for particular services and thus affect the profits of the self-employed or the job security of employed people. They do not in my view usually have to be justified under article 1 of the protocol no 1, although that should not be difficult.

129. Some of the claimants have been restricted in the use to which they can put their property. They cannot use their own land or horses or dogs for proscribed hunting, and they cannot allow others to do so. Given the number of uses to which they still can put their property, I would regard this as a very limited control of use. Control of use can be limited in the general interest and this is not a taxing standard to meet. Even in the context of deprivation of property the Strasbourg court has said that "finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one [the Court] will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation": *Jahn v Germany* (Application nos 46720/99, 72203/01 and 72552/01) (unreported) 30 June 2005, quoted in *Pye v United Kingdom*, above, at para 71. In determining whether a fair balance has been struck between the demands of the general interest and the interest of the individuals concerned, in control of use cases, "the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question": *AGOSI v United Kingdom* (1986) Series A, no 108, quoted in *Pye v United Kingdom*, above, at para 75. On that basis, protecting wild animals from avoidable compromise to their welfare seems to me to fall well within the general interest and the means chosen to strike a fair

balance. The fact that the same principles might have justified a wider ban does not mean that a narrower ban cannot be justified.

130. For the sake of completeness, I should add that even where the ban falls within the ambit of a Convention right, membership of the hunting community is not in my view another "status" for the purpose of article 14, for the reasons given in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484, especially at paras 52 to 62.

131. On the EC law claims I have nothing to add to the opinion of Lord Bingham. If, which is certainly not clear, either article 28 or article 49 is engaged by the hunting ban, then the ban is justified. As Lord Bingham points out (at para 50 above), this was a measure of social reform, not directed at the regulation of commercial activity, of which any impediment to intra-Community provision of goods and services was a minor and unintended consequence, and which bears more hardly on those within this country than outside it. The suggestion that the EC claimants might succeed while the human rights claimants did not would be illogical and unjust and fuel the fires of anti-communitarian sentiment in a quite unnecessary way.

132. For as long as the treaties of the European Community and European Convention on Human Rights remain part of our law, the courts cannot shrink from telling Parliament when it has infringed the rights which those treaties protect. We cannot abdicate the role which Parliament itself has given us, even if we would prefer to leave certain kinds of question to the Parliamentarians. But when we judge the compatibility of recent legislation we do not have to invent rights which the European institutions have never recognised; still less do we have to reject the justifications which the European institutions would be likely to accept. This is the world in which fundamental human rights and representative democracy can happily co-exist.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

133. Hunting has long been a controversial subject, the call for a ban heard first many years ago. I use the term hunting in this judgment for simplicity's sake to refer to the traditional form of mounted foxhunting with a pack of hounds. Some, whether they themselves hunt, strongly support it; others equally strongly condemn it. Each of your Lordships doubtless knows people on both sides of the divide. The supporters genuinely believe that hunting promotes rather than impairs the welfare of foxes; those opposed no less genuinely believe it to be cruel. It seems to me absurd to regard either side as acting dishonourably in the dispute. To my mind both views seem entirely respectable. No doubt there are those with unworthier motives in play but their existence, whether amongst hunt supporters or those opposed, cannot affect the outcome of this appeal.

134. The central question for the decision of the House is whether Parliament was entitled by legislation to give effect to the preference of one side of the debate (the majority) to ban hunting. That, of course, depends critically in the first place upon whether the hunters (or at least some of them) can establish a right to hunt which cannot be denied them except for good reason. If they cannot first establish such a right then Parliament can do whatever it likes whether for good reason or none and your Lordships would be powerless in the matter. When I say that Parliament can do whatever it likes I mean, of course, provided always that it follows a proper parliamentary process. That was the point at issue in the first challenge to the hunting ban: was the Parliament Act 1949 of full legal effect so as (by its amendments to the Parliament Act 1911) to provide a lawful means of enacting the Hunting Act 2004 without the consent of the House of Lords? The House held that it was: *R (Jackson) v Attorney General* [2006] 1 AC 262.

135. The hunters seek to establish a prima facie right to hunt either under the European Convention on Human Rights or under the Treaty establishing the European Community. As I have said, unless they can show that the ban engages some specific right under one or both of these treaties, that is an end of the matter: they can call for no justification whatever for the ban.

136. Before, therefore, turning to consider what might constitute good and sufficient justification for a ban (itself to my mind dependent upon which, if any, of the asserted rights is engaged) and what consequences would flow from any failure by the respondent to establish such justification, I propose first to address the particular rights for which the appellants variously contend. I shall touch upon them comparatively briefly: others of your Lordships have already considered them much more fully.

The European Convention on Human Rights
Article 8

137. Article 8(1) provides that: "Everyone has the right to respect for his private and family life, his home and his correspondence."

138. I cannot hope to improve upon the careful analysis of the ECtHR's (and domestic) jurisprudence on article 8 made by my noble and learned friend Lord Bingham of Cornhill (paragraphs 10-14 of his opinion) nor upon the reasons he gives in paragraph 15 for concluding that the appellants' claims cannot in the light of present authority reasonably be held to fall within article 8.

139. But I strongly wish that it were otherwise and for my part would hope to see the jurisprudence governing the scope of article 8 further developed by the Strasbourg Court. Why should it not encompass a broad philosophy of live and let live (or, in Mrs Pretty's case, let die: *Pretty v United Kingdom* (2002) 35 EHRR 1)? Why should people not be free to engage in whatever pursuits they wish—pursuits, that is, central to their wellbeing, as hunting was recognised in the courts below to be in the lives of some of these appellants ("a core part")— unless there is good and sufficient reason (as, indeed, was found in Mrs Pretty's own case) to forbid it? Article 8's protection is recognised to extend to a right to identity and to personal development and, as *Pretty* first articulated, the notion of personal autonomy. It encompasses almost any aspect of a person's sexuality and a good deal else that is clearly personal. But why should respect for private life not encompass also wider concepts of self-fulfilment? The traditional culture and lifestyle of gipsies and Lapps is protected under article 8 because each is recognised as an ethnic group with its own particular identity: see *Buckley v United Kingdom* (1996) 23 EHRR 101 and *G and E v Norway* (1983) 35 DR 30. But why should these groups alone have their way of life safeguarded? Why not others too? Of course the hunting community is

in no sense ethnically based nor, indeed, comparably identifiable as a defined group. But it may be doubted whether many gipsies are any more wedded to their particular lifestyle than are numbers of keen huntsmen to theirs. Many people in a real sense live for some particular activity, whether their profession or their recreation. In a real sense it defines them. Often it provides them with their feelings of identity, self-esteem and position in the community.

140. Take music or dance; or chess or bridge; or polo or golf; or climbing or canoeing. Should not a human rights convention ideally operate to ensure that all such activities could only be banned for good reason. Some perhaps may be regarded as more personal than others, carried out in circumstances of greater intimacy. But why should that be critical? All of them are activities to which people may choose to devote much of their lives and which for some are all-important. The alternative, clearly, is that any or all of these activities could be banned, perhaps by some Taliban-like administration, and that those affected, amateurs or professionals, however fundamentally, would have no right to call for a justification for the ban and no redress in the courts were none afforded. The government enacting such legislation would, of course, be politically accountable to the electorate. But if a majority in the country favoured such a ban, prompted, say, by feelings of prejudice or jealousy towards a wealthy or intellectual elite, there might in fact be political advantage in it.

141. Naturally I have considered whether this House ought itself properly to construe and apply article 8(1) sufficiently widely to encompass some at least of these appellants. But I conclude not. It is one thing to say that Member States have a margin of appreciation, perhaps a wide margin, when it comes to striking any balance that falls to be struck under article 8(2) (or, for that matter, in respect of any other qualified right); quite another to say that a comparable margin exists for determining whether the qualified right (here article 8(1)) is engaged in the first place. The reach of article 8 must be for the Strasbourg Court itself to develop.

Article 11

142. Article 11(1) provides that: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”

143. I have the greatest difficulty in understanding how this article is engaged in the present case. All those affected by the ban continue to be entitled to assemble and associate with others to their hearts' content. Obviously the ban prevents their hunting together once they have done so and obviously, therefore, they will be the less likely to exercise their article 11(1) rights than in times past. But it is not the right itself that has been restricted, only hunting.

144. Almost any activity ban is likely to bring in its wake a reduced exercise of article 11(1) rights by those previously engaged in it. Ban music and concert halls will close. Ban bridge and bridge clubs will close. In each case, of course, there is nothing to stop those banned from assembling and associating with others, not least to protest vigorously about the ban. Indeed, my recollection is that many of those affected by the hunting ban did just that.

Article 14

145. This is the Convention's (limited) non-discrimination provision. For the reasons given by Lord Bingham, the appellants' claim under this article cannot succeed in the light of the recent decisions of the House in *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 and *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484.

Article 1 of the First Protocol

146. This is the protection of property provision which I need not set out again. On this issue too I agree completely with what Lord Bingham says at paragraphs 20 and 21 of his opinion. This article plainly is engaged.

The Treaty of the European Community

147. I come now to the relevant provisions of the EC Treaty, articles 28 (quantitive restrictions on imports) and 49 (restrictions on freedom to provide services).

148. It seems at first blush (indeed, at second blush too) highly surprising that either of these articles should be engaged by so obviously a non-commercially oriented and non-discriminatory measure as the hunting ban. By the nature of things, few measures have no effect whatever on trans-border trade: just as the hunting ban inevitably reduces the demand in England for Irish-bred hunters and the demand on the Continent for English hunting services, so too, for example, must the handgun ban (the subject of challenge in Strasbourg, but not Luxembourg, in cases like *Denimark v United Kingdom* (2000) 30 EHRR CD 144 and *Ian Edgar (Liverpool) Ltd v United Kingdom* (Reports of Judgments and Decisions 2000-I, p 465) have reduced the demand for, say, Mauser and Beretta pistols, and no doubt various handgun-related services too. Is it really to be said that every such restrictive measure derogates from the fundamental principle of the free movement of goods and services so as to call for a public policy justification? I would have thought not.

149. As Lord Bingham has explained, however, the jurisprudence of the European Court of Justice is not yet clear on the point. In the past, almost any measure which to any degree operates to inhibit trans-border trade has been found to engage one or other of articles 28 and 49. The question, at least with regard to article 28, is presently under consideration by a Grand Chamber of the ECJ in Case C-110/05, *Commission of the European Communities v Italian Republic* (concerning Italian legislation prohibiting mopeds from towing trailers). It may be hoped that the Court will decide upon a narrower approach to these articles, introducing perhaps, in the case of non-discriminatory measures, a remoteness test or *de minimis* requirement. The arguments for this are to my mind very powerful. The outcome, however, cannot be taken for granted.

Justification and Proportionality

150. What was the aim of the majority of the House of Commons in banning hunting? It was described by the Divisional Court, and accepted by the Court of Appeal, as follows:

> "The legislative aim of the Hunting Act 2004 is a composite one of preventing or reducing unnecessary suffering to wild mammals, overlaid by a moral viewpoint that causing suffering to animals for sport is unethical…."

151. In short, the ban on foxhunting had two aims: one, to reduce unnecessary suffering to foxes; the other, to give effect to the view of those opposed to hunting that causing suffering to animals for sport is unethical. Although the appellants strongly dispute the evidential basis for the Court's discernment of this second aim, I for my part have no doubt that some at least of those seeking (and voting for) the ban were indeed thus motivated.

152. There is before your Lordships a mass of material, the Burns Report prominent amongst it, bearing on all aspects of animal welfare in connection with the hunting ban. It is sufficient for present purposes to state two conclusions which appear to me to emerge plainly from this abundance of evidence. First, that hunting causes at least some degree of suffering to foxes—it "compromises [their] welfare" as the Burns Report put it. Secondly, whether or not it causes *unnecessary* suffering to foxes (by which I mean more suffering than would result from the additional trapping and shooting—and thereby in some cases wounding instead of killing—of foxes consequent on a ban) can neither be proved nor disproved.

153. This second conclusion to my mind substantially undermines the purported justification for the first of the stated aims of the ban: if the ban cannot be shown to reduce unnecessary suffering it is difficult to see how it furthers that aim. Indeed there is a case (equally unproven, of course) for saying that the ban will increase the suffering of foxes generally. It was clearly for this reason that the courts below laid such emphasis on the ban's second aim: to put a stop to the causing of suffering to foxes for sport which the majority of those engaged in the dispute thought unethical. As the Court of Appeal put it at paragraph 123: "Once that objection [the moral objection] is identified, and is regarded as a legitimate basis for legislation, then a total ban was clearly a proportionate response."

154. Is such an objection, however, "a legitimate basis for legislation?" The answer to that question to my mind depends crucially upon what (if any) rights are being interfered with by the legislation. If the only rights impaired here are the appellants' property rights only under article 1 of Protocol 1, that is one thing. If, however, contrary to my view, but as I would have wished, the ban does engage the appellants' article 8 right to respect for their private lives, that would seem to me quite another thing. Let me explain.

Article 1 of Protocol 1— justification

155. The justification required for depriving someone of their possessions is merely that this be in the public interest. Similarly the use of people's property can be controlled by the state if that is deemed necessary in the public interest. The state must establish a legitimate aim in the public interest and the deprivation involved must be proportionate to that aim. A fair balance must be struck between the demands of the general interest of the Community and the need to protect the individual's property rights, a balance that will not be found if the individual has to bear an excessive burden. There is, however, as the ECtHR made clear in *James v United Kingdom* (1986) 8 EHRR 123 at para 51, no test of strict necessity to be found in this article. That being so, and the interference with the appellants' property rights here being comparatively slight, I am prepared to regard the moral objection of the majority as a sufficient public interest justification.

Article 8— justification

156. Contrast the position under article 1 of Protocol 1 with the justification required for an interference with article 8 rights. Article 8(2) permits such interference only if this is "necessary in a democratic society" which clearly *does* constitute a test of strict necessity. A convenient, but by no means novel, statement of the position is to be found in *Chassagnou v France* (1999) 29 EHRR 615 at para 112:

> "The Court reiterates that in assessing the necessity of a given measure a number of principles must be observed. The term 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable.' In addition, pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society.' Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Lastly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued."

157. I readily accept, as Lord Bingham suggests at para 45 of his opinion, that a degree of respect should be accorded to the decision of a majority of the country's democratically elected representatives reached after intense debate. I am unpersuaded, however, that this is "pre-eminently" a case for such respect and I confess to some difficulty with my Lord's suggestion that: "The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament."

158. The democratic process is a necessary but not a sufficient condition for the protection and vindication of human rights. Sometimes the majority misuses its powers. Not least this may occur when what are perceived as moral issues are involved. Take the Irish legislation criminalising homosexuality considered in *Norris v Ireland* (1988) 13 EHRR 186. True, it had been enacted as long ago as 1885 and was no longer enforced. But the Irish government was asserting in 1989 that it continued to serve a legitimate aim, the protection of morals. Whilst acknowledging that national authorities enjoy a wide margin of appreciation in matters of morals, the ECtHR pointed out that this is not unlimited and in the event held that there was no pressing social need for the legislation:

> "Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved." (para 46)

Or consider the UK Government's ban on gays in the military which was only ended after successful article 8 challenges were brought in Strasbourg.

159. Were the appellants' article 8 rights engaged here, I would have declined to find the hunting ban justifiable. I simply cannot regard the ethical objection of the majority as a sufficient basis for holding the ban to be "necessary." As I observed at the outset, the genuineness of this objection is not to be doubted, but nor too is the genuineness of those who believe that hunting contributes to animal welfare rather than impairs it. How then can the ban be reconciled with the values of "pluralism, tolerance and broadmindedness," these "hallmarks of a

democratic society"? Most would regard adultery (assuredly a pursuit engaging article 8) as unethical (and often causing suffering too). But could an intolerant majority therefore ban it and then argue that this was "necessary in a democratic society"? Surely not.

160. Of course, as Lord Bingham points out (at para 37), the UK has a long and proud tradition of animal welfare legislation born of a love of animals and a distaste for their unnecessary suffering. But I have difficulty in seeing this ban as just another step in that process, just another development of social policy.

161. I have cited *Chassagnou* for its statement of the approach to take to assessing the necessity of a given measure. But the circumstances of that case seem to me instructive too. They are very much the converse of the present case. At issue there were the rights of landowners opposed to hunting on ethical grounds who had been obliged under French legislation to transfer hunting rights over their land to approved municipal hunters' associations which they were required to join. They were thus unable to prevent hunting even on their own land. In finding a violation of article 11 the Court considered the applicants' opposition to hunting to be "worthy of respect in a democratic society" (para 114). That surely is unsurprising. More surprising, however, would be a conclusion that the views of those in favour of hunting (in some cases on their own land) are not also worthy of respect in a democratic society. It seems to me a matter of regret that the House of Commons was not more respectful of the views of those in favour of hunting in the present case.

Articles 28 and 49 - Justification

162. Mr Anderson QC for the EC appellants appears to have persuaded the Court of Appeal that the grounds of justification for acts otherwise breaching Community law are less extensive and more constrained than those justifying an interference with the qualified rights under the Convention—although the Court of Appeal came to hold that any derogation from articles 28 and/or 49 (which they did not in fact accept) was in any event justifiable and proportionate.

163. For my part I would reject any such contention. If anything, indeed, I would have thought interferences with the fundamental rights and freedoms guaranteed by the Convention more, rather than less,

difficult to justify than restrictions on the merely economic rights of free movement of goods and services provided for by the Treaty. If anything, these economic rights seem to me more akin to the property rights protected under article 1 of Protocol 1 than to the core rights guaranteed, for example, under articles 8-11—and therefore to be more readily overridden in the broad public interest than the Convention's core rights.

164. That said, I recognise the existence of a consistent strain of Community law jurisprudence to the effect that reliance (for a restrictive measure) on public policy requires "the existence...of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society": see *R v Bouchereau* (Case 30/77) [1977] ECR 1999, para 35. If that requirement is indeed as stringent as the requirement under Convention law that any interference with the (qualified) core rights must be "necessary in a democratic society" in the sense explained in *Chassagnou* (see para 156 above), it would follow from what I have already said that I would not myself regard the hunting ban (if ultimately it is found to engage articles 28 or 49) to be justified.

165. It does not follow, however, that I would refer this case to the ECJ for a ruling either on the question of whether articles 28 or 49 are engaged or, assuming they are, as to what should be the proper approach to the issue of justification. On the contrary, I would not. And for this reason. I simply cannot imagine a set of rulings by the ECJ which could then result in this House striking down the hunting ban as an impermissible derogation from the principle of the free movement of goods or services. If (a big if as I have already suggested) the ECJ were to regard the ban as engaging either article in the first place, then I cannot believe that its justification would fall to be judged as stringently as would be the case were article 8 engaged. In my judgment, if the Hunting Act 2004 is not to be declared incompatible with the appellants' Convention rights, it is certainly not to be disapplied by virtue of EC law.

166. In common, therefore, with Lord Bingham and my noble and learned friend Lord Hope of Craighead, although for rather different reasons, I too would dismiss both these appeals.