HOUSE OF LORDS SESSION 2007–08
[2007] UKHL 53
on appeal from:[2003] ScotCS 178

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Whaley and another (Appellant) v Lord Advocate (Respondent) (Scotland)

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

Appellants:
Brian Friend (in person)

Respondents:
Gerry Moynihan QC
James Mure
(Instructed by Treasury Solicitor)

Intervener's Counsel
Philip Engleman
(Instructed by Edwards Duthie)

Hearing date:
10-11,15-18 OCTOBER 2007

ON
WEDNESDAY 28 NOVEMBER 2007

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Whaley and another (Appellant) v Lord Advocate (Respondent) (Scotland)

[2007] UKHL 53

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. Save that I would, for reasons I have endeavoured to give in *R (Countryside Alliance and others) v Attorney General* and *R (Derwin and others) v Attorney General* [2007] UKHL 52, hesitate to conclude that article 11 of the European Convention is not applicable, I am in agreement with my noble and learned friend's reasoning and conclusions. For reasons also given in my opinion in the *Countryside Alliance* case I would hold that any interference with the appellant's right under article 11, if that article is engaged, is justified. I would accordingly dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

2. This in an appeal against an interlocutor of an Extra Division of the Court of Session (Lord MacLean, Lady Paton and Lady Smith) (*Friend v Lord Advocate* [2005] CSIH 69; 2006 SC 121) refusing a reclaiming motion by the appellant, Brian Leonard Friend, against an interlocutor of the Lord Ordinary (Lord Brodie) (*Whaley v Lord Advocate*, 2004 SC 78) dismissing a petition in which the appellant and Jeremy Hagan Whaley sought judicial review of the enactment by the Scottish Parliament of the Protection of Wild Mammals (Scotland) Act 2002 (asp 6). They sought review of the enactment on the ground that it was incompatible with the

European Convention on Human Rights read together with the Race Relations Act 1976 and with a number of international obligations of the United Kingdom. Their case was that, for these reasons, the Act was outside the legislative competence of the Scottish Parliament in terms of section 29 of the Scotland Act 1998. The petition was served on the Advocate General for Scotland, the Lord Advocate and the Scottish Ministers. It was responded to in the public interest by the Lord Advocate. Mr Whaley, who was the first named petitioner, did not insist on his reclaiming motion in the Inner House and is not a party to the appeal.

3. Mr Friend, with the late Hugh Edward Thomas, also brought a claim in England seeking judicial review by way of a declaration of incompatibility of the Hunting Act 2004 with the Convention as scheduled to the Human Rights Act 1998 read together with the Race Relations Act 1976 and the same international obligations as those referred to in the proceedings in the Court of Session. Their claim was dismissed by the Divisional Court on 29 July 2005. Their application for permission to appeal was refused by the Court of Appeal, as it was not thought that the arguments deployed by Mr Friend and Mr Thomas had any real prospect of success: *R (Countryside Alliance) v Attorney General* [2006] EWCA Civ 817, [2007] QB 305, para 179. Mr Friend's appeal against the interlocutor of the Court of Session has been brought without leave under section 40(1) (a) of the Court of Session Act 1988. He appeared in person before your Lordships to conduct his own appeal, as he has done throughout these proceedings.

4. The Court of Appeal paid tribute to the admirable way in which Mr Friend and Mr Thomas prepared their documentary case and the clarity and moderation with which they presented their oral submissions in that court: para 173. I should like to add my own tribute to the way Mr Friend has conducted his case in your Lordships' House. He brought to life, in a charming and restrained but forceful way, the very real sense of injustice that he and others in his position feel about what these enactments have done to the hunting community.

5. In his petition Mr Friend avers that he is an associate member of the Union of Country Sports Workers and follows what he describes as the ancient cultural activity and lifestyle of hunting with hounds. His home is in Devon but he also owns cottages in Duns and Kelso. He joins with others to follow hounds on foot with the Berwickshire Hunt and other hunts both north and south of the Border. He also used to ride to hounds, but for the time being at least he no longer does so following an injury.

He said that he was an ordinary person who enjoys hunting as a way of life. He is convinced that hunting with hounds causes the least suffering of all methods used to control foxes. As he put it, a fox which is hunted is either alive and free or it is dead. The kill is swift and it is efficient. The risk of wounding by shooting is avoided, as is the suffering that results from poisoning or the use of snares and traps. He felt that the legislators had not been impartial in their assessment of these issues. They had targeted a group of people that they did not like. He was seeking the protection of the European Convention on Human Rights in the belief that these rights are available to everyone including ordinary people like himself. He said that those who sought to take those rights away should answer for their actions in the courts.

6. Section 29(1) of the Scotland Act ("SA") provides that an Act of the Scottish Parliament is not law in so far as any provision is outside the legislative competence of the Parliament. Section 29(2) SA defines the limits of the Parliament's competence. Paragraph (d) of that subsection provides that a provision is outside that competence if it is incompatible with any of the Convention rights. It follows that the Protection of Wild Mammals (Scotland) Act 2002 ("the Act"), like any other enactment of the Scottish Parliament, is open to scrutiny on this ground. Mr Friend, like everyone else, is entitled to the protection of the Convention rights. The Convention exists to protect the fundamental rights and freedoms of each and every individual: *A v The Scottish Ministers,* 2002 SC (PC) 63, para 34. People who are members of a group that is disliked, as Mr Friend puts it, are as much entitled to that protection as anyone else. The Convention is impartial as to whether one person or minority group is more deserving of protection than another. The protection that it affords is available to everyone. The function of the courts is to ensure that they receive that protection.

7. But the scrutiny to which enactments of the Scottish Parliament can be subjected for their protection does not extend any further than the limits which section 29(2) SA has placed on the legislative competence of the Parliament. It is here that Mr Friend's complaint that the Act is incompatible with the United Kingdom's international obligations such as the Rio Declaration on Environment and Development of 1992, principle 22 of which encourages support for traditional practices and the culture and identity of indigenous peoples, meets an insuperable obstacle.

International obligations

8. Mr Friend submitted that, as observing and implementing international obligations, obligations under the Human Rights Convention and obligations under Community law are all excluded by para 7(2) (a) of Schedule 5 SA from the list of reserved matters, the Scottish Parliament was obliged to observe and implement international obligations in just the same way as it was obliged to implement and observe the Convention rights and Community law. That however is not how observing and implementing international obligations has been provided for by the Scotland Act. Section 126(10) SA provides that in the Act the expression "international obligations" means any international obligations of the United Kingdom "other than" obligations to observe and implement Community law and the Convention rights. The distinction that is inherent in the definition recognises that it is for Parliament, not the courts, to decide whether the international treaties should form part of domestic law. On the one hand there are the Convention rights which have been incorporated into domestic law by the Human Rights Act 1998 and Community law which has been incorporated into domestic law by the European Communities Act 1972. On the other hand there are international obligations of the kind that have not been incorporated. The international obligations that Mr Friend relies on all fall into the latter category. None of them are enforceable in the domestic courts as part of the law of Scotland. Nor is the Scottish Parliament bound to implement them, although it may choose to do so as they are not among the reserved matters that are outside its legislation competence: section 29(2)(b) SA. As Mr Moynihan QC for the Lord Advocate put it, the Scottish Parliament has the right so to legislate, not a duty to do so.

9. Recognising that international obligations are not part of domestic law, the Scotland Act provides for them in a different way. Section 35 (1) SA provides that the Secretary of State may make an order prohibiting the Presiding Officer from submitting a Bill for Royal Assent if it contains provisions which he has reasonable grounds to believe would be incompatible with any international obligations. Section 58(1) SA provides that the Secretary may also intervene at the stage when a Bill is introduced in the Parliament if he has reasonable grounds to believe that its introduction would be incompatible with any international obligations. He may so do by directing by order that that action shall not be taken. What these provisions do is enable the Secretary of State, who is a minister of the United Kingdom government, to intervene if he thinks it appropriate to do so in the interests, for example, of international comity. They do not limit the legislative competence of the Scottish Parliament in a way that can be decided upon by a court. I agree with both the Lord Ordinary and the

Extra Division that the averments that refer to the international obligations are irrelevant.

The Convention rights

10. Mr Friend submits that the Act is incompatible with articles 8, 9, 10, 11 and 14 of the Convention, all of which are included within the Convention rights for the purposes of section 29(2)(d) SA. But he also claims the protection of the Convention as a whole, notwithstanding the exclusion of some of its articles from the definition of the Convention rights in section 1(1) of the Human Rights Act 1998. He refers in particular to articles 17 and 53. He also invokes his right to a fair trial under article 6, on the ground that hunting and fishing is a civil right within the meaning of that article.

Articles 17 and 53

11. It is convenient to deal first with Mr Friend's submissions with reference to articles 17 and 53. I take them first because I do not think that they have any bearing on his basic argument, which is that the Act is not law because it is outside the legislative competence of the Scottish Parliament.

12. Article 17 provides that nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the limitation of any of the rights and freedoms set forth in the Convention to a greater extent than the Convention itself provides for. Section 1(1) of the Human Rights Act 1998 which defines the expression "the Convention rights" provides that the rights and fundamental freedoms set out in the articles listed in that subsection are to be read with, among others, that article. But in my opinion article 17 adds nothing, in the present context, to what section 29 SA itself provides. That section does all that the article seeks to achieve by providing that an Act of the Scottish Parliament is not law so far as any provision of the Act is incompatible with any of the Convention rights. Mr Friend very fairly appreciated this point when it was put to him, and he did not insist on that part of his argument.

13. After the hearing was over Mr Friend asked that his argument about this article be re-considered, on the ground that the Scottish Parliament's Rural Affairs Committee had admitted in its Report (SP Paper 376) that the Bill was intended to "target mounted hunting". What the Report actually says is that it was Lord Watson's stated aim "to end cruelty", and it was to the question whether mounted hunts were cruel that the Committee addressed its attention: paras 4, 10, 46, 98-102. Even if the Report is to be read as indicating that the intention was to target hunting, the fact remains that all the protection a person needs against legislation that is defective because it is incompatible with the Convention rights is to be found in section 29 SA. Section 29(1) SA states that legislation which is outside the competence of the Scottish Parliament "is not law." The section gives full effect to article 17. But to obtain the benefit of it Mr Friend must show that the Act is incompatible with one or more of the Convention rights.

14. As for article 53, it provides that nothing in the Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party. Mr Friend did not insist on this part of his case in the Inner House: 2006 SC 121, para 25. It has reappeared in his written case before your Lordships, so I make this brief comment on it. The primary function of article 53 is to avoid any conflict between the Convention and any of the human rights and fundamental freedoms which are protected by the domestic laws of the Contracting State – under its written constitution, for example. In the United Kingdom context this means that it is not to be read as limiting or derogating from any other right or freedom conferred by or under any law having effect in any part of it: see section 11 of the Human Rights Act 1998, which gives effect to this principle in domestic law. But the limits of the legislative competence of the Scottish Parliament are not defined by article 53 or section 11. The protection that article 53 requires in this context is to be found, and to be found only, in the limits that are set by the Convention rights listed in section 1 of that Act.

Articles 9 and 10

15. I take these articles next, because it seems to me that neither of these articles is applicable to Mr Friend's case and, in that sense, "engaged" by it: see my discussion of these terms in *Harrow London Borough Council v Qazi* [2004] 1 AC 983, para 47. It must follow that

his averments in reliance on them are irrelevant because, even if true, they cannot in law provide him with the remedy which he seeks.

16. Article 9 says that everyone has the right to freedom of thought, conscience and religion and that this right includes the right, either alone or in community with others and in public or private, to manifest his religion or belief in practice. Article 10 says that everyone has the right to freedom of expression and that this right includes freedom to hold opinions and to impart information and ideas without interference by public authorities.

17. Mr Friend said that hunting with hounds was a matter of conscience for the individual. It was not for the many to impose their views on those who participated in it. Hunting with dogs had been practised since the dawn of time. His conscience permitted him to engage in the practice because he knows that foxes that are killed as a result of it will not be wounded. He acknowledged this was a non-religious belief, and that for it to be protected by article 9 it must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs: *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, para 24, per Lord Nicholls of Birkenhead. But he said that his belief in his right to hunt was at least of comparable importance to him as his religious beliefs. Indeed it was greater, for him, than it was for his church. The wearing of traditional hunting dress, which shows who is in charge of the hunt, was a visible expression of this part of the cultural life of the community.

18. It is questionable whether Mr Friend's insistence that his belief is comparable to a religious belief would stand up to examination in Strasbourg, as the Court of Appeal observed in *R (Countryside Alliance) v Attorney General* [2007] QB 305, para 177. Looked at objectively, hunting with hounds is carried on mainly for pleasure and relaxation by those who take part in it: *Chassagnou v France* (1999) 29 EHRR 615, para 105 (Commission), para 108 (Court). So I doubt whether the threshold that Lord Nicholls identified in *Williamson* has been crossed. It has been said repeatedly, following Lord Bingham of Cornhill's observation in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20, that national courts should not outpace the jurisprudence of the Strasbourg court. The current jurisprudence does not support the proposition that a person's belief in his right to engage in an activity which he carries on for pleasure or recreation, however fervent or passionate, can be equated with beliefs of the kind that are protected by article 9. It would be surprising if it did so, as it would be hard in that

event to set any limits to the range of beliefs that would be opened up for protection.

19. As the Lord Ordinary observed, however, Mr Friend's freedom to hold and impart information about the views that he holds about hunting and to manifest his beliefs by the wearing of traditional hunting dress in public is not really in issue in this case: 2004 SC 78, para 74. The Act does not compel him to act contrary to his conscience or to refrain from holding and giving visible expression to his beliefs about the practice of hunting in the way he dresses. His freedom has been interfered with because the Act tells him that hunting with hounds remains lawful only if, once the targeted animal is found or emerges from cover, it is shot, or killed by a bird of prey, once it is safe to do so: see the exception in section 2(1). The activities which he is permitted to carry on have been limited to those permitted by the Act. But this does not interfere with the holding or expression of beliefs about the practice of hunting, nor is the wearing of the dress that is traditionally associated with it prohibited.

Articles 8 and 11

20. Mr Friend is not alone in claiming that the Act is incompatible with the rights that are protected by these articles. They were invoked by the petitioners in *Adams v Scottish Ministers,* 2004 SC 665. They were invoked too by the appellants in the appeal against the decision of the Court of Appeal in *R (Countryside Alliance) v Attorney General* which was heard immediately before the appeal in Mr Friend's case. There is already a substantial body of judicial opinion on the question whether these articles are engaged and, if so, whether the restrictions which the Act imposes can survive scrutiny as necessary in the public interest and proportionate. As the ground has already been covered in so much detail elsewhere I shall confine myself to the essential points.

21. Article 8 says that everyone has the right to respect for his private and family life, his home and his correspondence. Mr Friend said that hunting with hounds is part of his private life. It was what he did and wishes to be able to continue to do, as an ordinary person and a member of an ordinary family. It is his way of life, in common with other members of the hunting community. He maintained that the traditional way of life of the hunting community is equivalent to that of an ethnic group and that it is entitled to the same protection. He said that these aspects of his private and family life were entitled to the protection of the article, with which the Act was incompatible. These submissions

raise two questions as to the scope of article 8. The first is whether the concept of "private life" embraces activities of the kind that Mr Friend wishes to engage in. The second is whether the hunting community to which he belongs is entitled to the protection that is accorded to ethnic minority communities whose traditional way of life is regarded as falling within the article.

22. The scope of the expression "private life" in article 8 in the context of the practice of hunting has been examined by the Inner House in *Adams v Scottish Ministers,* 2004 SC 665, paras 62-64, and by the Court of Appeal in *R (Countryside Alliance) v Attorney General* [2007] QB 305, paras 71-105. In each case it was concluded, after an examination of the relevant authorities, that it does not extend to the rights asserted by Mr Friend and others in the hunting community. I have reached the same conclusion, for the following reasons. 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 Mr Friend's right to establish and develop relationships with other human beings and the outside world. But this right, which recognises that it would be too restrictive to limit the notion of "private life" in article 8 to an inner circle in which the individual may live his own personal life as he chooses, is protected only "to a certain degree": *Niemietz v Germany* (1992) 16 EHRR 97, para 29. As the Lord Justice Clerk (Gill), delivering the opinion of the court, said in *Adams*, 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 people such as Mr Friend hunting with hounds is a way of life. This is not just about how he spends his own time when he wishes to be left alone. It affects how he behaves with other people too. Not all activities of that kind lie outside the scope of the 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.

23. The argument that hunting is a traditional way of life which he should be permitted to engage in does not take Mr Friend any further. He made a valiant attempt to persuade your Lordships that those who participated in it were an ethnic group whose customs and practices in relation to hunting were entitled to protection in the same way as those of minority ethnic groups such as the Saami people in the north of Norway: *G and E v Norway* (1983) 35 DR 30. The European Commission of Human Rights accepted that this minority group was entitled to respect for its nomadic lifestyle, which included moving their herds of reindeer in search of suitable grazing over considerable distances. In *Chapman v United Kingdom* (2001) 33 EHRR 399, para 73, the Strasbourg court held that the applicant's occupation of her caravan was an integral part of her ethnic gipsy travelling lifestyle, reflecting the long tradition of that minority. But, as the Court of Appeal said in *R (Countryside Alliance) v Attorney General* [2007] QB 305, para 100, this argument seeks to convert protecting the rights of nomadic national or ethnic minorities into a generalised right of respect for minority community activities in general. There is no doubt that hunting with hounds 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, as Mr Moynihan submitted, they are a minority in numerical terms only. They are not part of a recognised ethnic or national group to whose traditional activities article 8 extends its protection. So this argument cannot be extended to Mr Friend's case.

24. Article 11 says that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. The Inner House in *Adams* said that this article was engaged if a person was prohibited from doing something so long as he is a member of a particular association or is adversely treated by reason of his membership of it: para 81. But a restriction which prohibits an activity without reference to any association, with the result that persons cannot associate for the purpose of carrying it out, was in a different category: para 82. The Court of Appeal in *R (Countryside Alliance) v Attorney General*, in agreement with the Lord Ordinary in this case at 2004 SC 78, para 80, was of the same opinion. All the Act did was to prohibit a particular activity once the participants had assembled: para 107. In my opinion this is not a sufficient answer to the argument that the claimants are within the protection of article 11.

25. 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 freedom 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. In the field of public protest it would, I think, be wrong to say that the article had no application because the activity on which they were engaged did not begin until after the participants had assembled.

26. But here again 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 Unité Jurassienne v Switzerland* (1979) 17 DLR 93, 119. The situations to which it applies must relate to activities of comparable importance, of which the right to form and join a trade union to 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 Mr Friend seeks to assert is really no more than a right to gather together in a public place to take part in an activity which the Strasbourg court, agreeing with the Commission at para 105, has held to be mainly for pleasure and recreation: *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 Mr Friend's position is no different from that of any other person who wishes to assemble with others 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 to Mr Friend's case.

Article 14

27. This article provides that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Mr Friend maintains that he is being discriminated against by the Act because he follows the ancient practice of hunting with hounds which others find offensive. He said that he was a member of a particular social group, which Labour politicians had denigrated not for what they did but because they were perceived, wrongly, to be toffs and Tories. It accorded different treatment to others, because it permitted the killing and pursuit of quarry species by methods that could not guarantee not to inflict more pain, and thus unnecessary suffering, than the use of hounds.

28. The Grand Chamber of the Strasbourg Court has held that article 14 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."

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."

The paradigm case is one where the state, having set up an institution such as a school or other educational establishment, takes discriminatory measures within the meaning of article 14 read with article 2 of the First Protocol which are based on differences in the language of children attending schools in unilingual regions: 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 for the 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.

29. 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"

The word "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.

30. The question is whether, applying these principles, the Act is outside the competence of the Scottish Parliament because it is incompatible with article 14. In my opinion Mr Friend's argument that it is incompatible with that article fails on both points. For the reasons already given, I do not think that any of the other articles that he relies on are engaged. Article 14 would be if he could show that this case nevertheless fell within, or was at least close to, the core of the values guaranteed by any one or more of those articles. But this is not something that can be plucked out of the air. It must be related to something 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 it, restrict it or take it away on grounds that would conflict with any of the core values. That however is not this case. The 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. That is the principal reason why I would hold that Mr Friend's 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 he complains is not directed at him 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 Mr Friend as an individual, it is not on the ground of his political or other opinion or any other status that he is able to identify that this action has been taken. The real reason for it lies in the nature of the activity, not any personal characteristic of his or of any of the many other people of all kinds and social backgrounds who participate in hunting.

Justification

31. If, as I would hold, none of the Convention rights on which Mr Friend founds are engaged in this case, it would follow that there is no need consider whether the incompatibility of which he complains is justified and proportionate. Had this been necessary however I would have held that these requirements were satisfied. The issues were

considered by the Inner House in *Adams v Scottish Ministers*: 2004 SC 665, paras 30-52. On its analysis, with which I agree, the broad legislative aim of the 2002 Act was to prevent cruelty to animals. Mounted foxhunting with hounds was considered 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.

32. Mr Friend vigorously disputed these conclusions. But I agree with the Inner House that there was adequate factual information to entitle the Scottish Parliament to conclude that foxhunting inflicted pain on the fox and that there was an adequate and proper basis on which it could make the judgment that the infliction of such pain in such circumstances constituted cruelty. The social impacts of the proposed legislation were for the legislature to judge. As the Lord Justice Clerk observed in para 47, the prevention of cruelty to animals has for over a century fallen within the constitutional responsibility of the legislature. The 2002 Act is to be seen as one more step on a long legislative sequence in which animal welfare has been promoted by the legislature in relation to contemporary needs and problems. The question whether the measures proposed were now necessary in a democratic society was pre-eminently one for the Parliament. Mr Moynihan was right to describe the effect of the Act, in the light of the activities which are excepted from the prohibition by sections 2 to 5, as a restriction on mounted fox hunting, not a ban. That is how its effect has proved to be in practice. The legislative aim was achieved in a way that was proportionate.

Article 6

33. Mr Friend has invoked article 6 on the grounds that the right to hunt with hounds is a civil right and that he is entitled to a determination of his right to do so by an independent and impartial tribunal. He maintains that the Lord Ordinary's decision to dismiss the petition following a first hearing, without hearing evidence, has deprived him of a full and impartial hearing pursuant to his right under the article. He did not suggest that there were grounds for doubting the impartiality of the Lord Ordinary. In essence his complaint is that, because his petition was dismissed because his averments were irrelevant, he has not had a fair trial.

34. I see no reason to doubt that the right to fish or hunt is a civil right within the meaning of article 6: *Könkämä v Sweden* (1996) 87-A DR 78.

In fact, the issue that has to be determined in this case is not whether Mr Friend has a right to hunt but whether it was within the legislative competence of the Scottish Parliament to interfere with, or limit, that right. This point however is immaterial, as his right to have this issue too determined is a civil right. Nor does it dispose of his reason for invoking article 6. The question is whether a hearing on evidence is an essential component of a fair trial in a case where the judge is satisfied that, as the litigant's averments are irrelevant, no good purpose would be served by continuing with the case for a determination as to whether the petitioner is able to show that his averments are true.

35. The proposition only has to be stated for it to be obvious that it is untenable. The question whether there is a relevant case can be determined on the pleadings. This is always done by taking the averments pro veritate – assuming that they are true. A case which is found to be irrelevant is not assisted by the leading of evidence. As it happens, as can be seen from his careful opinion, the Lord Ordinary was not short of documentary evidence. He had before him the Report of the Rural Affairs Committee which, together with its appendices, provided him with a good deal of background information. He also had all the information that was needed to examine the progress of the Bill after it had reached that stage. Mr Friend was in a position to provide further information at first hand about his own beliefs and personal circumstances, as he did without objection when he was addressing your Lordships. He has been given ample opportunity to present his case. Indeed he went out of his way to express his appreciation of the courtesy that had been shown to him throughout this litigation. I do not believe that there are any grounds for thinking that he has not had a fair trial.

Conclusion

36. I agree with the Extra Division that the Lord Ordinary was right to dismiss the petition, although I have not reached this conclusion entirely for the same reasons. I would dismiss the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

37. I have had the advantage of considering the speech of my noble and learned friend, Lord Hope of Craighead, in draft. So far as the "private life" aspect of article 8 is concerned, despite the compelling way that he presented his case, I would hold that Mr Friend's Convention right is not engaged for the reasons which I have set out in my speech in *R (Countryside Alliance and others) v Attorney General* and *R (Derwin and others) v Attorney General* [2007] UKHL 52. In short, when engaged in the public spectacle of hunting, Mr Friend and others who hunt are not entitled to the guarantees relating to the "private life" of individuals. For the rest, I agree with what Lord Hope says and would accordingly dismiss the appeal for the reasons which he gives.

BARONESS HALE OF RICHMOND

My Lords,

38. I too agree that this appeal should be dismissed, essentially for the same reasons as those given by my noble and learned friend Lord Hope of Craighead. On the central questions of the scope and applicability of articles 8 and 11, I have explained my reasoning in more detail in the related cases of *R (Countryside Alliance and others) v Attorney General* and *R (Derwin and others) v Attorney General* [2007] UKHL [00] (*"Countryside Alliance"*). Much of that reasoning is addressed to the case which Mr Friend has put so attractively before us and so I hope that he will refer to it for a fuller explanation. I agree with him entirely that the Human Rights Act is for the benefit of ordinary people who lead ordinary lives: it is to protect them *inter alia* against arbitrary interceptions of their mail, email and telephone conversations, searches of their homes and persons, arrest, prolonged imprisonment without charge or trial, enforced separation from their children and families, trials in secret before military tribunals, inhuman and degrading treatment in hospital and care homes. In short, the Human Rights Act brings "something for everyone" (Jenny Watson, *Something for Everyone*: *the Impact of the Human Rights Act and the Need for a Human Rights Commission,* British Institute for Human Rights, 2002). It may well be that, in practice, the people who have had most need of its

protection are rather out of the ordinary; but that does not alter the fact that it is there to protect us all as we go about our everyday lives.

39. But there is a difference between a fundamental human right and the freedom to do as one pleases. The convention rights were drafted to address specific abuses of power and as a check upon what even a democratically elected Parliament and executive could do. Although their scope can grow and develop over time, they have not yet been developed to cover every interference by Parliament with what we might otherwise want to do. In my 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": *Countryside Alliance*, para 116. Article 11 is addressed to public as well as private gatherings. 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". Taken together, articles 10 and 11 "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": *ibid*, para 118. They do not protect *everything* which a group of people might wish to do when they get together.

40. If a particular piece of legislation does fall within the scope of the rights protected by articles 8, 9, 10, and 11, then Parliament can be called upon to justify it. On the face of it, the justifications permitted by those articles are quite narrowly drafted. I sympathise with Mr Friend's difficulty in understanding how the hunting ban could be said to be "necessary in a democratic society". My answer is 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": *ibid*, para 124. When it comes to the protection of morals, the Convention also has to take account of the very different importance attached to certain moral values in different member states. The British have long attached importance to protecting animals from harm and the hunting ban is simply the latest in a long line of legislation to that end. The fact that Parliament might have gone further or done differently does not mean that what it has done cannot be justified.

41. If we could confidently predict that the European Court of Human Rights would find that the hunting ban did engage these Convention rights and could not be justified, then in my view it would be our duty to say so. Even though it is the recently enacted Act of a democratic Parliament, we could not wash our hands of the matter. But we certainly cannot confidently so predict in this case. We must, I think, leave it to Strasbourg to tell the United Kingdom if it has got it wrong. That, in short, is why Mr Friend's attractive appeal must fail.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

42. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead and for the reasons he gives I too feel compelled to dismiss this appeal. Mr Friend should know, however, that I had considerable sympathy for his submissions (which could not have been more beguilingly put) and that they contributed to the views about the hunting ban which I have expressed in my opinion in the parallel appeal brought by the Countryside Alliance.