

**Judgment 8/2008**

**Thomas v Minister of the Housing Department –  
Royal Court (Civil Action File 1154) – 26 February  
2008)**

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**European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (Art.8) – right of respect for private and family life – Housing (Control of Occupation) (Guernsey) Law, 1994 – housing licence to be subject, inter alia, to condition that part of the Appellant’s house be let to a locally qualified lodger – circumstances in which the State can legitimately interfere with private and family life - Convention rights in Guernsey courts – whether Article 8 engaged – proportionality - the condition requiring the taking in of a lodger held to be ultra vires and unreasonable – appeal allowed**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

Civil 1154

The 26<sup>th</sup> Day of February 2008 before John Russell Finch Esquire, Lieutenant Bailiff;  
sitting alone

Between

JEREMY LLOYD THOMAS

Appellant

and

THE MINISTER OF THE STATES OF GUERNSEY  
HOUSING DEPARTMENT

Respondent

Whereas on 21<sup>st</sup> and 23<sup>rd</sup> January 2008 the Lieutenant Bailiff considered a point of law arising from the application of Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and heard thereon Advocates St. J. A. Robilliard and R.J. McMahon counsel for the Appellant and Respondent respectively the Lieutenant Bailiff this day gave judgment in the terms attached hereto and

1. Held the Respondent’s decision to require the Appellant to take in a locally qualified person as a lodger to be *ultra vires* and unreasonable as it breaches the Appellant’s right to respect for his private life granted by Article 8 of the European Convention on Human Rights and Fundamental Freedoms.
2. Reserved the question of costs.

S M D ROSS

H.M. Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)**

**JEREMY LLOYD THOMAS**

**Appellant**

**Between**

**And**

**THE MINISTER OF THE  
STATES OF GUERNSEY  
HOUSING DEPARTMENT**

**Respondent**

**Date of hearing: 21st & 23rd January 2008**

**Judgment handed down on: 26th February 2008**

**Before: John Russell FINCH Esquire, Lieutenant-Bailiff**

Advocate for Appellant: St J A Robilliard  
Advocate for Respondent: R J McMahon

**Cases, texts and statutes referred to:**

Cases referred to:

1) European Court of Human Rights Cases:

Codona v United Kingdom (2006) 485/05  
Connors v United Kingdom (2005) 40 EHRR 335  
Gillow v United Kingdom (1986) 11 EHRR 335  
Jersild v Denmark (1995) 19 EHRR 1  
Kroon v Netherlands (1994) 17 EHRR 263  
Pretty v United Kingdom (2007) 35 EHRR 1  
Slivenko v Latvia (2003) 48321/99

2) Guernsey Cases:

Perkins v States Housing Authority (1995) Civil Appeal No. 216; 20 GLJ 66  
Walters v States Housing Authority (1997) Civil Appeal No. 231; 24 GLJ 32  
X v States Housing Authority (1999) Royal Court, 6<sup>th</sup> August, 1999

3) United Kingdom Cases:

Brown v Stott [2003] 1AC 681  
Harrow London Borough Council v Qazi [2004] 1AC 983  
Knight v McNicholls [2004] 1 WLR 1653

R v Director of Public Prosecutions ex.p.Kebiline And Others [1999] 1WLR 972

R v Secretary of State for the Home Department ex.p. Daly [2001] 2 AC 532

R (Mahmood) v Secretary Of State for the Home Department [2001] 1 WLR 842

R v Shayler [2003] 1AC 247

R v Stratford Justices ex.p. Imbert (1999) 2 Cr. App R. 276

Texts:

- 1) Human Rights Law (Amos) (2006)
- 2) Human Rights and Criminal Justice (Emmerson, Ashworth and Macdonald) (Second Edition) (2007)
- 3) Human Rights Law and Practice (Lester and Pannick)(Second Edition) (2004)

Statutes:

- 1) The Housing (Control of Occupation) (Guernsey) Law, 1994, Sections 2, 3 and 56.
- 2) The Human Rights (Bailiwick of Guernsey) Law, 2000, Sections 2, 3 and 6.

## JUDGMENT

### **Background**

1. In this case I am asked to determine a point of law arising from the suggested application of Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950, as it has effect in Guernsey by virtue of the Human Rights (Bailiwick of Guernsey) Law, 2000. Put simply, I have to decide if Article 8, which is headed "*Right to respect for private and family life*" is engaged in this case, and if it is, whether Article 8(2), which deals with permitted interference with that right, applies. The position of the Respondent is that Article 8 does not operate in the present case, but if it does, any interference is permissible by virtue of Article 8(2). The parties in the case are the Appellant, Mr Thomas (hereafter "A") and the Minister of Housing, the Respondent (hereafter "R"). For the sake of convenience, I propose to refer to the Housing (Control of Occupation) (Guernsey) Law 1994 as "the Law", the European Convention as the "ECHR" and bundles submitted by the parties as "A's Bundle" and "R's Bundle" respectively.
2. The facts are not in dispute and set out in "A's" Cause (item (B) of his Bundle), especially paragraphs 1-15 inclusive. They can be summarized as follows:

- (a) “A” is aged 38. He first came to Guernsey for a holiday with his Uncle and Aunt in December 1992. In April 1993 he commenced residence in Guernsey. As has been correctly pointed out on behalf of “R”, although “A” has lived in Guernsey for almost all that period, it is not continuous, as he worked in Brecqhou for a year from January 1996 to January 1997. Brecqhou is a dependency of Sark, not Guernsey.
- (b) From 1993 to 1996, “A” lived in rented local market accommodation as the cohabitee of a qualified local resident. From January 1997 to March 1997, “A” lawfully resided in Guernsey under a short term employment licence. He then rented accommodation with another locally-qualified person, living with her under a licence. Since 2000, “A” has been employed by the well known local firm of J Meerveld and Sons as a bricklayer and trains apprentices. In April 2000, “A” and his cohabitee jointly purchased a house, which he renovated.
- (c) On 9<sup>th</sup> February 2005, “A” wrote to “R” setting out his circumstances and explaining that the current relationship was unfortunately breaking down (see item C(i) of “A’s” Bundle). He set out his links with Guernsey and provided letters of support. By letter of 13<sup>th</sup> May, 2005 (item C(ii) of “A’s” Bundle) Housing expressed the view that “A’s” connections with the Island were insufficiently strong to justify the grant of a Housing Licence. Following a meeting shortly thereafter with the Director of Housing, it was suggested “A” supply further details of his situation. On 9<sup>th</sup> August 2005, “A” wrote to “R” providing further details, including his training of Guernsey apprentices, together with further letters of support (item C(iii) of “A’s” Bundle).
- (d) On 27<sup>th</sup> September 2005, “R” wrote to “A” stating that if “A” continued to be employed by Meervelds as a bricklayer and continued to be involved in training apprentices, he would be granted a licence to occupy either lodgings (hotel or guest-house), or accommodation in the household of a lawfully resident householder. A further meeting took place on 2<sup>nd</sup> October 2005 and it was decided that “A” could obtain his own house, but would have to let part of it to a locally-qualified lodger. Thereafter, “A” continued to live at the house he had purchased with his cohabitee, but the relationship got strained. “A” observed that he wanted to continue living in Guernsey, as he had done for (largely) the past fourteen

years and had just accepted responsibility for a five year apprentice. “A’s” options are;

- (i) to occupy a property, provided a qualified resident occupied it with him; or
  - (ii) live in lodgings, i.e., a hotel or guest-house; or
  - (iii) occupy any accommodation in the household of a lawfully resident occupier, who was already the owner or tenant of it and who was ordinarily resident in that building.
- (e) “A” is financially unable to purchase his cohabitee’s share in the house and it will therefore have to be sold.

3. For the purposes of the present hearing, the question for consideration is the ECHR point, as set out at paragraph 16(a) of “A’s” Cause. In relation to “R’s” decision to require “A” to live with a “*stranger*” so he can remain in Guernsey, it is suggested that this would:

*“.....breach the Appellant’s right to respect for his private life granted by Article 8 of the European Convention on Human Rights and Fundamental Freedoms .....*”

### **Appellant’s Submissions**

4. Both Counsel are considerable experts on this area of the law and made submissions in detail. These submissions were based upon their respective Skeleton Arguments and were developed to cover a great deal of ground. The basic point made on behalf of “A” was that “R’s” decision is too restrictive and a breach of Article 8(1). “A” must show the rights subject to protection are relevant under that Article - then, it was said, the burden goes on to “R”. The Guernsey Housing Law is unique and has to be approached on general principles. The leading case of Walters v States Housing Authority (1997) Civil Appeal No. 231 was referred to, and it was suggested that Human Rights arguments are now a separate category to the five items set out by Beloff J A at pages 9 – 10, or a “*gloss*” on the *ultra vires*/unreasonable category. Counsel then referred to the leading text book Human Rights Law and Practice (Second Edition) (2004) by Lord Lester QC and David Pannick QC (hereafter “Lester and Pannick”).
5. After being taken to the general introduction to and scope of Article 8 rights (para 4.8.2), Counsel went to para 4.8.18, “*The concept of private life*”. The case of Pretty v United Kingdom (2002) 35 EHRR 1, at para 61 was referred to:

*“Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside worlds .....”.*

6. The next part of Lester and Pannick that was cited was para 4.8.84, which introduces the justification element in Article 8(2). In summary, there must be *“a pressing social need”* for the interference and the means employed need to be *“proportionate to the legitimate aim(s) pursued by the State”*. Para 4.8.102 refers to the case of *Gillow v United Kingdom (1986) 11 EHRR 335*, where the enforcement of the housing control legislation in Guernsey was not objectionable in itself, but the particular action taken in the circumstances of the case was found disproportionate to the legitimate aim pursued.

7. Counsel for “A” produced various ECHR decisions dealing with the rights of travellers. It was stressed that the facts were very different from the situation before the Royal Court and the questions for consideration were the principles relating to Article 8 points, rather than their detailed application to cases involving caravan sites in England. The first case mentioned was *Connors v United Kingdom (2005) 40 EHRR 9*, especially paragraphs 81 and 82 of the decision. Paragraph 81 is a general summary of the question of the legitimacy of *“interference”*:

*“81. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention (see, among other authorities, Smith and Grady v the United Kingdom, nos. 33985/96 and 33986/96, 27 September 1999, §§ 88, ECHR 1999-VI)”.*

8. Paragraph 82 covers the approach to the so-called *“margin of appreciation”*:

*“82. In this regard, a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the*

*right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see, for example, Dudgeon v the United Kingdom, judgment of 22 October 1981, Series A no. 45, p. 21, § 52; Gillow v the United Kingdom, judgment of 24 November 1986, Series A, no. 104, § 55). On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that "[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation (Buckley v the United Kingdom, judgment of 26 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1292, § 75 in fine). The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation (see Mellacher and Others v Austria, judgment of 19 December 1989, Series A no. 169, p 27, § 45, Immobiliare Saffi v Italy [GC], no. 22774/93, ECHR 1999-V, § 49). It may be noted however that this was in the context of Article 1 of Protocol No. 1, not Article 8 which concerns rights of central importance to the individual's identify, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community (see, *mutatis mutandis*, Gillow v the United Kingdom, cited above, § 55; Pretty v the United Kingdom, no. 2346/02, ECHR 2002-III; Christine Goodwin v the United Kingdom, no. 28957/95, § 90, ECHR 2002-VI). Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant (Hatton and others v the United Kingdom, [GC] no. 36022/97, ECHR 2003-..., §§ 103 and 123)".*

Counsel stressed that the "margin of appreciation" was, in his submission, not a term which domestic courts have regard to, only the Strasbourg Court.

9. It was next submitted that "R's" Skeleton was wrong in its observation at para 3 to the effect that "A's" personal life can continue as it was before the decision. "A" has not been living as a lodger or taken a lodger, but has been with partners of his choice. Whilst it was conceded that there was no positive obligation to financially support "A", there was one not to impose conditions that impact upon his private life. Para 6 of the Skeleton is also incorrect, as the Article 8(2) test is not whether the interference is

*“arbitrary”* or not and the case of *Kroon v Netherlands (1994) 17 EHRR 263* did not involve the exercise of a discretionary power.

10. After considering Article 8(1), it is necessary to go to 8(2). If Article 8(1) is not engaged, then that is the end of the ECHR arguments in this appeal. If Article 8(2) falls for consideration, then the burden is on “R” to justify it. Counsel for “A” referred to the Housing Needs Survey of 2006, found as item E of “R’s” Bundle. You cannot retrospectively introduce matters, it was suggested, that were not before the deciding body. There is no reference to this document in the correspondence. It was pointed out that “A” is not contesting the legislation on Housing Control per se and the *Gillow* decision applies. Reference was made to the case of *Slivenko v Latvia (2003) 4832/99* para 103 (“R’s” Bundle, item D):

*“The Court points out that the basis for its examination must always be the impugned decisions of the domestic authorities and the legal grounds on which they relied. It cannot take into account any alternative legal grounds suggested by the Respondent Government in order to justify the measure in question if those grounds are not reflected or inherent in the decisions of the competent domestic authorities”.*

### **Respondent’s Submissions**

11. The appeal is made under Section 56 of the Law, which provides for the burden to lie on the Appellant. Section 56(3) applies throughout:

*“(3) On an appeal under this section the appellant shall have the burden of proof and the final right of reply”.*

The legal burden therefore rests throughout on “A”.

12. Under Section 3(3) of the Law, “R” is entitled to impose such conditions *“as it considers to be necessary or expedient”*.
13. Whilst the facts are not in dispute, it was pointed out that “A” has not been in continual residence in Guernsey since 1993, his period dates from 1997 due to his one year residence in Brecqhou.
14. “R’s” primary submission, made very clearly, was that Article 8 is not engaged in this case. The main purpose of Article 8 involves negative obligations of the State; in this case there are no rights that have been interfered with or not accorded. “A” is seeking to give Article 8 a far wider breadth than the jurisprudence supports. “R” has not acted unlawfully. Counsel then indicated that if “R” fails in this general point then it is submitted that the imposition of conditions is capable of being justified under Article 8(2). It was

suggested that nobody is stopping “A” establishing a home. The decision applies some conditions on his absolute freedom of choice, but he is given a licence – that affords the respect which Article 8 deals with. “A” wants complete freedom of choice in where he lives and he wants to live where he chooses to live. Article 8 does not confer such a broad freedom of choice. “A” is able to function the same way as previously and “R’s” decision does not affect his privacy. The imposition of these conditions does not fall within the ambit of Article 8, there is no arbitrary interfering effect. Counsel referred to the list of “*private life*” interests shown in Lester and Pannick, paragraph 4.8.21. These do not apply in “A’s” situation.

15. Paragraph 31 of the judgment in *Kroon* (supra) is a general statement of principle in relation to Article 8. The essential object is to protect the individual against “*arbitrary action by public authorities*”. A “*fair balance*” has to be struck “*between the competing interests of the individual and of the community as a whole; and ..... the state enjoys a certain margin of appreciation*”. Article 8 is about the recognition that the state cannot descend into private lives to an extent that the intrusion is too great. Persons have a right to personal autonomy.
16. The decision in *Codona v United Kingdom (2006) 485/05* was referred to (“R’s” Bundle item B). In that case the Strasbourg Court found that Article 8 “*does not in terms recognise a right to be provided with a home .... let alone a specific home or category of home – for instance in a particular location*” (p 10 of judgment). It was submitted that the phrase “*is under a positive obligation by virtue of Article 8 to provide her with accommodation of her own choosing*” could be amended for the purposes of the present case so as to read: “*is under a positive obligation by virtue of Article 8 to permit him to have accommodation of his own choosing*”. “R” is under no such obligation. It follows that when dealing with Article 8, there is a balancing between positive and negative obligations. The positive obligations do not accord “A” a complete freedom of choice; there is no positive obligation to assist the self-determination of individuals.
17. Under Article 8, it was submitted, there are limitations on what has to be respected. “*Private life*” extends to certain core concepts, not to everything a person might wish to do. In the present case, a decision by “R” to impose conditions demonstrates a consistent approach by “R”; “A” has never been completely free to choose his own accommodation. “R’s” decision, in short, accords respect to “A’s” right to stay in Guernsey and carry on – nothing has changed. Article 8 is not baldly a right to private life, it is more about respect for private life.

18. By virtue of the *Gillow* case (supra) the Law and its aims are accepted for the purposes of this hearing as legitimate, the matter for consideration if Article 8(2) comes into focus, is the question (put generally) of “proportionality”. It was submitted that where Article 8 is involved, that does not mean “R” on appeal has attracted the legal burden to disprove the allegation and prove it has acted *intra vires*. The terms of Section 56 of the Law cannot be side stepped. The Court must look at the terms of Section 56(3). In this appeal the statute has primacy; the legal burden stays with “A”. “R” has to demonstrate that it has done something evidentially to form its contention that the decision impugned was indeed proportionate; the Court can take judicial notice of the increasing size of the Island’s population and can take account of the *Gillow* decision as well.
19. Counsel dealt with the question of the margin of appreciation by stating that there have been cases where this concept has been used under the description of “discretionary area of judgment”, or “judicial deference”. The Court’s role is not to substitute its own decision, but to review “R’s”. There are areas of flexibility accorded to the decision-maker. In the present case, less would need to be demonstrated to justify the “interference”; “A” is not e.g. being evicted and what is being done by “R” is at the lower end of the scale. What was done was necessary in a democratic society and should not be invalidated.
20. It was “R’s” letter of 17<sup>th</sup> October 2007 (item C9(vi) in “A’s” Bundle) which is the subject of the appeal. Counsel suggested that the Housing Needs Survey of 2006 (item E of “R’s” Bundle) is dated 26<sup>th</sup> September 2007 and was in the minds of “R” at the time it took its decision in relation to “A’s” case. Various citations were made from this document, particularly in relation to the pressure on housing stock in Guernsey at the lower end of the market. In “A’s” case there are people competing for such dwellings and “R” must conduct a balancing exercise in each individual case. In such an exercise, persons with essential licenses need to be taken into account.

### **Appellant’s Reply**

21. By way of reply, Counsel for “A” submitted that Section 56 of the Law has to be read in the light of the Human Rights Law, which is later legislation. Convention Rights must be interpreted in exactly the same way as they would be in Strasbourg and, of course, a domestic court can apply Convention Rights without the parties needing to go off to Strasbourg. It does not matter whether the proceedings concern Section 7(1)(a) of the Human Rights Law, or (as here) Section 7(1)(b).

22. On the facts, it was put forward that for the vast majority of his time in Guernsey, “A” has been with a partner, in a one to one relationship. The requirement now being imposed is rather different; specifying as to whom you may live with is important. The *Codona* case (supra) was also referred to again. It was submitted (looking at pages 10 – 11 of the judgment) that the correct interpretation is that the Strasbourg Court would not make a finding the state had to pay money for the applicant there. Counsel dealt with the Housing Needs Report by suggesting there was no evidence before the Court to show that this document impacted on the particular decision in this case. Reference was made to the case of *X v States Housing Authority (1999)* Royal Court, 6<sup>th</sup> August, which cited the Court of Appeal decision in *Perkins v States Housing Authority (1995) Civil Appeal No. 216*, page 10 of transcript, D-G. At the conclusion of this passage, Southwell JA said:

*“This Court cannot take account of matters which found no mention in the decision letter of 30<sup>th</sup> March 1994, and as to which no evidence was admitted before the Royal Court”.*

And added:

*“It is unfortunate that in this respect the Authority has failed to take account of what this Court said in Ward”.*

Counsel concluded by claiming that nothing on the decision appealed from indicates any reliance on the material in question.

### **Convention Rights in Guernsey Courts**

23. It is apposite to point out that we are concerned with Article 8 of the ECHR because the States of Guernsey have enacted the Human Rights (Bailiwick of Guernsey) Law, 2000, approved by Her Majesty in Council on 13<sup>th</sup> December, 2000. Under Section 2(1) of that Law, Guernsey Courts or Tribunals determining questions relating to Convention Rights, must take into account judgments of the European Court of Human Rights; and under Section 3(1) “*so far as it is possible to do so*”, legislation in Guernsey must be read and given effect to in a way which is compatible with the Convention Rights. Article 8 is such a Right. The Convention is sometimes seen as a charter for undesirables and an unwarranted rein on the discretion of public bodies to act in the proper execution of their functions. But the Convention contains an important element of balance, which courts need to bear very clearly in mind, as was explained by Lord Steyn in *Brown v Stott [2003] 1 AC 681*:

*“The inspirers of the European Convention ..... realised that from time to time the fundamental rights of one individual may conflict with the human rights of another. Thus the*

*principles of free speech and privacy may collide. They also realised only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited; we live in communities of individuals who also have rights .... Subject to a limited number of absolute guarantees, the scheme and structure of the Convention reflects this balanced approach. It differs in material respects from other constitutional systems but as a European nation it represents our Bill of Rights, we must be guided by it”.*

24. The obligation, under Section 2(1) of the Law of 2000 to “take into account” Strasbourg jurisprudence, is construed as an obligation to follow it as well. In the words of M.Amos in her valuable textbook “Human Rights Law” (2006) at para 7.2, page 18:

*“It has been held that, in the absence of some special circumstance, the court should follow any clear and constant jurisprudence of the European Court of Human Rights”.*

Although there have been some “special circumstances” in some UK cases, there are none evident in the present case. Accordingly, I will seek to interpret Article 8 in a way that appears to me, consistent with decisions of the Strasbourg Court.

25. By virtue of Section 6(1) of the Law of 2000 “it is unlawful for a public authority to act in a way which is incompatible with a Convention Right”. For the purposes of the present case, “R” is a “public authority”.
26. It is with this fundamental background in mind that we must now turn to consider the application of Article 8 of the Convention to the present case.

### **Is Article 8 Engaged?**

27. In the words of “R’s” Skeleton, at para 6:

*“In this case, the Appellant has failed to demonstrate any interference with his right to respect of his private life or his home and the Department is not required to present any Article 8(2) justification”.*

Whereas the simple assertion is made in “A’s” Skeleton at para 5:

*“It is submitted that the conditions imposed by the Appellant (should read “Respondent”) impinge both on the Appellant’s home and private life, in that they require him to live in a particular way”.*

28. Two conditions are found e.g. in “R’s” letter of 27<sup>th</sup> September, 2005 (item (c)(vi) of “A’s” Bundle), viz:
- (a) lodgings, i.e. hotel or guest house; or
  - (b) any accommodation that the Appellant was occupying in the household of a lawfully resident householder who was already the owner or tenant of it and was lawfully resident in that building.
29. A further condition was added after “A’s” meeting with Mrs Brown on 2<sup>nd</sup> October 2005: the Appellant could buy his own house, but would then have to let part of it to a locally qualified person as a lodger, and the Appellant could live with such a person. This condition is the point at issue for resolution in this case.
30. “Private life” is a rather broad term, which is difficult to pin down and define. One helpful attempt can be found in *R v Broadcasting Standards Commission ex.p. BBC [2001] QB 885 at 900*, per Lord Mustill:

*“To my mind the privacy of a human being denotes at the same time the personal ‘space’ in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate”.*

31. More concisely, “private life” can be said to cover all aspects of a person’s physical identity and thus freedom to live as they choose. Whilst some matters are not within the sphere of “private life”, the concept under the jurisprudence of the Strasbourg Court is a wide one. In *Pretty v United Kingdom (2002) 35 EHRR 1*, at para 61, it was said (quoted in Lester and Pannick, para 4.8.18, enclosure (E) of “A’s” Bundle):

*“The concept of “private life” is a broad term, not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person”.*

And:

*“Article 8 also protects a right to personal development and the right to establish and develop relationships with other*

*human beings and the outside worlds ..... the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees”.*

32. “Home” has an autonomous meaning. The concept was examined by the House of Lords in Harrow London Borough Council v Qazi [2004] 1 AC 983, Lord Millett observed at 1016, para 89:

*“A person’s home is ..... the place where he and his family are entitled to be left in peace free from interference by the State or agents of the State. It is an important aspect of his dignity as a human being and it is protected as such and not as an item of property”.*

There are other helpful observations in that case, including from Lord Bingham at pp 990 – 991, paras 8 – 10, referring to Gillow (supra). Consideration of the concept should be “*down-to-earth and pragmatic*”.

33. It must be accepted, when considering the cases, that there are limitations on what has to be respected under Article 8. As was submitted on behalf of “R”, “*private life*” extends to certain core concepts, not to everything a person may wish to do. “R” submitted that nothing has changed and that the decision accords with “A’s” wish to stay in Guernsey and carry on. “A” has never had complete freedom in his accommodation options. “A’s” response was to point out that for the vast majority of his time in Guernsey, he has been with a locally qualified partner, in a one-to-one relationship. The requirement now being imposed is rather different. Specifying whom an individual may live with, or whom he may take into his home is important. Nor, stressed Counsel, is this a case where “A” is asking the state to pay money or provide a house for him; it is accepted that there is no positive obligation of that nature. It seems to me, with great respect to Housing, that the requirement of taking a locally qualified lodger should “A” buy his own home, is a markedly different situation from that he has been in. It certainly impacts on “A’s” personal autonomy and his entitlement to be “*left in peace*”. It is not too many steps removed from the old concept of billeting members of the armed forces on householders, which although a more extreme situation, is not wholly unrelated. There is therefore an “*interference*” that has to be justified under Article 8(2).

### **Article 8(2)**

34. It is clear from the plain wording of the Convention, that once “A” has shown that Article 8(1) is engaged, it is for “R” to demonstrate that Article 8(2) applies, in order to justify the interference. “R” asserts that the interference can be justified by reference to the Housing Needs Survey (para 7 of “R’s” Skeleton), which shows the pressure that exists in the housing market and that demand

outweighs supply. “A” responded that “R” cannot rely upon this document (see para 20 above). In my judgment, what was said by the Court of Appeal in *Perkins* (supra) and the Royal Court in *X* (supra) still holds good. In *X* (page 15 of the transcript, at B-C), the Bailiff said (explaining *Perkins*):

*“The Court also rejected the attempt by Counsel for the Authority ..... to introduce material explaining the decision that had not been included in the original letter explaining the Authority’s decision”.*

35. There is no reference to the Housing Needs Survey in any of “R’s” correspondence, and thus no evidence that it was taken account of in resolving “A’s” application. Counsel for “R” submitted that this material was in the minds of Housing by the time it took its decision; the relevant decision letter is dated 17<sup>th</sup> October 2007, the Report to the States is dated 26<sup>th</sup> September 2007. This submission does not meet the objection put forward on behalf of “A”. The observations of the Court of Appeal in this respect are binding upon me, but it is right to emphasize that this is not some mere legalistic quibble or technicality of pleading. A person is entitled to know, in reasonable detail, what the basis of a decision adverse to him is. The trend of Court of Appeal housing decisions is emphatically in favour of providing applicants with full information, and, with respect, that is plainly the just way to proceed in cases of such importance to individuals. On this point, “A’s” submissions are correct and consistent with the *Slivenko* case (supra) as well.
36. There was a further issue between the parties on the burden of proof. “R” submitted that the appeal provisions of Section 56 of the Law could not be side-stepped. When Article 8 is invoked, that does not mean “R” on appeal has the legal burden to disprove the allegation and prove it has acted *intra vires*. The Housing Law has primacy in this regard in the appeal, but once interference in Convention terms is recognised, it is for the public authority to justify it. In the present case, the decision in *Gillow* (supra) is, as has been mentioned, not impeached. The Housing Law and its aims are not under attack, the question is whether the decision impugned is “*necessary in a democratic society*”. It was pointed out on behalf of “A” that the Housing legislation must be read in the light of the Human Rights Law, and that when the Convention is invoked, the Convention Right is interpreted in the domestic courts in exactly the same way as in Strasbourg.
37. At the risk of appearing to be simplistic, I do not consider there is any tension between the provisions of Article 8(2) and the Housing Law. The legal position in Guernsey is that “A” has the burden of proof: Section 56(3). The legal position is also that “R” (in broad terms) must, as a public authority, justify any interference under

Article 8(2). These seem to me to co-exist quite peacefully. It would be wholly wrong to negate the consistent and correct approach of national courts and Strasbourg and stand Article 8(2) on its head, so that the burden rested on the Applicant in a case, not the public authority. But no mental gymnastics need be involved, as there is nothing inconsistent in accepting both Section 56 and Article 8(2). Accordingly, in the present case, “R” must demonstrate that the interference is justified, and at the end of the day, “A” has the burden in the appeal. There is no reason to seek to put either provision here to the sword.

### Margin of Appreciation?

38. A further issue between the parties alluded to the concept of “margin of appreciation”. In broad summary, the nub of “R’s” case (para 11 of “R’s” Skeleton) is that “*the extent of interference falls within the margin of appreciation open to the Department to operate the 1994 Law ...*”. “A” submits that this concept is for the Strasbourg Court, not a domestic tribunal. I take the term to mean: “*a doctrine of restrained review at the international level, which reflects the primary role that the national authorities, including the courts, are intended to perform in human rights protection. According to a former judge of the court, it is simply the term used to describe “the amount of latitude left to national authorities once the appropriate level of review has been decided by the Court”*”. (Human Rights and Criminal Justice, Emmerson et al, Second Edition (2007), para 2 – 115, page 115); and in the words of Sedley L J in *Knight v McNicholls [2004] 1 WLR 1653* at para 38:

*“Any decision of the Strasbourg Court that a potential breach falls within the Member States’ margin of appreciation belongs to its jurisprudence, not to ours”.*

39. However, the Strasbourg Court’s decisions concerning the margin of appreciation are still relevant, especially as, under Section 2 of the Human Rights Law, this Court must “*take into account*” judgments, etc of the Strasbourg Court. Some observations of Buxton L J in *R v Stratford Justices ex.p. Imbert [1999] 2 Cr. App R. 276* are apposite:

*“The application of the doctrine of the margin of appreciation would appear to be solely a matter for the Strasbourg Court. By appealing to the doctrine that court recognises that the detailed content of at least some Convention obligations is more appropriately determined in the light of national conditions .... The English judge cannot therefore himself apply or have recourse to the doctrine of the margin of appreciation as implemented by the Strasbourg court. He must, however, recognise the impact of that doctrine upon the Strasbourg Court’s analysis of the meaning and implications of the broad*

*terms of the Convention provisions: which is the obvious source of guidance as to those provisions, and a source that in any event the English court will be obliged, once section 2(1)(a) of the 1998 Act has come into force, to take into account”.*

40. The standard of review under the Human Rights Law is distinct from the Strasbourg Court’s “margin of appreciation”. In *R v D.P.P. ex.p Kebiline And Others [1999] 1 WLR 972*, this was recognized in the speech of Lord Hope:

*“[The doctrine of the margin of appreciation] is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the Court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality. In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention ..... It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection”.*

41. If the doctrine of margin of appreciation has no place in the armoury of domestic courts, beyond the limited influence referred to, the question then arises as to what test should be applied. The burden of establishing “proportionality”, which the domestic courts do invoke, lies on the state. In *Jersild v Denmark (1995) 19 EHRR 1* at para 31, the Strasbourg Court stated it would:

*“.....look at the interference complained of in the light of the case as a whole and determine whether the reasons*

*adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued.”*

42. In R v Secretary of State for the Home Department ex.p Daly [2001] 2 AC 532, Lord Steyn laid down more detailed general guidance, which is most helpful from the ambit of a domestic tribunal:

*“The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v Ministry of Defence, ex.p. Smith is not necessarily appropriate to the protection of human rights .... [T]he intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood are correct. And Laws L.J. rightly emphasises in Mahmood ‘that the intensity of review in a public law case will depend on the subject matter in hand’. That is so even in cases involving convention rights. In law context is everything”.*

43. The key phrase for consideration in the present case is to be found in Article 8(2). The interference must be “*necessary in a democratic society*”. It will be recalled that there is no quarrel

with the Housing Law or the legitimate aim it pursues, following the *Gillow* decision (supra). The most important consideration is whether or not the interference is proportionate to the legitimate aim pursued. Various formulations have been made by the House of Lords, a helpful one coming from Lord Bingham in *R v Shayler [2003] 1 AC 247* – the acid test was whether, in all the circumstances, the interference with the individual’s Convention Right prescribed by national law was greater than was required to meet the legitimate object which the State sought to achieve. (Lords Hobhouse and Scott agreed).

44. I have already made reference to the ECHR case of *Connors* (para 7 above). “A” relies upon para 82 of the judgment, and it is worth considering what was said there. In referring to the margin of appreciation the Strasbourg Court drew attention to the fact that this will vary “*according to the nature of the Convention Rights in issue, its importance for the individual, and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions*”. The judgment, importantly to my mind, then goes on to say:

*“The margin will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights”.*

45. The case of *Gillow* is an example cited in the context of that sentence. The judgment goes on to say (later in the same paragraph):

*“Article 8 .....concerns rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community”.*

Again, *Gillow* is cited after this sentence.

### **Observations on the Facts**

46. Counsel for “R” made much of the assertion that “*nothing has changed*” as a result of the decision. “A” has not had his own licence and has never been completely free to choose his own accommodation options. He has not been granted an independent licence and has never had one. As has already been mentioned, “A’s” contention is that the requirement now being imposed is different - and a requirement of this nature, as to whom you may live with, is important. I concur in the observations made on behalf of “A”. Requiring that “A” permits a stranger to live with him is onerous and somewhat difficult to see working smoothly in the real world. To take one trite example, as I mentioned briefly in argument, suppose “A” does not like the person who is locally-

qualified? How about if the relationship ends, and he cannot get on with the next one? These scenarios are hardly far-fetched. Even if “A” attracted a congenial spirit, the requirement strikes at the heart of the individual’s right to privacy and personal space. It is hardly a minor or technical “*interference*” with “A’s” personal autonomy; indeed at para 33 above, I considered it not far removed from the obsolete practice of billeting.

47. I have referred to “*private life*” in paragraphs 5, 30, 31 and 33 above. In view of the decisions mentioned, including Lord Mustill’s observations in the *Broadcasting Standards* case (supra), I find that the impugned condition is a disproportionate potential interference with “A’s” rights under Article 8 of the ECHR. I need not repeat the quote from that case, which was set out at paragraph 30 above. In coming to this conclusion, I am mindful of the need not to “*usurp those functions of government which are controlled and distributed by powers whose authority is derived from the ballot box*”, to use the words of Laws L J in *R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840*. However, as Lord Steyn said in *Daly* (supra, see paragraph 42 above):

*“And Laws L J rightly emphasises in Mahmood “that the intensity of the review in a public law case will depend on the subject matter in hand”. That is so even in cases involving Convention rights. In law context is everything”.*

48. In this case, to quote what appears in paragraph 82 of the judgment in *Connors* (supra): “*the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights*” (citing, inter alia, *Gillow*). The balancing exercise therefore comes down in favour of “A”, on the individual circumstances of this particular case.

## **Decision**

49. On this aspect of the appeal “A” succeeds. In terms of paragraph 16(a) of “A’s” Cause, “R’s” decision to require him to take in a locally-qualified person as a lodger is *ultra vires* and unreasonable, as it breaches “A’s” right to respect for his private life granted by Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

## **Costs**

50. Reserved.

## **J R Finch**