Chapter 11

Conclusion to the book

This book has sought to develop the concepts of personal autonomy, identity and integrity which the ECtHR has explicitly reiterated – in recent years and developed throughout its jurisprudence from its earliest of days – is protected for all persons under Article 8 of the ECHR. The concepts often overlap and some cases do not fit easily into one category rather than another. Overall however, the jurisprudence shows the possibility of a profound respect for personal freedom as manifested in these concepts. In many ways, the case law has developed to increase the personal freedom in a way which goes to the very heart of what it means to be a person, protecting intimate areas of one’s life and increasingly doing so even when the affects are felt in public rather than private life for the applicants concerned.

The Court has clearly shown that it will not be enough to leave people alone for their rights to be protected under this provision. However, leaving people alone when they want to be left alone and preventing harm and damage to another’s mental and physical stability is necessary and is evidently protected. Yet problems do arise when the Court looks to the nature of the activity in question and fails to see the importance of it to the applicants in question, as in Pretty and in Laskey. Here, issues of moral standards and a moral framework are introduced which sometime veer the Court towards the protection of the majority rather than focusing on the nature of human rights as a protector of individuals, often against the opposition of the moral majority. Yet, having said that, a slippage into ideas of personal freedom as self-determination wholly without moral and social context is, in my view, undesirable. In such decisions it is necessary for the Court to uphold certain standards but these should rest on the importance of personal freedom, respecting the choices people make and treating them to equal respect from the legal system. The Court’s approach to religion as particularly seen in the Islamic headscarf cases illustrates their lack of doing this most clearly. There is a tendency therefore for
the Court’s jurisprudence on Article 8 to be incoherent as to the type of personal freedom, autonomy, identity and integrity it is upholding. The danger is that a moral autonomy, human dignity as constraint and freedom as self-realisation will be the prevalent view of what personal freedom, as protected by European human rights law, means.

The way the Article 8 right has been developed in the sexual identity cases shows in legal form that the development of one’s personality does not need to entail a belief in an inner essence in the sense of an unchanging foundational core that may be prohibitive, in that it can be used to justify placing constraints on new ways of being, focusing on individuals’ ‘finding out’ who they ‘truly’ are, with ideas of core ‘authenticity’ or self-realisation. Instead, it can be expressed as the potential to form projects and exist in the world in a meaningful way. Given this potential, political and legal programmes can assist in its fruition because the projects people choose and the way they choose to exist and who they choose to become is created in large part by the social conditions individuals find themselves in. Structures and an environment, including human rights’ institutions, that allow people the chance to think about what is possible for their lives, and then put this into concrete terms, are required. The human rights law analysed here can play an important role in protecting existing choices. However, it can also play a vital part in allowing identity formation, through creating the social conditions to enable an individual to develop their personality and identity as they wish. While the right to access information relating to one’s childhood existence and development, as in Gaskin and M.G., is also part of this idea of freedom, when it comes to ‘biological truth’ the case law has the tendency to validate a version of freedom as self-realisation which could prove problematic as we saw in the strong dissenting judgment in Odievre. Freedom as self-direction and self-development is not something that individuals can sustain on their own. Identity is partly defined in conversation with others and through common understandings which underlie the practices of society. Yet linking it so deeply with one’s biological parentage in the sense that it is more ‘natural’ and ‘authentic’ needs to be investigated to ensure that undue constraints on freedom do not result. The problem with self-realisation is that it seems that ‘wrong’ or inauthentic choices may open a space for state intervention.802 The danger with presenting a view of the “human

802 H. Reece 2003.