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

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

N. A. MOREHAM

THE AGEING MODEL OF INDIRECT DISCRIMINATION

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

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

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Rutherford's arguments. While the judges were unanimous in their conclusion, they differed in their reasoning on the key question of whether the statute indirectly discriminated against men.

Indirect discrimination is a means of challenging a rule which does not, on its face, discriminate on the prohibited ground (this would be direct discrimination) but whose *effect* is discriminatory due to the disparate impact the rule has on the protected group. As Baroness Hale noted in *Rutherford*, indirect discrimination looks beyond the formal equality achieved by the prohibition of direct discrimination towards the more substantive equality of results.

In claims for indirect discrimination the applicant needs to (1) identify the rule; (2) select the appropriate pool to which the rule applies and (3) show that, of that pool, a considerably higher number of one sex than the other is affected by the application of that rule (the disparate impact question). The answer to these questions in *Rutherford* troubled six courts (the Employment Tribunal and the Employment Appeal Tribunal twice, the Court of Appeal and the House of Lords).

In the Lords, Lord Walker adopted the most conventional discrimination law analysis. He accepted the pool advocated by the Secretary of State *i.e.* those aged between 16 and 79 with one year's continuous service. On disparate impact, he embarked on a careful analysis of the thorny question of whether this can be shown through the "advantage-led" or "disadvantage–led" approach. The advantage-led or "success rates" approach considers whether the proportion of one group who *can* comply with the requirement is considerably smaller than the proportion of the other group, while the disadvantage-led or "failure rates" approach focuses on the question whether the proportion of one group who *cannot* comply with the requirement is considerably larger than the proportion of the other group. The disadvantage-led approach tends to favour the applicant.

While not ruling out the disadvantage-led approach, Lord Walker did say that the more extreme the majority of the advantaged in both pools - here 13.5 million men to 12.5 million women, a gender ratio of 1.08:1 (or 1:1.004 if taken as a proportion of the whole pool) - the more difficult it was to pay much attention to the result of the disadvantage–led approach - here 195,200 men to 124,900 women, a ratio of 1.56:1 (or 1.44:1 as a proportion of the whole pool). Thus, even though he admitted that the disadvantage ratio did, arguably, constitute a "considerable difference", he said that it was irrelevant on the facts of *Rutherford* since the advantage-led ratio was the only relevant figure and that did not reveal a considerable difference. Since no disparate impact was found, he did not need to consider the question of objective justification.

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Lord Nicholls, while claiming that he agreed with Lord Walker, in fact appeared to apply the disadvantage-led approach. He held that a ratio of women and men who were adversely affected of 1:1.4 was not sufficient to establish the necessary degree of disparate impact as between men and women and so he too, in a short speech, found no disparate impact.

The speeches of the other three Law Lords (Scott, Rodger and Baroness Hale) were less clear. It seems that it was the choice of pool - to include those under 65 – that particularly stuck in the majority's craw. According to Baroness Hale "one should not be bringing into the comparison people who have no interest in the advantage in question". Beyond that, as Lord Walker curtly noted, it is not "easy to extract from their opinions a single, easily-stated principle", not least because they were decided on the basis of grounds "not argued below or before this House".

Lord Scott, having observed that "something has gone awry with the jurisprudence about indirect discrimination", admitted that he felt uneasy that an age discrimination case was being dressed up as sex discrimination. He noted that "the statutory bar applies to relatively more men than women", but said that this was simply a consequence of the fact that more men than women go on working after the age of 65. However, showing signs of some confusion between direct and indirect discrimination, he added that since the rule applied "to everyone over 65" and no-one under 65, he could not find disparate impact: "there are no proportions to compare". Baroness Hale also found no disproportionate effect on any particular group within the group who were still in the workforce over 65: the rule "applies to the same proportion of women in that group as it applies to men".

Lord Rodger, while recognising that the Secretary of State had conceded that "a considerably higher proportion of men over 65 than of women over 65 work", thought that statistics were irrelevant to the issue in hand: in order to raise indirect discrimination the men would have to show that a substantially higher proportion of the men over 65 who worked than of the women over 65 who worked did not receive dismissal compensation. That was not the case here: "100% of both groups receive equal pay for equal work".

Viewed through the lens of equal pay the majority's approach makes sense: men and women working over 65 are paid the same in that neither group can receive statutory compensation on dismissal (they are treated equally, albeit equally badly). Viewed through the lens of indirect discrimination, some might argue the majority's approach is more problematic in that, had they clearly identified the "rule" (question 1), (*e.g.* "being under 65"), they might have found disparate impact against men which would have needed justification.

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At one level the problem in *Rutherford* is of historic interest only. The Age Discrimination Regulations repealed the statutory age bar and introduced, subject to justification, an express prohibition on direct and indirect discrimination on the grounds of age. The new definition of indirect discrimination in the Age Discrimination Regulations, which also applies to sex discrimination (as well as the other strands) in the employment context, asks the question whether the applicant suffers ''particular disadvantage'' which, according to the government, does not always require detailed statistical calculations. Most lawyers will heave a sigh of relief at that. But, in those circumstances (sex discrimination cases which do not concern employment issues, and employment and other cases where discrimination on the grounds of colour or nationality is alleged) where the old (''considerably higher'') formula continues to apply, statistics still need to be shown. Even where the new ''particular disadvantage'' formula applies, a pool will still have to be identified to determine whether a group has been particularly disadvantaged. So in both these situations the ruling in *Rutherford* remains relevant but unfortunately the House of Lords offers tribunals only ambiguous guidance.

CATHERINE BARNARD

RES JUDICATA OR SUPREMACY? THE BINDING FORCE OF ARTICLE 249 EC

THE House of Lords ruling in *Inntrepreneur* v. *Crehan* [2006] UKHL 38 brings to an unsuccessful end Bernard Crehan's thirteen-year campaign to recover damages for loss he claims to have suffered as a result of entering into an agreement falling foul of Article 81 EC. Inntrepreneur owns a number of public houses in the UK, some of which are leased to tenants who run them as their own business. In July 1991 Inntrepreneur leased Crehan two public houses for 20 years on condition that all beer sold on the premises be purchased from Courage. Crehan's business failed in 1993. Crehan claimed that (a) the condition in his lease requiring him to purchase exclusively from Courage (the beer-tie) was a breach of Article 81 EC, and (b) by preventing him from purchasing from cheaper suppliers the beer-tie caused him to suffer substantial losses. Crehan had already successfully resisted the claim that even if he were able to show an infringement of Article 81 EC he could not recover damages as he was *in pari delicto*, under which doctrine the courts refuse to aid those party to illegal action. In Case C-453/99 *Courage v Crehan* [2001] E.C.R. I 6297, [19]-[24] the ECJ ruled that the *in pari delicto* doctrine could not be blindly applied to bar recovery of damages suffered by

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