the information to be published is true. The media does not necessarily have the right to publish something simply because it is true or alleged to be true.

This can be seen in another recent case in a different context. In *Satakunnan Markkinapőrssi Oy and another v Finland* (Application no. 931/13) [2017] ECHR 931/13, Finnish law made tax information filed by a taxpayer publicly accessible but did not enable another person to collect, store and disseminate the data, as the applicant media had done, incurring sanctions. The Strasbourg Court held that the media's right to freedom of expression was not violated. It balanced the public interest in enabling people to monitor tax collection against the taxpayer's Article 8 right, and concluded that the limitation on the media's right to freedom of expression was justified. So too, in *Khuja*, the material could not be published simply because it was true. There had to be a balancing of both Convention rights.

In conclusion, *Khuja* not only reflects the approach of Convention case law, albeit without explicitly saying so; as explained above, it also reveals a shift to a more "granular" approach to the balancing of competing Convention rights.

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DEVOLUTION AND DISCRIMINATION BETWEEN CITIZENS UNDER ARTICLE 14 ECHR: PRESERVING LOCAL PROVISION

Many women from Northern Ireland (NI) travel to England each year to pay for abortion services because of the limited availability of the service in NI. In *R (on the application of A and B) (Appellants) v Secretary of State for Health (Respondent)* [2017] UKSC 41; [2017] 1 W.L.R. 2492, the Supreme Court was asked whether it was unlawful for the Secretary of State for Health to have failed to make provision for abortion services free of charge under the National Health Service in England to women who are UK citizens usually resident in NI. The majority answered "no" and, on delivering the judgment, Lord Wilson (for the majority) described the Court as "sharply divided" on both the public law and human rights arguments that had been before it.

The outcome in *A and B* has obvious significance for the estimated (minimum of) 1,000 NI women who travel to England for abortions each year (evidence summarised at [5]), in that they must still pay to access the service unlike their English counterparts. The focus of this comment, however, is on the wider implications of the Court's human rights analysis for UK citizens in the context of allegations of discrimination concerning

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distinct service provision under the devolution arrangements. In this regard, *A and B* provides a tentative roadmap with the following two markers: first, differential treatment by one UK jurisdiction against the citizens of another UK jurisdiction because of their "place of residence" will engage Article 14 ECHR if the matter is within the scope of another ECHR right. Secondly, despite such matters engaging Article 14, the legitimate aim of the state to respect the devolved framework for local provision to residents in each of the four jurisdictions is accorded a substantial weight that cannot be easily overcome by the interference with the individual's right. The detail of the Court's analysis was as follows.

Since Article 14 ECHR prevents discrimination only in regard to the enjoyment of another Convention right, the appellants argued that the discrimination pertained to the enjoyment of their right to private and family life under Article 8 ECHR. To prove an Article 14 violation, the appellants did not need to also prove a violation of Article 8 – only that the matter fell within its scope. The Court quickly dispensed with the Article 8 question, all agreeing that a decision to provide abortion services falls within the scope of the right to a private life because of the potential restriction concerning a woman's autonomy of a particularly intimate kind (at [22] and [83]).

The question then arose as to "whether laws or administrative practices adopted within one of the constituent parts of the UK, which differentiate between UK citizens according to whether they are or are not residents of that part, fall within the scope of article 14", at [37]. Some time was given to answering this question (by Lords Wilson, Reed and Kerr) since the issue had, to that date, only been indirectly addressed by the European Court of Human Rights. As a preliminary point, it was emphasised that variations within a state due to separate internal jurisdictions, such as occurs in a federal or unitary state, do not, of themselves, constitute discrimination (see paras. [40], [41], [89]). With that point of principle in mind, since a person's "place of residence" does not constitute one of the specified grounds of discrimination under Article 14 ECHR, it has to fall within Article 14's residual ground of "other status". To constitute an "other status", the distinction in question must relate to a personal (or identifiable (at [44])) characteristic of the applicant (at [24]). Based on the previous jurisprudence of the European Court, it was clear that a distinction could be drawn between laws or practices which differentiate between the *location* of the applicant at any given time, not considered to relate to a personal characteristic (for which see *Magee v United Kingdom* (Application no. 28135/95) (2000) 31 EHRR 35), and those which differentiate based on *place of residence*, a personal characteristic (see *Carson v United Kingdom* (Application no. 42184/05) (2010) 51 EHRR 13) (see at [25], [46]). Lord Reed (at [47]) further identified that differential treatment between citizens based on their place of residence falls within the scope

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of Article 14 irrespective of whether that treatment: (1) emerges from the national or sub-national authorities; distinguishes between residence at home and abroad; or (2) distinguishes between residence within different UK jurisdictions. In the end, since the matter at issue in *A and B* concerned differential treatment based on place of residence (that is, whether the UK citizen resided in England or NI), the Court came to the unanimous conclusion that the matter engaged Article 14.

Although a matter may fall within the scope of Article 14, it will not of course amount to discrimination if the law or practice in question can be justified. To determine whether or not the difference in treatment in *A and B* could be justified, Lord Wilson applied the well-known four-part test used in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 W.L.R. 3820, at [33]: (1) Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right? (2) Is the measure rationally connected to that aim? (3) Could a less intrusive measure have been used? and (4) Bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community? (at [32]).

The majority accepted that the legitimate aim of the Secretary of State in his decision not to provide abortion services free of charge to UK women usually resident in NI was that of "stay[ing] loyal to a legitimate scheme for health services to be devolved in the interests of securing local provision to residents in each of the four countries" (at [32]) but also, a respect for the "democratic decision reached in [NI] in relation to abortion services" (at [35]). The minority judgments of Lord Kerr and Lady Hale did not, however, accept the applicability of this aim. Lord Kerr (at [84]) considered that permitting abortions free of charge to women coming from NI involves "no compromise" on the devolved health scheme, which intends local provision of medical services and "does not impinge on the NI Assembly's continuing responsibility for the provision of medical services in [NI]". Lord Kerr's latter point is undoubtedly true in a technical sense – the Northern Ireland Assembly would not be compelled by the decision to provide a more comprehensive abortion service than it currently does. His former assertion is, however, questionable. It is difficult to see how broader health provision in any part of the UK, whether it be a drug or operative service, if made available free of charge to residents of other UK jurisdictions, would not be availed of by at least some, if not many, of those residents. According to the majority (which included Lord Kerr's opinion on the public law question that the Secretary of State owed a duty to all people in England, including from abroad) such health tourism could precipitate "a near collapse of the edifice of devolved health services" (at [36]).

The majority considered the real question under Article 14 to be whether in light of that aim (skipping questions (2) and (3) of the four-part

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justification test), a fair balance had been struck between the limitation on Article 8 and the interests of the community. Although there was early acknowledgment that the ability to access abortion services fell within the scope of Article 8 and was intimately related to a woman's autonomy, the majority opinion, unlike the minority, did not commence by interrogating the extent of this value. Instead, the majority took as their starting point the importance of the devolved nature of health provision throughout the UK. The reason for such a stance was not, regrettably, made explicit. It can be imagined that, had the majority sought to do so, it would have identified that devolution concerns the constitutional structure of the state that was intentionally facilitated by the UK legislature, and additionally so, pursuant to a referenda – an exercise of direct democracy. Explanation or not, the majority's opinion established a high hurdle which the appellants could overcome by persuasive argument. Since the appellants relied upon recommendations/comments from the UN Committee on the Elimination of Discrimination Against Women and the UN Committee on Economic, Social and Cultural Rights, the authority of which was said to be "slight" as a matter of international law, they were insufficient to outweigh the Secretary of State's legitimate aim (see para. [35]).

The minority (at [74]) was also careful to show deference to the devolved legislatures. In their opinion however, the Secretary of State did not have a legitimate aim and so the fair balance question did not arise. Lady Hale's minority opinion, rather, appears to identify a fundamental right to access abortion services derived from the value of autonomy, which she asserts, underpins both the common law (at [93]) and Article 8 (at [97]); an approach clearly at odds with the reasoning of the majority (cf. para. [35]). As such, the judicial divide in *A and B* appears to centre on the weight to be accorded to a women's ability to access abortion services. The parameters of this right under Article 8 will undoubtedly be more fully discussed when the Supreme Court delivers its judgment in *Re Northern Ireland Human Rights Commission's Application for Judicial Review* (on appeal from [2017] NICA 42), a case that challenges the compliance of NI's abortion law with the ECHR. Given that *re Northern Ireland Human Rights Commission* will address a more germane issue for persons within the appellant's situation, it might be considered a good thing that for now, the Supreme Court did not add an extra layer of constitutional complexity to an already difficult constitutional question.

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