The protection of family in the case-law of the European Court of Human Rights

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Summary

1. Preliminary considerations
2. Conventional provisions that safeguard family relations
3. New forms of family
4. Filiations
5. Immigrants’ family
6. Prisoners’ family
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1. Preliminary considerations

1. The council of Europe

2. The European Convention on Human Rights

3. The European Court of Human Rights
2. Conventional provisions that safeguard family relations

- Article 8
- Article 12
- Article 14
- Article 1 Protocol No. 1
- Article 5 Protocol No. 7
- Article 2 Protocol No. 1
- Article 6
2.1. Article 8 and the right to respect for private and family life

Article 8 ECHR
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

- Dual structure.
- Aims essentially to prevent any arbitrary interference by the public authorities in the private and family sphere of every individual.
- Evolutive or dynamic interpretation refrained by the “margin of appreciation” doctrine.
The concept of “family life”

2.1.1. What constitutes “family life” under Article 8?

- A lawful and genuine marriage (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, § 62).

- Relationships between parents and their children starting from the moment of birth and by the very fact of it, regardless of being a child born in or out of wedlock (see Keegan v. Ireland, § 44).

- *De facto* ‘family’ ties where the parties are living together outside of marriage, as long as the ties are sufficiently close and effective.

Sufficiently close interpersonal ties factor

“the existence or non-existence of ‘family life’ is essentially a question of fact depending upon the real existence in practice of close personal ties” (see Brauer v. Germany, § 30).
The concept of “family life”

- Relationships between near relatives (e.g., Boyle v. the United Kingdom).

- Ties between members of recomposed families (e.g., K. and T. v. Finland).

- The link between adoptive parents and their adoptive children (see, e.g., Pini, Bertani and Others v. Romania).

- Homosexual relationships (see, e.g., Schalk and Kopf v. Austria)

Appearance of a family factor (e.g., X, Y and Z. v. the United Kingdom).
The concept of “family life”

2.1.2. What does not constitute “family life” under Article 8?

- The mere desire to found a family, either by marrying (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, § 62) or having the opportunity to adopt children (see Fretté v. France, § 32).

- The polygamous family (see, e.g., E.A. and A.A v. the Netherlands, App. No. 14501/89).

- The link between the sperm donor and the child conceived by artificial insemination (see J.R.M. v. the Netherlands, App. No. 16944/90).

1.1.3. The dilution of the concept of “family life”
2.2. Article 12 and the right to marry and to found a family

Article 12 ECHR

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

- Safeguards two rights
  - Right to marry
  - Right to found a family
3. New forms of family

3.1. *De facto* families
3.2. Mono-parental and recomposed families
3.3. Transsexuals and the respect for (private and) family life
3.4. Homosexuals and the respect for (private and) family life
3.1. *De facto* families

3.1.1. Children born out of wedlock

- No distinction should be made between children born in or out of wedlock - Principle of non-discrimination (*see, e.g.*, Pla and Puncernau v. Andorra, § 61).
3.1. De facto families

3.1.2. Establishment of affiliation of children born out of wedlock

- *Mater semper certa est* (see Marckx v. Belgium).

- Domestic law should provide a wide range of legal safeguards to allow the challenge of the paternity presumption (see Kroon and Others v. the Netherlands).

- It is justifiable “to give greater weight to the interests of the child and the family in which it lives than to the interest of an applicant in obtaining determination of a biological fact” and, therefore, it is acceptable that a natural father is prevented from challenging a legal presumption (see Nylund v. Finland).

- In cases where the Member State has no procedural means to compel the alleged father to comply with a court order for DNA tests to be carried out, it should provide “alternative means enabling an independent authority to determine the paternity claim speedily” (see Mikulić v. Croatia, § 64).
3.1. *De facto* families

3.1.3. Natural fathers

- **Parental rights of access**
  - The difference of treatment between the divorced fathers and the natural fathers after family disruption is not consistent with Article 8 ECHR, taken in conjunction with Article 14 ECHR (see, e.g., Sommerfeld v. Germany, §§ 91-94).
  - There is no breach of Article 8 ECHR if the national authorities sufficiently involve the natural father in the decision-making process to provide him with the possibility of protecting his interests (see, e.g., Elsholz v. Germany, §§ 49, 52, 53).

- **Adoption without the natural father’s knowledge or consent**
  - There is no breach of Article 8 ECHR if the natural father’s procedural rights are safeguarded by national authorities in the decision-making process (see, e.g., Keegan v. Ireland, § 55).
3.1. *De facto* families

3.1.4. *De facto* couples

- A stable relationship of an unmarried couple who cohabit gives rise to “family life”, within the meaning of Article 8 ECHR (*see, e.g.*, Saucedo Gómez v. Spain, App. No. 37784/97).

- Married couples and *de facto* couples may be considered as being in an analogous position for the purposes of Article 14 ECHR.

- The difference in treatment between spouses and cohabitees must have an objective and reasonable justification. (*see, e.g.*, Quintana Zapata v. Spain, App. No. 34615/97)

protection of marriage and of the traditional family
3.2. Mono-parental and recomposed families

3.2.1. Mono-parental families

- The right to found a mono-parental family is not protected by the Convention, either under the scope of Article 8 or under Article 12 (see, e.g., X. v. Belgium and the Netherlands, App. No. 6482/74).

- Once a mono-parental family is founded, it should be regarded as a family entitled to the protection granted by Article 8 (see, e.g., Marckx v. Belgium).
3.2. Mono-parental and recomposed families

3.2.2. Recomposed families

- A relationship between a child and the partner or spouse of a parent may be characterised as “family life”, if the close *de facto* interpersonal ties or appearance of a family criterion is verified.

- The best interests of the child may determine that “social parenthood” should prevail over “biological parenthood”. A decision permitting the “social parent” to adopt the child, without the biological father’s consent, may be in accordance with the Convention *(see, e.g., Söderbäck v. Sweden)*.
3.3. Transsexuals and the respect for (private and) family life

3.3.1. Legal recognition of transsexuals’ gender re-assignment

- Initial reluctance in imposing an obligation on Member States to legally recognise transsexuals’ gender re-assignment.
- Change of approach in Christine Goodwin and I. v. the United Kingdom.

3.3.2. The right to marry

- In the cases Rees, Cossey and Sheffield and Horsham, the Court repeatedly interpreted Article 12 ECHR as referring only to the traditional marriage between persons of opposite biological sex.
- In Christine Goodwin and I. cases, the Strasbourg Court overcame this interpretation and upheld that a Member State’s refusal to allow a post-operative transsexual to marry a person of the opposite sex constitutes a breach of Article 12 ECHR.
3.3. Transsexuals and the respect for (private and) family life

3.3.3. Parental rights

- In X, Y and Z v. the United Kingdom, the Court found that there was no common ground amongst the Contracting States as to the recognition of transsexual’s parental rights and, therefore, the Member State ought to be afforded a wide margin of appreciation.
3.4. Homosexuals and the respect for (private and) family life

- Principle of non-discrimination on the grounds of “sexual orientation”.
  - Parental rights (see Salgueiro da Silva Mouta v. Portugal)
  - Tenancy rights (see Karner v. Austria)
  - Adoption (see E.B. v. France)

- Long-term homosexual relationships create family life protected by Article 8 ECHR (see Schalk and Kopf v. Austria)
3.4. Homosexuals and the respect for (private and) family life

- **Right to marry**
  - Christine Goodwin and I. v. the United Kingdom → the Court will not play the role of guardian of the traditional marriage’s temple for much longer.
  - Parry v. the United Kingdom, App. No. 42971/05, and R. and F. v. the United Kingdom, App. No. 35748/05 → the Court continued to hold that Article 12 enshrines the traditional concept of marriage as being between a man and a woman.
  - See Schalk y Kopf c. Austria
4. Filiations

- **Custody and access**
  - the restriction, exclusion, or non-enforcement of visiting rights and the non-enforcement of custody in cases of abduction constitute an interference which may be legitimate under paragraph 2 of Article 8, namely:
    - if the non-discrimination principle is respected *(e.g., Hoffmann v. Austria)*;
    - if good faith efforts to enforce access arrangements are made to facilitate the reunion between the child and the custodial parent in cases of abduction *(e.g., Ignaccolo-Zenide v. Romania; Maire v. Portugal)* or to enforce the access rights of the non-custodial parent *(e.g., Hokkanen v. Finland)*.
4. Filiations

- **Children in public care**
  - The best interest of the child is the paramount consideration.
  - Article 8 will not be breached, namely:
    - If care measures are based on relevant and sufficient reasons (e.g., Covezzi and Morselli v. Italy);
    - If a serious and sustained effort of national authorities is directed towards facilitating family reunification (e.g., K.A. v. Finland);
    - If a fair balance has been struck between the conflicting interests (e.g., Johansen v. Norway);
    - The parents’ procedural guarantees are safeguarded (e.g., McMichael v. the United Kingdom).
5. Immigrants’ family

*Every person* who is under the jurisdiction of a State-party to the ECHR may rely on the protection afforded by this instrument (article 1 ECHR).

**Article 8** - limit to the immigration policies of States Parties

*However* does not guarantee the right of an alien to enter or to reside in a particular country:

States have the sovereign power to control immigration, and broad discretionary in such context.

The extent of a State’s obligation to admit into its territory foreign relatives or to refrain from expelling immigrants *will vary* according to the particular circumstances of the persons involved and the general interest.
5. Immigrants’ family

Refusals of Family Reunification

More margin of appreciation:

- only disrespect article 8 if the family does not have the chance to be reunited in a country connected with either of the members

- Gül v. Switzerland
- Sen v. The Netherlands

Principle of the best interest of the child
5. Immigrants’ family

Deportations:

The State has to strike a fair balance between the applicants’ interests on the one hand and its own interest in controlling immigration on the other.

*Boultif v. Switzerland / Üner v. The Netherlands*

- personal and family life of the alien and the solidarity of social, cultural and family ties with the host country
- regular or irregular situation of the alien in the country
- remaining ties with the country of origin
- nature or seriousness of the offence committed
- best interests and well-being of the children - *Rodrigues da Silva and Hoogkamer v. The Netherlands*
6. Prisoner’s family

- **Contact restrictions**
  - The right to respect for family life of prisoners encompasses the State’s positive obligation to assist the prisoner in establishing and maintaining effective contact with his family (see Messina (No. 2) v. Italy, § 61)
  - Constitute interferences with the right to respect for family life, which may be justifiable under paragraph 2 of Article 8 (see Klamecki v. Poland, § 144)

- **“Conjugal visits”**
  - The right to found a family does not include the prisoner’s right to conjugal visits (see X. v. the United Kingdom, App. No. 6564/74)
  - The refusal of conjugal visits to the detained spouse may “for the present time” be regarded as justified under paragraph 2 of Article 8 (see Aliev v. Ukraine, § 188)
7. Conclusions

- The main lines of the Strasbourg Court’s decisions in this field are nothing more than a reflection of the coordinates of the existing Family Law in Europe: equality and pedo-centrism.

- In some areas the commitment to the principle of equality is suspended by the European Court of Human Rights on the grounds of protection of marriage and the traditional family.

- The generosity of the Court in granting legal protection to new forms of “family life”, notwithstanding the permission of the differential treatment of the de facto couples and the failure to recognise the stable homosexual relations as “family life”, allows us to say that the Strasbourg case-law is only modestly conservative.