

Family disruption in the case-law of the European Court of Human Rights

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1. General considerations

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was adopted in 1950 within the framework of the Council of Europe and nowadays legally binds 47 States,² granting effective human rights protection and, in particular, guaranteeing respect for the family life of almost 800 million people.³

The importance and originality of the ECHR lies on its extended catalogue of human rights and also on the monitoring mechanisms that are provided for the enforcement of such rights. Such mechanisms are based on a jurisdictional organ - the European Court of Human Rights (Eur. Ct. H.R.)⁴. This system has built a standard of protection of human rights which is higher than the standard established by the International community in general.

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² The Council of Europe, based in Strasbourg, was founded on 5 May 1949 by ten countries (Belgium, Denmark, France, Holland, Ireland, Italy, Luxembourg, Norway, Sweden and UK). In August 1949, Greece and Turkey joined this organization. Currently, many other countries are also part of the Council of Europe, namely, by date of accession: Iceland and Germany (1950), Austria (1956), Cyprus (1961), Switzerland (1963), Malta (1965), Portugal (1976), Spain (1977), Liechtenstein (1978), San Marino (1988), Finland (1989), Hungary (1990), Poland (1991), Bulgaria (1992), Slovakia, Slovenia, Estonia, Lithuania, Slovakia and Romania (1993), Andorra (1994), Albania, Latvia, Moldova, Former Yugoslav Republic of Macedonia and Ukraine (1995), Russian Federation and Croatia (1996), Georgia (1999), Armenia and Azerbaijan (2001), Bosnia-Herzegovina (2002), Serbia (2003), Monaco (2004) and Montenegro (2007).

³ In general, on the ECHR, *see, inter alia*, D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, (Oxford University Press, 2009) [hereinafter HARRIS, *LAW OF THE EUROPEAN*]; PIETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, (Kluwer Law International 2006) [hereinafter DIJK, *THEORY AND PRACTICE*]; FRÉDÉRIC SUDRE, *DROIT EUROPÉEN ET INTERNATIONAL DES DROITS DE L'HOMME* (Presses Universitaires de France 2005) [hereinafter SUDRE, *DROIT EUROPÉEN*]; CLARE OVEY & ROBIN WHITE, *JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press 2002); SERGIO BARTOLE ET AL., *COMMENTARIO ALLA CONVENZIONE EUROPEA PER LA TUTELA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI* (CEDAM 2001); BLACKBURN & POLAKIEWICZ, *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1995-2000* (Oxford University Press 2001); DAVID J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Butterworths 1995).

⁴ The Court was instituted as a permanent entity with full-time judges on 1 November 1998, replacing the then existing enforcement mechanisms, which included the European Commission of Human Rights created in 1954 and the European Court of Human Rights, which had been created in 1959. The new format of the Court was the result of the ratification of Protocol No. 11, an amendment to the Convention that was ratified in November 1998.

Every State that ratifies the ECHR becomes bound by the jurisdiction of the Court. The Court consists in a number of judges equal to that of the States Parties to the Convention (Article 20 ECHR). Nevertheless, the judges are not representatives from the States Parties, performing their duties with independence and impartiality.

Any Contracting State⁵ or individual⁶ claiming to be a victim of a violation of the Convention may lodge directly with the Eur. Ct. H.R an application alleging a breach by a Contracting State of one of the Convention rights.

The procedure before the Eur. Ct. H.R is adversarial and public. Firstly, the individual and the State enjoy absolute procedural equality. Secondly, hearings, which are held only in a minority of cases, are public, unless the Court decides otherwise on account of exceptional circumstances. Memorials and other documents filed with the Court's Registry by the parties are, in principle, accessible to the public (Article 40 ECHR).

The procedure before the Court is provided with a mechanism for the filtering of applications and a procedure to enable friendly settlements.

To consider cases brought before it, the Court sits in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges (Article 26 ECHR).

A single judge⁷ may declare inadmissible or strike out of the Court's list of cases an application where such a decision can be taken without further examination, for example because of inadmissibility of the application⁸. These decisions are final. If the

⁵ Any Contracting State may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another Contracting Party (Article 33 ECHR).

⁶ The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the Contracting States (Article 34 ECHR).

⁷ When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected (Article 26 (3) ECHR).

⁸ Article 35 of the ECHR sets forth the admissibility criteria. Firstly, the Court may only deal with the matter after all domestic remedies have been exhausted and within a period of six months from the date on which the final decision was taken. Only those domestic remedies that are likely to be effective, adequate and available shall be taken into account. Furthermore, the Court shall not deal with any application that is anonymous or is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. It also considers inadmissible those applications that are manifestly ill-founded, or that constitute an abuse of the right of application. Finally, the applications that are incompatible with the provisions of the Convention or the protocols thereto shall be dismissed as well. An application is so considered if it is incompatible *ratione temporis* (the Convention is not binding on the State at the time of the events complained of), incompatible *ratione loci* (the complaint relates to a place where the Convention is not binding), incompatible *ratione personae* (the complaint relates to a person not bound by the Convention, or over whom the organs do not have jurisdiction) or incompatible *ratione materiae* (the complaint relates to a right not protected by the Convention). Finally, the Court shall declare inadmissible an application where the applicant has not suffered a significant disadvantage

single judge does not take such decisions, the application shall be forwarded to a committee or to a Chamber for further examination (Article 27 ECHR).

A committee may, on one hand, declare the application inadmissible or strike it out of its list of cases, where such decision can be taken without further examination (in which case the decision is final). On the other hand, it may declare the application admissible and render a judgment on the merits, if the underlying question in the case is already the subject of well-established case-law of the Court. If none of these decisions is taken, the application proceeds to the Chambers (Article 28 ECHR)⁹.

Chambers determine both admissibility and merits (Article 29 ECHR). The first stage of the procedure is generally written, although the Chamber may decide to hold a public hearing. The President may invite or grant leave to any Contracting State which is not party to the proceedings, or any person concerned who is not the applicant, to submit written comments, and, in exceptional circumstances, to make representations at the hearing. A Contracting State whose national is an applicant in the case is entitled to intervene as of right (Article 36 ECHR). During the procedure on the merits, negotiations aimed at securing a friendly settlement may be conducted through the Registrar¹⁰. Such negotiations are confidential (Article 38 ECHR).

Chambers decide by a majority vote. Any judge who has taken part in the consideration of the case is entitled to append to the judgment a separate opinion. A Chamber's judgment becomes final on expiry of the three-month period and shall be published (Article 44 ECHR). Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible (Article 45 ECHR).

Chambers may at any time relinquish jurisdiction in favour of the Grand Chamber where a case raises a serious question of interpretation of the Convention or where there is a risk of departing from existing case-law, unless one of the parties objects to such relinquishment (Article 30 ECHR). Also, within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber (Article 43 ECHR). The Grand Chamber decides by a majority vote and its judgments are final.

(unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of on the merits).

⁹ The committee decides by a unanimous vote.

¹⁰ If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached (Article 39).

All final judgments of the Court are binding on the respondent States concerned, and responsibility for supervising the execution of judgments lies with the Committee of Ministers of the Council of Europe (Article 46 ECHR)¹¹. The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to enforce it. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, the Article 50 empowers the Court to afford the injured party such satisfaction as appears to be appropriate¹². Sometimes the Court specifies the measures that the States must adopt in order to comply with a judgment. Such measures may be individual or general (*e. g.*, amendment of domestic legislation). Only the parties to the process are bound by the Court decisions. Nevertheless, since the decisions of the Court are meant to interpret the ECHR provisions, they acquire an autonomous authority that has influence on all the States Parties. All of them have to respect the ECHR provisions with the interpretation given by the Court. In several occasions, some States Parties have amended domestic statutes in order to respect the latest decisions of the Eur. Ct. H.R. Also the domestic courts, including the constitutional jurisdictions take the Eur. Ct. H.R case-law in consideration.

The Eur. Ct. H.R is a unique institution in the world, since it works in a permanent basis and has broad powers, like investigation and sentence. Until 1998 claims were also decided by the now-defunct European Commission of Human Rights (Eur. Comm'n H.R.). Thus, some of the cases mentioned below were issued by that organ.

2. The right to respect for family life under Article 8 of the European Convention on Human Rights

The respect for private and family life is a fundamental right protected in the ECHR under Article 8. This provision aims essentially to prevent any arbitrary interference by the public authorities in the private and family sphere of every individual.

Article 8 ECHR reads as follows:

¹¹ Nevertheless, this body cannot force States to comply, and the ultimate sanction for non-compliance is expulsion from the Council of Europe.

¹² *Papamichalopoulos v. Greece* 16 Eur. Ct. H.R. (1993). All the ECHR decisions may be found at <http://echr.coe.int/echr/en/hudoc>.

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.

This provision possesses a dual structure: the first paragraph defines the scope of the protected right and the second paragraph lays down on which grounds Member States may legitimately interfere with the enjoyment of such right.

The first step that the Eur. Ct. H.R. has to take in Article 8 ECHR claims is to analyse whether the relationship described by the applicant can be characterized as “family life”, as only in that case will the situation fall under the scope of this provision. After that, the Eur. Ct. H.R. will determine whether there has been an interference with the right to respect for family life or if the Member State had a positive obligation and failed to act. Lastly, if concluding that there was such an interference or omission, the Eur. Ct. H.R. will examine whether it was justified under paragraph 2 of Article 8 and, accordingly, whether it was in accordance to the law, necessary in a democratic society or pursued any of the legitimate aims set out in this paragraph.

The vagueness of the expression “respect for private and family life” has raised considerable interpretive problems in the case-law of the Eur. Ct. H.R. Also, considering that the ECHR is “a living instrument which must be interpreted in the light of present day conditions”¹³, the Eur. Ct. H.R. has clearly opted for a dynamic or evolutive interpretation. Thus, it has dynamically interpreted the coexisting concepts of “private life” and “family life”. In addition, the dynamic interpretation of the term “respect” has let the Court to read into Article 8 not only traditional, negative obligations (by which a Member State must abstain from interfering with the enjoyment of this right to private and family life), but also positive obligations, namely

¹³ *Tyrer v. the United Kingdom*, 26 Eur. Ct. H.R. § 31 (1978). *See also, mutatis mutandis*, *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 41 (1979); *Rees v. the United Kingdom*, 106 Eur. Ct. H.R. § 47 (1986); *Johnston and Others v. Ireland*, 112 Eur. Ct. H.R. § 53 (1986); *Christine Goodwin v. the United Kingdom*, 2002-VI Eur. Ct. H.R § 75.

substantive¹⁴ and procedural¹⁵ (by which a Contracting State must take action to secure the enjoyment of the right enshrined).

If the Eur. Ct. H.R. has shown great generosity in granting legal protection to new forms of “family life” by interpreting extensively paragraph 1 of Article 8 ECHR, the same is not true regarding to paragraph 2, where the Strasbourg Court has been particularly deferential to the Contracting States, allowing a wide margin of appreciation from the States in assessing the necessity of an interference with the right guaranteed.¹⁶

As already alluded above, in assessing an alleged violation of Article 8, the Court begins by investigating if the relationship described by the applicant constitutes “family life”. Since the authors of the Convention did not define the concept of “family” or the concept of “family life”, it is for the Strasbourg Court to determine case-by-case what constitutes a “family” under the Convention.

In this process of construction of the concept of “family life” under Article 8, the Eur. Ct. H.R. begins by pointing out that a lawful and genuine marriage undoubtedly gives rise to family life.¹⁷ In addition, generally, the relationship between parents and their children constitutes family life starting from the moment of birth and by the very fact of it, regardless of being a child born in or out of wedlock.¹⁸

The notion of family under this provision “may encompass *de facto* ‘family’ ties where the parties are living together outside of marriage”¹⁹, as long as the ties are sufficiently close and effective.²⁰ Several relevant factors may be considered in order to demonstrate that the relationship invoked by the applicant has sufficient constancy to

¹⁴ For example, to legally recognise the family relationship between an unmarried mother and her child born out of wedlock, as in *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979).

¹⁵ For example, to ensure that natural fathers intervene in the adoption’s decision-making process of their children, as in *Keegan v. Ireland*, 290 Eur. Ct. H.R. (1994), or to ensure the sufficient involvement of parents in the decision-making process leading to the taking of their children into public care, as in *W. v. the United Kingdom*, 121 Eur. Ct. H.R. (1987).

¹⁶ For instance, in the case *X, Y and Z v. the United Kingdom*, 1997-II Eur. Ct. H.R., although the Eur. Ct. H.R. considered that there was family life between a female-to-male transsexual, his female partner and her child born by artificial insemination, it stressed the lack of any common European standard with regard to the granting of parental rights to transsexuals when reasoning about the State’s failure to allow the female-to-male transsexual to be registered as the father of that child and, therefore, decided that there had been no violation of Article 8.

¹⁷ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 94 Eur. Ct. H.R. (ser. A) § 62 (1985).

¹⁸ *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) § 44 (1994).

¹⁹ *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) § 44 (1994). *See, mutatis mutandis*, *Kroon and Others v. the Netherlands*, 297-C Eur. Ct. H.R. (ser. A) § 30 (1994); *Elsholz v. Germany*, 2000-VIII Eur. Ct. H.R. § 43; *Lebbink v. the Netherlands*, 2004-IV Eur. Ct. H.R. § 34.

²⁰ Moreover, for the purposes of Article 8, no distinction should be made between families based on matrimony and those that are not, as a different standpoint would be contrary to Article 14. *See Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 31 (1979).

create “family life”, *e. g.*, whether the couple live together,²¹ the length of their relationship,²² whether they have demonstrated their commitment to each other by having children together²³, whether there are elements of financial and/or psychological dependency involving more than normal emotional ties²⁴, or even whether there is regular visits by the parent.²⁵

Consistent with this, and according to the Eur. Ct. H.R., “family life” may embrace stable heterosexual relationships, as well as biological ties between a parent and a child, whether they arise from a mono-parental,²⁶ a bi-parental²⁷ or an adulterous²⁸ relationship, as long as the ties are sufficiently close and effective. For the Eur. Ct. H.R., “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”.²⁹

Relationships between near relatives, as those between siblings,³⁰ or between grandparents and grandchildren³¹, or even between uncles/aunts and nephews/nieces,³² may likewise fall within the protective scope of Article 8.³³

²¹ See *Johnston and Others v. Ireland*, 112 Eur. Ct. H.R. (ser. A) §§ 56, 72 (1986); *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) § 45 (1994). It should be noted, however, that the European Court considers that cohabitation is not always necessary. For example, in *Berrehab v. the Netherlands*, 138 Eur. Ct. H.R. (ser. A) § 21 (1988), the Court held that “family life” existed even if the parents were not living together at the time of the child’s birth. Furthermore, the fact that after the divorce or breakup not all members of the family live together any more does not put an end to their family life nor constitutes an obstacle to its creation. In *Elsholz v. Germany*, Eur. Ct. H.R. (2000), *e.g.*, although the parents were no longer living together, the father maintained regular contact with his son and, accordingly, the Court considered that there was “family life” between them.

²² See, *e.g.*, *Quintana Zapata v. Spain*, App. No. 34615/97, 92-A Eur. Comm’n H.R. Dec. & Rep. 139 (1998) (holding that a *more uxorio* relationship that lasted 65 years constituted undoubtedly “family life”).

²³ See, *e.g.*, *Kroon and Others v. the Netherlands*, 297-C Eur. Ct. H.R. (ser. A) (1994) (considering that although the couple had never live together, they had a long-standing relationship and had four children and therefore the Court found that they had “family life” within the scope of Article 8).

²⁴ See, *e.g.*, *Emonet and Others v. Switzerland*, Eur. Ct. H.R. § 37 (2007), (founding “additional factors of dependence other than normal ties of affection”, since the first applicant, due to a serious illness that left her paraplegic, needed to be cared by her biological mother and her adoptive father, respectively second and third applicants).

²⁵ *Gül v. Switzerland*, 1996-I Eur. Ct. H.R. § 33

²⁶ *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 31 (1979).

²⁷ *McMichael v. the United Kingdom*, 307-B Eur. Ct. H.R. (ser. A) (1995).

²⁸ *Kroon and Others v. the Netherlands*, 297-C Eur. Ct. H.R. (ser. A) (1994).

²⁹ See *Brauer v. Germany*, § 30).

³⁰ See, *e.g.*, *Moustaquim v. Belgium*, 193 Eur. Ct. H.R. (ser. A) (1991), (stating that there was “family life” between the applicant and his siblings).

³¹ See, *e.g.*, *Vermeire v. Belgium*, 214-C Eur. Ct. H.R. (ser. A) (1991) (concerning the exclusion of a grandchild from the estate of a grandparent solely because of the “illegitimate” nature of the affiliation between them).

³² See, *e.g.*, *Boyle v. the United Kingdom*, 282-B Eur. Ct. H.R. (ser. A) (1994) (where the applicant complained about the denial of access to his nephew, who had been taken into public care, because British law did not envisage this possibility).

³³ In this regard, the Court held in the *Marckx* Judgment that “family life”, in the sense of Article 8, “includes at least the ties between near relatives, for instance those between grandparents and

With regard to recomposed families, the Eur. Ct. H.R. found, *e.g.*, in *K. and T. v. Finland*, that family ties, within the meaning of Article 8, included the relationship between a child and his social father, who was living with the biological mother of that same child.³⁴

The notion of “family life”, in the Strasbourg Court’s view, also comprises the link between adoptive parents and their adoptive children.³⁵

The Eur. Ct. H.R. has also combined the “sufficiently close interpersonal ties” factor to the “appearance of a family” factor, in order to determine the existence of “family life” between people not bound by blood, marriage or adoption.³⁶ By way of example, in *X, Y and Z v. the United Kingdom*, the Eur. Ct. H.R. stated that *de facto* family ties linked X, a female-to-male transsexual, who had undergone gender reassignment surgery, Y, a woman, with whom X had lived for 18 years to all appearances as her male partner, and Z, Y’s child as a result of artificial insemination by a donor. In fact, the Court noted that in this case there was a clear social appearance of a traditional family, since both X and Y had applied jointly for treatment by artificial insemination, and X had been involved throughout that process and had play the role of Z’s “father” in every respect since his birth.³⁷

In short, in the case of married couples and children who are born in or out of wedlock, and in the case of other close family relationships, the genuineness of the family ties is presumed, even if subject to proof to the contrary. Thus, while the mere existence of a biological link may not be sufficient to trigger the protection granted by Article 8, the absence of biological ties does not preclude the existence of family life, as long as either the “sufficiently close interpersonal ties” or the “appearance of a family” criterion is verified.

And what does not constitute family life under Article 8?

grandchildren, since such relatives may play a considerable part in the family”. See *Marekx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 45 (1979).

³⁴ *K. and T. v. Finland*, Eur. Ct. H.R. §§149, 150 (2001).

³⁵ *Pini, Bertani and Others v. Romania*, 2004-V Eur. Ct. H.R. §§ 146, 148. In fact, in this case the Court favoured a simple link, arising from a lawful and genuine adoption, over the close *de facto* ties factor, since, although there was no cohabitation nor development of sufficiently *de facto* close ties between adopted children and adoptive parents before or after the adoption orders, the simple “potential relation”, arising from a lawful and genuine adoption, was already worthy of the protection granted by Article 8.

³⁶ Sudre, Frédéric Sudre, *Rapport Introductif – La “construction” par le juge européen du droit au respect de la vie familiale*, in *LE DROIT AU RESPECT DE LA VIE FAMILIALE AU SENS DE LA CONVENTION EUROPEENNE DES DROITS DE L’HOMME* 11, 21 (Frédéric Sudre ed., Bruylant 2002) [hereinafter Sudre, *Raport Introductif*].

³⁷ *X, Y and Z v. the United Kingdom*, 1997-II Eur. Ct. H.R §§ 35-37.

The protective shield of Article 8 does not encompass the mere desire to found a family, either by marrying³⁸, or having the opportunity to adopt children³⁹. Moreover, the European Commission of Human Rights took the view that the sperm donor “that donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child”.⁴⁰ Moreover, a relationship between a fiancé and fiancée does not in itself constitute “family life”⁴¹. Polygamous marriages may create “family life”, notwithstanding the fact that it does not seem to be an obligation to afford them protection under Article 8 in all circumstances⁴². Finally, as regards homosexual relationships, considering the different views of the Member States in relation to this issue, they are yet to be protected as “family life”. The Convention institutions have, indeed, reiterated that “despite the modern evolution of attitudes towards homosexuality”, a stable homosexual relationship between two women or two men does not give rise to family life and hence does not fall within the scope of the right to respect for family life, granting them, nevertheless, protection under the concept of “private life”.⁴³

The uncertainty and the coexistence of the concepts of “privacy” and “family” in Article 8 has also led the Court to blur the boundary between them, which resulted, on numerous occasions, in the emergency of the nebulous concept of “respect for private and family life”, including the right to establish and develop interpersonal relations. This broad interpretation of the right to respect for private and family life has undoubtedly permitted the extension of the protective shield of this provision and, therefore, also ensured its vitality. However, this approach has equally led to a progressive dilution of the specificity and precise boundaries of the concept of “family life”.⁴⁴

³⁸ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 94 Eur. Ct. H.R. (ser. A) § 62 (1985).

³⁹ *Fretté v. France*, 2002-I Eur. Ct. H.R. § 32 (recalling, when called to rule on adoption by single homosexuals, that the Convention does not guarantee the right to adopt as such and, in addition, emphasizing that “the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family”). *See also* *E.B. v. France*, Eur. Ct. H.R. § 41 (2008).

⁴⁰ *J.R.M. v. the Netherlands*, App. No. 16944/90, 74 Eur. Comm’n H.R. Dec. & Rep. 120 (1993).

⁴¹ *Wakefield v. the United Kingdom*, App. No. 11373/85, 66 Eur. Comm’n H.R. Dec. & Rep. 225 (1990).

⁴² *See, e.g., E.A. and A.A v. the Netherlands*, App. No. 14501/89, 72 Eur. Comm’n H.R. Dec. & Rep. 118 (1992) and *Alam and Khan v. the United Kingdom*, App. No. 2991/66, 1968 Y.B. Eur. Conv. H.R. 788 (Eur. Comm’n H.R.).

⁴³ *See, e.g., Rööslü v. Germany*, App. No. 28318/95, 85-A Eur. Comm’n H.R. Dec. & Rep. 149, 151 (1996).

⁴⁴ For more details about the evolutionary case-to-case construction of the concept of “family life”, *see, inter alia*, SUSANA ALMEIDA, O RESPEITO PELA VIDA (PRIVADA E) FAMILIAR NA JURISPRUDÊNCIA DO

Finally, and now regarding more specifically the cases of family disruption, according to the Strasbourg Court, the right to respect for family life, within the meaning of Article 8, requires a positive obligation of Member States to act in a manner calculated to allow family ties to develop normally.⁴⁵ Furthermore, as this Court often stresses, the mutual enjoyment by parents and children of each other's company constitutes a fundamental element of family life and thus one of the objectives pursued by Article 8.⁴⁶

Therefore, the restriction or non-enforcement of custody and access rights, as well as the compulsory taking of children into public care and the implementation of care measures, or the limitation or prohibition of visits from family members to prisoners, or even the refusal of family reunification of immigrants, represent an interference with the right to respect for family life under Article 8. In the following paragraphs we shall analyse these cases of family disruption and examine under which grounds, according to this organ, Member States may legitimately interfere with the enjoyment of the right to respect for family life.

3. Custody and Access

In the significant amount of applications concerning the relationship of parents and children on marriage breakdown or other family crises, the Strasbourg organs have emphasised that divorce or separation of the parents do not put an end to family life of parents with their children⁴⁷ and therefore family ties between them must be preserved. Thus, the award of custody to one parent, the restriction, exclusion, or non-enforcement

TRIBUNAL EUROPEU DOS DIREITOS DO HOMEM: A TUTELA DAS NOVAS FORMAS DE FAMÍLIA, (Coimbra Editora, 2009), Hans Danelius, *Reflections on some important Judgements of the European Court of Human Rights regarding family life*, in FAMILY LIFE AND HUMAN RIGHTS 153 (Peter Lødrup & Eva Modvar ed., Gyldendal 2004); GILLES DUTERTRE, KEY CASE – LAW EXTRACTS: EUROPEAN COURT OF HUMAN RIGHTS 268-93 (Council of Europe Publishing 2003); WHITE, JACOBS AND WHITE, *supra* 3, at 217-24; Sudre, *Raport Introductif*, *supra* 36, at 11-54; DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND EUROPEAN SOCIAL CHARTER 239-253 (Council of Europe Publishing 1999); Jane Liddy, *Current topic: the concept of family life under ECHR*, 1 EUR. HUM. RTS. L. REV. 15 (1998); David Feldman, *The developing scope of Article 8 of the European Convention on Human Rights*, 3 EUR. HUM. RTS. L. REV. 265 (1997); Vincent Coussirat-Coustère, *La notion de famille dans les jurisprudences de la Commission et de la Cour européennes des droits de l'Homme*, in INTERNATIONALISATION DES DROITS DE L'HOMME ET ÉVOLUTION DU DROIT DE LA FAMILLE 45 (1996).

⁴⁵ *See, inter alia*, Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) § 45 (1979); Scozzari and Giunta v. Italy, 2000-VIII Eur. Ct. H.R. § 221.

⁴⁶ *See, e. g.*, Keegan v. Ireland, 290 Eur. Ct. H.R. (ser. A) § 50 (1994); Margareta and Roger Andersson v. Sweden, 226 Eur. Ct. H.R. (ser. A) § 72 (1992); Elsholz v. Germany, 2000-VIII Eur. Ct. H.R. § 43; Kutzner v. Germany, 2002-I Eur. Ct. H.R. § 58.

⁴⁷ *Inter alia*, Berrehab v. the Netherlands, 138 Eur. Ct. H.R. (ser. A) § 21 (1988); Elsholz v. Germany, 2000-VIII Eur. Ct. H.R. § 43.

of visiting rights and the non-enforcement of custody in cases of abduction constitute an interference with the right to respect for family life, which may be, in certain cases and as we shall see, legitimate under paragraph 2 of Article 8. Furthermore, as the Court has repeatedly held either in cases of non-enforcement of access rights or in cases of child abduction, Article 8 includes a right for parents to have measures taken by the national authorities in a manner calculated to enable family ties to be developed normally and that will permit them to be reunited with their children.⁴⁸ In the Court's analysis a fair balance between the interests of all persons concerned and the general interest in ensuring respect for the rule of law must be struck.⁴⁹

The award of the custody to one parent will inevitably constitute an interference with the family life of the other parent and, although the conventional organs consider that "the terms of paragraph 2 leave a considerable measure of discretion to the domestic courts when deciding on questions concerning the custody of the children of divorced parents",⁵⁰ a right of access will derive from Article 8 to the non-custodial parent.⁵¹ In fact, the non-custodial parent can only be prevented from access to the child if very serious reasons laid down on the second paragraph of Article 8 are put forward, such as the protection of health and morals of children, namely their psychological well-being.⁵² Besides, all difference in treatment regarding access rights between divorced parents and natural parents of children born outside marriage without an objective and reasonable justification is discriminatory and thus condemned by the European Judge.⁵³

The equality principle between mother and father should also guide the national authorities' decision in awarding parental rights. Therefore, in the Court's opinion, a

⁴⁸ See, e. g., *Eriksson v. Sweden*, 156 Eur. Ct. H.R. (ser. A) § 71 (1989); *Margareta and Roger Andersson v. Sweden*, 226-A Eur. Ct. H.R. (ser. A) § 91 (1992); *Olsson v. Sweden* (No. 2), 250 Eur. Ct. H.R. (ser. A) § 90 (1992); *Hokkanen v. Finland*, 299-A Eur. Ct. H.R. (ser. A) § 55 (1994); *Ignaccolo-Zenide v. Romania*, 2000-I Eur. Ct. H.R. § 94; *Sophia Gudrun Hansen v. Turkey*, Eur. Ct. H.R. § 97 (2003).

⁴⁹ *Nuutinen v. Finland*, 2000-VIII Eur. Ct. H.R. § 129.

⁵⁰ *X. v. Federal Republic of Germany*, App. No. 2699/65, 11 Eur. Comm'n H.R. Dec. & Rep. 366, 376 (1968). Moreover, as the Strasbourg Court noted in *Hokkanen v. Finland*, 299-A Eur. Ct. H.R. (ser. A) § 55 (1994), this Court's "task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation".

⁵¹ See, e. g., *Hendriks v. the Netherlands*, App. No. 8427/78, 29 Eur. Comm'n H.R. Dec. & Rep. 5 § 94 (1982).

⁵² See, e.g., *Jonsson v. Sweden*, App. No. 12495/86, 54 Eur. Comm'n H.R. Dec. & Rep. 194, 199 (1987) (where, given the serious difficulties and conflicts between parents, the refusal of a natural father's right of access to his child was considered a justified interference with his right to respect for his family life, because it was important for the child's well-being to be kept out of those difficulties) and *Schaal v. Luxembourg*, Eur. Ct. H.R. §§ 50-53 (2003) (finding that the interests of the child justified suspending the applicant's access rights and the interference with his right to respect for his family life while waiting for the outcome of the criminal trial against him for sexual abuses).

⁵³ See, for instance, *Sahin and Sommerfeld v. Germany*, 2003-VIII Eur. Ct. H.R.

decision based essentially in religion⁵⁴ or sexual orientation⁵⁵ of the parent alone encompasses a violation of Article 8 taken in conjunction with Article 14 of the Convention.

On the other hand, rocky relationships between separated or divorced parents or between parents and other relatives may often lead to conflicting problems or obstacles on access to children by the non-custodial parent. In general, considering the national authorities' obligation to act in manner calculated to allow family ties to develop and to take measures that will enable parent and child to be reunited, the non-enforcement of a parent's right to access to its child against the person who is refusing to comply with court orders may constitute a violation of Article 8.

For instance, in *Hokkanen v. Finland*, the Strasbourg Court upheld that the State's failure to implement a father's right to access to his daughter against the denial of the maternal grandparents to comply with court orders was contrary to his right to respect for his family life.⁵⁶

Nevertheless, the Court will not find a violation of Article 8 if the Member State has made good faith efforts to enforce the access rights awarded under a court order and the principle obstacle to the parent-child contact is the opposition and resistance of the custodial parent.⁵⁷

Similarly, and having in mind the same positive obligation of national authorities, the state's failure to facilitate the prompt reunion of a parent with a child in cases of abduction by the other parent is contrary to the parent's right to respect for his or her family life. Indeed, the Strasbourg Court will usually find a breach of Article 8 if it concludes that national authorities have failed to locate the child, to restore the rights that were restricted and to penalise the parent who unlawfully removed and retained the

⁵⁴ *Hoffmann v. Austria*, 255-C Eur. Ct. H.R. (ser. A) §§ 30-36 (1993) (holding that the withdrawal of parental rights previously granted to the mother based on the mere fact that she was a member of Jehovah's Witnesses constituted a violation of Article 8 taken in conjunction with Article 14). *See also*, *mutatis mutandis*, *Palau-Martinez v. France*, 2003-XII Eur. Ct. H.R. §§ 29-43. By contrast *see* *Ismailova v. Russia*, Eur. Ct. H.R. §§ 62-63 (2007) (considering that the reasoning of the domestic courts showed that they were focused solely on the interest of the children and therefore finding no violation of Articles 8 and 14).

⁵⁵ *Salgueiro da Silva Mouta v. Portugal*, 1999-IX Eur. Ct. H.R. § 36 (finding that the national court awarding the custody to the mother made a distinction based on considerations regarding the father's sexual orientation, which was not acceptable under the Convention).

⁵⁶ *Hokkanen v. Finland*, 299-A Eur. Ct. H.R. (ser. A) §§ 58-62 (1994). *See also* *Sophia Gudrun Hansen v. Turkey*, Eur. Ct. H.R. §§ 101-109 (2003) (concluding that the national authorities "failed to make adequate and effective efforts to enforce the applicant's access rights to her children and thereby violated her right to respect for her family life", §108).

⁵⁷ *See* *Glaser v. the United Kingdom*, Eur. Ct. H.R. §§ 86-87 (2000); *Nuutinen v. Finland*, 2000-VIII Eur. Ct. H.R. §§ 130-138.

child. In addition, when assessing the compliance with Article 8 in this context, the European Judge has analysed whether States have acted in conformity to the obligations concerning the prompt return of an abducted child enshrined in the Hague Convention on Civil Aspects of International Child Abduction of 25 October 1980.⁵⁸

For example, in *Ignaccolo-Zenide v. Romania*, concerning the unlawful removal of the applicant's two daughters by their father, the Court found that national authorities had failed to "make adequate and effective efforts" to facilitate the execution of the domestic court's order and thereby to enforce the mother's right to the return of her children, which breached her right to respect for her family life.⁵⁹

The Strasbourg Court has likewise underlined that in cases of this kind, having regard to the damaging and irremediable consequences that the passage of time will bring on the parent-child relationship and also in compliance with Article 11 of the Hague Convention, the national authorities must take all the measures that could reasonably be expected and that they must do so "without delay".⁶⁰

In *Maire v. Portugal*, the Court held that the four years and six months length of time that had elapsed between the moment that the applicant's request for returning the child was transmitted to the Portuguese authorities and the location of the child "placed the applicant in an unfavourable position, particularly with the child being so young".⁶¹ In the instant case, the Strasbourg Court further stated "that each Contracting State must equip itself with an adequate and sufficient legal arsenal to ensure compliance with the

⁵⁸ See, among others, *Ignaccolo-Zenide v. Romania*, 2000-I Eur. Ct. H.R. § 95; *Iglesias Gil and A.U.I. v. Spain*, 2003-V Eur. Ct. H.R. § 51; *Sylvester v. Austria*, Eur. Ct. H.R. § 57 (2003); *Maire v. Portugal*, 2003-VII Eur. Ct. H.R. § 72. See also *Bajrami v. Albania*, 2006-XIV Eur. Ct. H.R. §§ 66-68, where the Court found a breach of Article 8 on the basis of the failure to ratify the Hague Convention.

⁵⁹ *Ignaccolo-Zenide v. Romania*, 2000-I Eur. Ct. H.R. § 113. By contrast, see *Volesky v. Czech Republic*, Eur. Ct. H.R. § 116-125 (2004) (finding no violation of Article 8, as the national authorities, according to the Court, took all the measures that could reasonably have been expected of them in order to enforce the right of access in respect of the applicant's son) and also *Mihailova v. Bulgaria*, Eur. Ct. H.R. §§ 84-102 (2006).

⁶⁰ See *Ignaccolo-Zenide v. Romania*, 2000-I Eur. Ct. H.R. § 102; *Sylvester v. Austria*, Eur. Ct. H.R. § 60 (2003).

⁶¹ *Maire v. Portugal*, 2003-VII Eur. Ct. H.R. § 77. See also, *inter alia*, *Monory v. Romania and Hungary*, Eur. Ct. H.R. §§ 82-83 (2005) (underlying that "in matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation, such cases requiring urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them" and recalling that "the interests of the child are paramount in such cases") and *Kříž v. Czech Republic*, Eur. Ct. H.R. §§ 89, 92, 93 (2007) (where the Court, in order to find a breach of Article 8, took account of the lapse of time between the application for the enforcement of the decision granting the applicant a right of contact in 1994 and the first meeting between the applicant and his son in 2001, when the child was nearly ten years old).

positive obligations imposed on it by Article 8 of the Convention and the other international agreements it has chosen to ratify”.⁶²

Finally, it should be noted that, according to the Court, “the national authorities’ obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken”.⁶³ It further added that “the nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned are always an important ingredient” and, accordingly, “whilst national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention”.⁶⁴

4. Children in public care

According to the well established case-law of the European Court, “the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention”.⁶⁵ Consequently, the compulsory taking of children into public care, their placement in homes or with foster families or even their freeing for adoption and the contact restrictions constitute interferences with the right to respect for family life and may entail a violation of Article 8, unless they are “in accordance with the law”, pursue a “legitimate aim” and can be regarded as “necessary in a democratic society”.

The Strasbourg Court makes a distinction between normal interferences (*e.g.*, the temporary taking of children into public care), supplementary interferences (*e.g.*,

⁶² *Maire v. Portugal*, 2003-VII Eur. Ct. H.R. § 76.

⁶³ *Sophia Gudrun Hansen v. Turkey*, Eur. Ct. H.R. § 98 (2003). *See also* *Ignaccolo-Zenide v. Romania*, 2000-I Eur. Ct. H.R. § 94.

⁶⁴ *Sophia Gudrun Hansen v. Turkey*, Eur. Ct. H.R. § 98 (2003). *See also* *Ignaccolo-Zenide v. Romania*, 2000-I Eur. Ct. H.R. § 94.

In general, on this subject *see, inter alia*, HARRIS, *LAW OF THE EUROPEAN*, *supra* 3, at 392-4, 408, 409, 555; Nicole Gallus, *La séparation du couple*, in *LE DROIT DE LA FAMILLE À L’ÉPREUVE DE LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME*, 55, 62-87 (F. Krenç and M. Puéchavy, ed., Bruylant, 2008); DIJK, *THEORY AND PRACTICE*, *supra* 3, at 697-8; GOMIEN, *SHORT GUIDE*, *supra* 91, at 85-6; SUDRE, *DROIT EUROPÉEN*, *supra* 3, at 438-9.

⁶⁵ *See*, among others, *Johansen v. Norway*, 1996-III Eur. Ct. H.R. § 52; *K. and T. V. Finland*, 2001-VII Eur. Ct. H.R. § 151.

restriction of access rights) and extremely harsh interferences (e.g., the taking of a newborn baby into public care at the moment of its birth). The Court's scrutiny will be, therefore, intensified and more rigorous when supplementary restrictions or drastic measures are at stake.

Furthermore, the European Court has consistently stressed that, even though the taking into public care of a child may be considered legitimate, such measure should be regarded as temporary, to be discontinued as soon as circumstances permit, and should be consistent with the ultimate aim of reuniting the family.⁶⁶ In this regard, according to this organ, a fair balance has to be struck between, on one hand, the interests of the child remaining in care and, on the other hand, those of the parent in being reunited with the child.⁶⁷ In carrying out this balancing exercise, the best interests of the child must be the paramount consideration and, thus, may override those of the parent.⁶⁸

For instance, in *K.A. v. Finland*, the Strasbourg Court found that Article 8 had been breached, since it could not discern "any serious and sustained effort on the part of the social welfare authority directed towards facilitating a possible family reunification".⁶⁹

In order to be regarded as "necessary in a democratic society" care measures must be based on relevant and sufficient reasons, that is to say strong presumptions that the children are suffering from violence and maltreatment⁷⁰ or sexual abuses⁷¹, or that the parent is incapable of managing the children and their upbringing due to mental illness or personality disorder⁷². Nevertheless, if neither the parents' capacity to bring

⁶⁶ See, e.g., *Olsson (No.1) v. Sweden*, 130 Eur. Ct. H.R. (ser. A) § 81 (1988); *Johansen v. Norway*, 1996-III Eur. Ct. H.R. § 78; *K. and T. v. Finland*, 2001-VII Eur. Ct. H.R. § 178; *Kutzner v. Germany*, 2002-I Eur. Ct. H.R. § 76.

⁶⁷ See, e.g., *Haase v. Germany*, 2004-VII Eur. Ct. H.R. § 93.

⁶⁸ See, e.g., *Johansen v. Norway*, 1996-III Eur. Ct. H.R. § 78; *K. and T. v. Finland*, 2001-VII Eur. Ct. H.R. § 156.

⁶⁹ *K.A. v. Finland*, Eur. Ct. H.R. § 142 (2003). See also *K. and T. v. Finland*, 2001-VII Eur. Ct. H.R. § 164 (finding that, despite evidence of an improvement in the situation which had led to the care orders – the mother's mental illness –, there was no serious effort in order to put an end to public care and, therefore, a fair balance between the interests involved was not struck and this constituted a violation of Article 8).

⁷⁰ For example, in *Gnahoré v. France*, 2000-IX Eur. Ct. H.R., the Court found that the taking of the child into public care, the suspension of the applicant's right to contact and to the restrictions imposed on that right during the relevant period were justified by the risk of violence and maltreatment carried out by the father, as the child was admitted to the hospital with serious bodily wounds and scars.

⁷¹ For instance, in *Covezzi and Morselli v. Italy*, Eur. Ct. H.R. (2003), care measures were authorized on the grounds that the children had been subjected to sexual abuse by certain members of the family.

⁷² By way of example, in *Scozzari and Giunta* the suspension of the first applicant's parental rights and the temporary removal of the children from their mother's care were considered justified by the fact that the mother suffered from a personality disorder and, thus, was incapable of assuming her role as a parent. Also in *P. c. and S. v. the United Kingdom*, 2002-VI Eur. Ct. H.R., the newborn's removal from her

up their children or the affection they bore them are at stake, the Court does not consider justified the most drastic care measure as the placement of children in public institutions on grounds of lack of resources (e.g. suitable and stable home or insufficient financial resources). In *Wallova and Walla v. the Czech Republic*, the Court held that national authorities should have had recourse to less drastic measures, like monitoring the applicants' living conditions and hygiene arrangements and advising them what steps they could take to improve the situation and find a solution to their problems.⁷³

In what regards the proportionality assessment, the Strasbourg Court has also found that the removal of a newborn from its mother was a too extreme measure to be compatible to Article 8.⁷⁴

In addition, in these cases, the Court has held that the obligation to respect family life under Article 8 involves procedural guarantees. Thus, the domestic authority's decision-making process must take into account, for instance, the parents point of view and interests, the social services reports, the children's own wishes, if their age allows it.⁷⁵ Accordingly, in order to guarantee the respect for family life, national authorities must properly involve parents in the decision-making process concerning their children and this may mean granting them direct access to the authorities' file of protective care.⁷⁶

By way of example, in *McMichael v. the United Kingdom*, the Court concluded that, considering the failure to disclosure reports and other relevant documents during the domestic proceedings, the parents had not been "involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests" and, consequently, it found a breach of Article 8.⁷⁷ Also, in *Moser v. Austria*, having regard to the fact that the applicant was only heard once by the

mother at birth was due to the existing evidence that the mother may have had a propensity to harm her child, which was caused by psychiatric problems (Munchausen syndrome), although the Court concluded that this was a too extreme measure and hence violated Article 8. *See also* *K. and T. v. Finland*, 2001-VII Eur. Ct. H.R.; *Kutzner v. Germany*, 2002-I Eur. Ct. H.R.

⁷³ *Wallova and Walla v. the Czech Republic*, Eur. Ct. H.R. §§ 74-75 (2006).

⁷⁴ *See* *K. and T. v. Finland*, 2001-VII Eur. Ct. H.R. § 168; *P. c. and S. v. the United Kingdom*, 2002-VI Eur. Ct. H.R. § 116.

⁷⁵ *See*, among others, *W. v. the United Kingdom*, 121 Eur. Ct. H.R. (ser. A) § 63 (1987); *Couillard and Maugery v. France*, Eur. Ct. H.R. § 303 (2004).

⁷⁶ In this sense, *see* SUDRE, *DROIT EUROPÉEN*, *supra* 3, at 437. *See also* *T. P. and K. M. v. the United Kingdom*, 2001-V Eur. Ct. H.R., where the Court emphasised "that it is essential that a parent be placed in a position where he or she may obtain access to information which is relied on by the authorities in taking measures of protective care" (§ 80) and further stated that "the positive obligation on the Contracting State to protect the interests of the family requires that this material be made available to the parent concerned, even in the absence of any request by the parent" (§82).

⁷⁷ *McMichael v. the United Kingdom*, 307-B Eur. Ct. H.R. (ser. A) §§ 87-93 (1995).

Juvenile Court, had no possibility to comment a report of social services and was not assisted by counsel in the proceedings before that Court, the European Court held that the parent was not sufficiently involved in the decision-making process.⁷⁸

Besides, in the Court's point of view, parents may not be sufficiently involved in the decision-making process, if an excessive procedural delay is verified.⁷⁹

However, the European Court admits exceptions regarding the parents' proper involvement in the decision-making process in exceptional circumstances,⁸⁰ as those of an immediate threat to the child.⁸¹

5. The right to respect for family life of prisoners

Although any detention, lawful for the purposes of Article 5 of the Convention, entails by its nature an interference with one's private and family life, the conventional organs consistently hold that it is an essential part of a prisoner's right to respect for family life that the State assists him as far as possible in establishing and maintaining effective contact with his family and, in general, with people outside prison in order to facilitate the prisoners' social rehabilitation.⁸²

In *Boyle and Rice v. the United Kingdom*, the Strasbourg Court held that, when assessing the scope of the State's positive obligation under Article 8 in relation to prison visits, "regard must be had to the ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion which the national authorities must be allowed in regulating a prisoner's contact with his family".⁸³ In what concerns specifically the transference of a prisoner to prison closer home, as the European Commission asserted in *Ouinias v. France*, only in exceptional circumstances will the described State's positive obligation extend to transferring a prisoner from one prison to another.⁸⁴

⁷⁸ Moser v. Austria, Eur. Ct. H.R. § 72 (2006). See also P. c. and S. v. the United Kingdom, 2002-VI Eur. Ct. H.R. § 137 (holding that the lack of legal representation during care and adoption proceedings and the lack of any real lapse of time between the two procedures deprived the applicants of being sufficiently involved in the decision-making process, which amounted to a violation of Article 8).

⁷⁹ For instance, in *Covezzi and Morselli v. Italy*, Eur. Ct. H.R. § 132-139 (2003), this organ considered that the excessively long period of 20 months taken by the Youth Court to decide the issue of the applicants' parental rights contravened Article 8.

⁸⁰ See *K. and T. V. Finland*, 2001-VII Eur. Ct. H.R. § 166.

⁸¹ See *Haase v. Germany*, 2004-VII Eur. Ct. H.R. § 95.

⁸² See *A. v. the United Kingdom*, App. No. 9054/80, Eur. Comm'n H.R. 9 (1982); *McCotter v. United Kingdom*, App. No. 18632/91, Eur. Comm'n H.R. (1992); *Messina (No. 2) v. Italy*, 2000-X Eur. Ct. H.R. § 61.

⁸³ *Boyle and Rice v. the United Kingdom*, 131 Eur. Ct. H.R. (ser. A) § 74 (1988). See also *Dikme v. Turkey*, 2000-VIII Eur. Ct. H.R. § 117.

⁸⁴ *Ouinias v. France*, App. No. 13756/88, 65 Eur. Comm'n H.R. Dec. & Rep. 272, 277 (1990).

The restrictions imposed on the number of visits to a prisoner or on the number of persons who may visit a prisoner or even on correspondence, the interdiction of visits or supervision over those visits, the subjection of a detainee to a special prison regime or special visit arrangements constitute, therefore, an interference with the right to respect for family life under Article 8.⁸⁵ Such measures may be justifiable if they are “in accordance to the law” and are “necessary in a democratic society” in order to pursue a legitimate aim or aims, namely, for the “prevention of disorder or crime”, as required by paragraph 2 of the same provision.

In what regards the “in accordance with the law” criterion, the contact limitation must be based on published, accessible, sufficiently clear and detailed provisions.⁸⁶ Thus, there may be a violation of Article 8 when national authorities have total discretion to limit or to exclude visits or correspondence from family members to prisoners.⁸⁷ On the other hand, if guidelines for limiting visits by family members to particularly categories of prisoners, that is, if special prison regimes are promulgated, the Court may find no breach of Article 8 if the grounds laying under those regimes are particularly serious and the possibility of relaxing the restrictions exists.⁸⁸

As to the “necessity” criterion, these measures must correspond to a pressing social need and, in addition, must be proportionate to the legitimate aim they intend to achieve.⁸⁹ When assessing the proportionality of the restriction of family visits, the European Judge takes into account, namely, the duration and range of those measures,⁹⁰

⁸⁵ *Klamecki v. Poland (No. 2)*, Eur. Ct. H.R. § 144 (2003).

⁸⁶ *Gülmez v. Turkey*, Eur. Ct. H.R. §§ 50-55 (2008).

⁸⁷ *Poltoratskiy v. Ukraine, 2003-V* Eur. Ct. H.R. §§ 157-162 (finding that the interference was not “in accordance with the law”, since the conditions of detention of persons on death row were governed by an internal and unpublished document which was not accessible to the public and, therefore, violated Article 8).

⁸⁸ *See Messina (No. 2) v. Italy, 2000-X* Eur. Ct. H.R. (where the special visiting regime was due to the fact that the prisoner was a convicted Mafia member and aimed to cut the links between him and his original criminal environment and, hence, preventing Mafia crime).

⁸⁹ *See Van der Ven v. the Netherlands, 2003-II* Eur. Ct. H.R. §§ 69-72 (where restricting family visits aimed the prevention of escape and, according to the Court, those measures were proportional to the legitimate aim pursued) and *Messina (No. 2) v. Italy, 2000-X* Eur. Ct. H.R. §§ 72-74 (where restricting family visits aimed the prevention of Mafia crime and did not go beyond what was necessary in a democratic society to attain that aim). By contrast, *see Lavents v. Latvia, Eur. Ct. H.R. §§ 138-143* (2002) (finding that the absolute prohibition of family visits for one year and seven months had not been necessary in a democratic society and, thus, violated Article 8 on that account).

⁹⁰ *See Klamecki v. Poland (No. 2)*, Eur. Ct. H.R. § 152 (2003) (concluding that, having regard to the duration and the nature of the restrictions on the applicant's contact with his wife, who had also been charged with a related criminal offence, the absolute prohibition of contact between them for one year was disproportionate to the aim pursued).

the reason for the detention⁹¹ and the seriousness of what is at stake for the prisoner in question.⁹² Nevertheless, in this organ's point of view, an absolute prohibition of visits will only be justifiable in exceptional circumstances.⁹³

Regarding "conjugal visits", despite noting with sympathy the reformative movement in several European Countries towards the improvement of the imprisonment conditions and the possibilities for detained persons of continuing their conjugal life to a limited extent⁹⁴, the Strasbourg organs have repeatedly stressed that the right to family life under Art 8 does not encompass the right for convicted prisoners to enjoy "conjugal visits" with their spouses.⁹⁵ Indeed, the refusal of conjugal visits to the detained spouse, in spite of amounting to an interference with the right to respect for family life, may "for the present time"⁹⁶ be regarded as justified for the prevention of disorder and crime within the meaning of paragraph 2 of Article 8 and thus cannot constitute at the same time a breach of Article 12, the conventional provisional which grants protection to the right to marry.⁹⁷

⁹¹ As Donna Gomiien rightly observes, "those serving criminal sentences generally have less protection than those detained for other purposes permitted under Article 5 of the Convention". See DONNA GOMIEN, SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 85 (Council of Europe Publishing 2005) [hereinafter GOMIEN, SHORT GUIDE]. See, e.g., *Nowicka v. Poland*, Eur. Ct. H.R. §§ 73-77 (2002), (holding that restricting visits to one per month where the applicant was detained for a total period of eighty-three days for the purposes of compelling compliance with a lawful court order and did not contest the grounds for the detention entailed a breach of Article 8).

⁹² See *Ploski v. Poland*, Eur. Ct. H.R. §§ 36-39 (2002) (finding that the refusal to grant the applicant a temporary release to attend the funerals of his parents violated Article 8). See also and in contrast *Marincola and Sestito v. Italy*, App. No. 42662/98, Eur. Ct. H.R. (1999) and *Georgiou v. Greece*, App. No. 45138/98, Eur. Ct. H.R. (2000). See also *Togher v. the United Kingdom*, App. No. 28555/95, Eur. Ct. H.R. (1998) (considering that an enforced separation of a mother from her baby in prison as a consequence of her categorization as a security prisoner may also engage Article 8).

⁹³ *Lavents v. Latvia*, Eur. Ct. H.R. § 141 (2002).

⁹⁴ See, *inter alia*, *X. and Y. v. Switzerland*, App. No. 8166/78, 13 Eur. Comm'n H.R. Dec. & Rep. 241, 243 (1978); *E.L. H. and P.B. H. v. the United Kingdom*, App. No. 32094/96 and 32568/96, 91-B Eur. Comm'n H.R. Dec. & Rep. 61, 64; *Aliev v. Ukraine*, Eur. Ct. H.R. § 188 (2003). In fact, in *Dickson v. the United Kingdom*, Eur. Ct. H.R. § 81 (2007), the Court observed that more than half of the Contracting States allowed conjugal visits in prison.

⁹⁵ See *X. v. Federal Republic of Germany*, App. No. 3603/68, Eur. Comm'n H.R. (1970) (where the applicant was refused permission to receive visits from his wife over weekends in order to maintain their marital life). See also, *mutatis mutandis*, *Aliev v. Ukraine*, Eur. Ct. H.R. §§ 188-189 (2003).

⁹⁶ This expression used by the Court in *Aliev v. Ukraine*, Eur. Ct. H.R. § 188 (2003) suggests, as rightly points out Alistair Mowbray, that this organ seems to be willing to change its approach regarding this matter in the future. See ALISTAIR MOWBRAY, CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 785 (Oxford University Press, 2007).

⁹⁷ See *X. and Y. v. Switzerland*, App. No. 8166/78, 13 Eur. Comm'n H.R. Dec. & Rep. 241, 243 and 244 (1978); *E.L. H. and P.B. H. v. the United Kingdom*, App. No. 32094/96 and 32568/96, 91-B Eur. Comm'n H.R. Dec. & Rep. 61, 64.

For more details on the respect for family life of prisoners see, *inter alia*, HARRIS, LAW OF THE EUROPEAN, *supra* 3, at 395, 408, 409, 555; DIJK, THEORY AND PRACTICE, *supra* 3, at 715-9; GOMIEN, SHORT GUIDE, *supra* 91, at 85; Manuel Lezertua Rodríguez, *Los derechos de los reclusos en virtud del Convenio Europeo de Derechos Humanos*, in EGUZKILORE – CUADERNO DEL INSTITUTO VASCO DE CRIMINOLOGÍA, 135, 145-153 (Instituto Vasco de Criminología, 1998).

In this context, mention should also be made to the case *Dickson v. the United Kingdom*, where the Court's Grand Chamber sustained that the refusal of access to artificial insemination facilities to the applicants, who were both detained, did not strike a fair balance between the competing public and private interests involved and, accordingly, violated Article 8.⁹⁸

6. The right to respect for family life of immigrants

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). Thus, also the foreigners who claim to be affected by a measure issued from a State-party may address an application to the Eur. Ct. H.R.

Article 8 is an important limit to the immigration policies of States Parties⁹⁹. The Eur. Ct. H.R. has stressed that the measures of exclusion and deportation of aliens may interfere with an existing family life, since such decisions might result in the separation of the members of the family¹⁰⁰.

Therefore, Article 8 can be a ground for controlling both a refusal of family reunification and a decision of deportation. In the former situation, the State might have the positive obligation to admit the entry of a foreign family member into the territory. In the latter case, the State might be prevented from deporting an alien if the deportation amounts to a disruption of the family living in the territory.

However, the Court has continuously held that Article 8 does not guarantee the right of an alien to enter or to reside in a particular country. This is because of the general principle of international law whereby States have the sovereign power to control immigration, and broad discretionary in such context. The extent of a State's

⁹⁸ See *Dickson v. the United Kingdom*, Eur. Ct. H.R. §§ 77-85 (2007).

⁹⁹ In general, on the respect for family life of the immigrants, see Ana Rita Gil, *Um Caso de Europeização do Direito Constitucional Português – a Afirmação de um Direito Fundamental ao Reagrupamento Familiar*, REV. DIREITO PÚBLICO 2 (2009); Hélène Lambert, *The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion*, INT'L J. REFUGEE L. 11, (1999), P. Van Dijk, *Protection of «Integrated» Aliens against Expulsion under the European Convention on Human Rights*, in IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE, (Kluwer Law International, 2001) Cynthia S. Anderfuhren-Wayne, *Family Unity in Immigration and Refugee Matters: United States and European Approaches*, INT'L J. REFUGEE L. 8 (1996), Jen Vedsted-Hansen, *Migration and the Right to Family and Private Life*, in MONDIALISATION, MIGRATION ET DROITS DE L'HOMME : LE DROIT INTERNATIONAL EN QUESTION (Bruylant, 2007).

¹⁰⁰ In 1963, the Eur. Comm'n H.R. has stressed: « in certain circumstances, refusals to give certain persons access to, or allow them to take up residence in, a particular country, might result in the separation of such persons from the close members of their family which could raise serious problems under Article 8 of the Convention » *X. v. Denmark* App. No. 1855/63, 8 Y.B. Eur. Conv. H.R. 200204 (1965).

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.

The Eur. Ct. H.R. has so far took the position that the decisions on deportation must be under a stricter scrutiny than the decisions refusing family reunification¹⁰¹. Regarding the latter, the Court considers that they only lead to a violation of Article 8 if the family does not have the chance to be reunited in a country connected with either of the members¹⁰². In *Gül* case, the applicant was a Turkish national who lived in Switzerland with a temporary residence permit on humanitarian grounds with his seriously ill wife and their daughter. The Swiss authorities refused to allow his two sons, who had remained in Turkey, to join them. The Court considered that no interference in the family life had occurred because there were no obstacles preventing the family from being reunited in Turkey¹⁰³.

The Court's approach to family reunification issues changed in 2000. In two cases the decisions of refusal of family reunification were considered a breach to Article 8¹⁰⁴. In both of them the applicants had asked for the reunification of their children and had other children deeply integrated in the host country. The Court considered that these children would suffer strong hardship in case of removal of the entire family to the country of origin of the parents. Therefore, besides the protection of the family unity, it was also the principle of the best interest of the child that played an important role in these cases.

The Court has adopted a more liberal approach towards non-citizens already present in the territory of a member-state seeking not to be removed from there. The Court holds that the State, when deciding a deportation measure, has to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other. They have to strike such a balance in order to justify that the interference was "necessary in a democratic society" in light of Article 8 (2). In order to determine whether the States have struck a fair balance between these

¹⁰¹ That is because the refusals of family reunification are considered positive obligations, in which the States have a broader margin of appreciation.

¹⁰² The Eur. Comm'n H.R. has also stressed: "If the only legal residence which they can find is in a country unconnected with either of them, might constitute a violation of Article 8". See *X & Y v. United Kingdom*, application 5301/71, §82, Coll. 43 (1973). p. 82.

¹⁰³ *Gül v. Switzerland*, 1996-I 3 Eur. Ct. H.R.. In the case *Ahmut v. the Netherlands*, 1996-VI 24 Eur. Ct. H.R., the Court has reached the same conclusion.

¹⁰⁴ *Case Sen v. the Netherlands* 2001-XII Eur. Ct. H.R. and *Tuquabo-Tekle and others v. the Netherlands* 2005 Eur. Ct. H.R.

two competing interests, the Court takes into account several aspects. They were summarized in the *Boultif*¹⁰⁵ and *Üner*¹⁰⁶ cases. The Court analyses the existing personal and family life of the alien and the solidity of social, cultural and family ties with the host country¹⁰⁷, the nationalities of the various persons concerned, and the situation of the alien's family¹⁰⁸. The regular or irregular situation of the alien in the country is also to be considered. Besides, the Court takes in consideration the remaining ties with the country of origin. It assesses the possibility of transferring the family life in the country to which the alien is to be expelled and the seriousness of the difficulties which the family members are likely to encounter therein. Where the alien is being deported for having committed a crime, the Court analyses the nature or seriousness of the offence committed, and the time elapsed since the offence and the alien's conduct during that period.

An important factor which is always taken into account is whether there are children involved, their age and their socialization in the host country. The best interests and well-being of the children, in particular the seriousness of the difficulties which they are likely to encounter in the country to which the applicant is to be expelled are of the utmost importance, according to the principle of the best interest of the child¹⁰⁹. The Court takes into account the age of the children concerned, their situation in the country of origin and the extent to which they are dependent on their parents¹¹⁰.

¹⁰⁵ *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R.

¹⁰⁶ *Üner v. Netherlands*, 2007 Eur. Ct. H.R.

¹⁰⁷ In particular, the length of the stay, the age of the alien when he or she has first arrived to the country of immigration (*Moustaquim v. Belgium*, 193 Eur. Ct. H.R. (ser. A) (1991)), whether he or she has studied or worked in the host country (*Keles v. Germany*, 2005, Eur. Ct. H.R.), the acquisition of the nationality of the host country (*El Boujaïdi v. France*, 51 Eur. Ct. H.R. (1997-VI)), amongst other factors that may demonstrate that the alien is deeply integrated into the host community.

¹⁰⁸ It is specially considered the marriage to a citizen of the host country and the length of the marriage. *Berrehab v. the Netherlands*, 138 Eur. Ct. H.R. (ser. A) § 21 (1988).

¹⁰⁹ *Maslov v. Austria* 2008 Eur. Ct. H.R..

¹¹⁰ The case *Rodrigues da Silva and Hoogkamer v. The Netherlands* (2006-I Eur. Ct. H.R) is particularly illustrative. A Brazilian citizen had entered and remained unlawfully in the Netherlands and had a daughter to a Dutch citizen. After divorcing from her partner, who took custody of the child, the foreign mother requested a residence permit, arguing the need to maintain contact with her daughter. Her application was rejected by the Dutch Government. The Eur. Ct. H.R considered it was in the child's best interests to stay in the Netherlands, because she had been raised jointly by her mother and her paternal grandparents, with her father playing a less prominent role. Thus, she could not follow her mother abroad. On the other hand, the refusal of a residence permit and the expulsion of the mother to Brazil would in effect break the ties between the mother and the child, as it would be impossible for them to maintain regular contact. Thus, the Court concluded that the Dutch Government was under a duty to allow the applicant to reside in the Netherlands, in order to enable the contacts between the alien and her child. The basis for its decision was not only the principle of family unity, but also the best interests of the child. *See also, mutatis mutandis*, *Berrehab v. the Netherlands*, 138 Eur. Ct. H.R. (ser. A) § 21 (1988).

These principles apply regardless of the legality of the alien's stay in the host country or the nationality of the family members.

Despite its case-by-case approach and its restrictiveness regarding positive obligations, the Eur. Ct. H.R. has made a decisive contribution for the protection of the family unity of the immigrants. Nowadays almost all immigration laws in Europe require that administrative authorities take into account the principle of family unity in their decisions.

The protection afforded against family disruption in immigration context by the Eur. Ct. H.R. is more developed than the one afforded by the Supreme Court of United States. This latter relies on the plenary power doctrine – a doctrine rooted in sovereignty that gives the legislative and executive branches of government broad and exclusive authority to regulate immigration matters¹¹¹. It is true that U.S. immigration law provides some opportunities for discretionary relief from deportation for aliens, especially for those who have substantial ties to the United States. They can prove to an immigration judge that the negative aspects of their conviction were outweighed by their U.S. connections. Nevertheless, though these remedies have similarities to the European approach of balancing the interests, in practice they are not easy to obtain. For example, the hardship that separation from a parent or enforced deportation from one's home country entails is not considered sufficient to enable the parent of a citizen child to resist removal¹¹².

7. Conclusions

The case-law of the Eur. Ct. H.R. has developed new meanings of the Article 8 ECHR, far beyond what mere reading of this provision would suggest. Thus, Article 8 nowadays protects the family unity in several dimensions whenever it is threatened by a State measure.

¹¹¹ In this context, the case *Fiallo v. Bell*, 430 US 787, 792 (1977) is a leading case. It involved a challenge to the constitutionality of an immigration law which allowed for a more favourable treatment for alien children who were coming to join their citizen-mothers, than to alien children who were coming to join their citizen-fathers. The petitioners argued that the provision violated due process and equal protection rights, and that it "implicated the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship". The Court upheld the constitutionality of the statute on the basis of the plenary power doctrine, stressing the limited scope of judicial inquiry into immigration matters.

¹¹² On this aspect, see Jacqueline Bhabha, *The «Mere Fortuit of Birth»? Children, Mothers, Borders and the Meaning of Citizenship*, in *MIGRATIONS AND MOBILITIES – CITIZENSHIP, BORDERS AND GENDER*, (New York University Press, 2009).

The case-law analysis carried out in this paper concerning custody and access allowed us to conclude that, although a wide margin of appreciation may be granted to Member States in this field, the respect for family life will not be considered to be violated if parents' procedural rights are safeguarded, if the equality principle is respected, if good faith efforts to enforce access arrangements are made and if a fair balance between the conflicting interests is made.

In what regards public care measures, the State's margin of appreciation seems to be narrower and the best interest of the child is the paramount consideration. Article 8 will not be breached, *e. g.*, if care measures are based on relevant and sufficient reasons and the parents' procedural guarantees are safeguarded.

In relation to the right to family life of prisoners, the Courts approach concerning in particular "conjugal visits" seems to be excessively severe and, considering that more than half of the Contracting States allow conjugal visits in prison, an evolutive interpretation should be expected in the future.

Regarding the immigrants, the case-law of the Eur. Ct. H.R represents an important development in an area that was traditionally ruled exclusively by the States' interests and policies, for it stressed that all decisions regarding immigration and deportation must take into account the family life of the alien. Interferences with the family life are only legitimate if they were preceded by a balancing between the interests of the State mentioned on the paragraph 2 of Article 8 and the interests of the immigrant.

In short, despite not protecting the family unity in an absolute fashion, the case-law of the Eur. Ct. H.R represents a strong contribution for the widespread respect of the family as the basic and sacred unity of the human society. It shows that family can not be arbitrarily disrupted by State measures, even where such measures are justified by public interests of the utmost importance.