CHAPTER 16

ECHR article 8 and family and private life

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Introduction

16.1 This chapter reviews the circumstances in which protected family or private life for the purposes of European Convention on Human Rights (ECHR) article 8(1) may be found to exist.

16.2 This chapter begins with a review of the general principles applicable to a claim that family life exists. We then go on to consider the approach taken by the European Court of Human Rights (ECtHR) and the domestic courts to different types of relationships.

16.3 We then turn to private life, and to ‘composite’ claims engaging both the family and private life aspects of ECHR article 8(1).

Family life

General principles applicable to family life under ECHR article 8(1)

Looking at the family as a whole

16.4 The House of Lords in Beoku-Betts referred to ‘the central point about family life, which is that the whole is greater than the sum of its individual parts’. Thus, where the family consists of more than two people, the existence of family life should be considered as a whole. It is an error of law to consider a family as a series of discrete, relationships and then to determine whether family life exists for each distinct segment.

Factors to be considering when assessing the existence of family life

16.5 The ECtHR has emphasised the fact-specificity of family life and the equal value of different models of family life:

The existence or non-existence of ‘family life’ for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties.

Families differ widely, in their composition and in the mutual relations which exist between the members, and marked changes are

likely to occur over time within the same family. Thus there is no pre-determined model of family or family life to which article 8 must be applied. The article requires respect to be shown for the right to such family life as is or may be enjoyed by the particular applicant or applicants before the court, always bearing in mind (since any family must have at least two members, and may have many more) the participation of other members who share in the life of that family. In this context, as in most Convention contexts, the facts of the particular case are crucial.\(^ 4\)

16.6 However, at odds with its professions of equal acceptance of distinct family models, the ECtHR has in practice taken a somewhat different approach to a) the nuclear family of legally and legitimately married spouses and minor children, and b) other family relationships. The ECtHR also has yet to accept the existence of family life between same-sex partners. We consider these different approaches at paras 16.13–16.18 and 16.24–16.27 below.

16.7 Where evidence must be shown of close family ties amounting to family life, the decision-maker must consider the degree of closeness enjoyed; whether there is a shared history; and prevalent cultural norms in the country of origin which may give additional importance to the family tie.\(^ 5\)

*Duty to give reasons for findings as to existence or lack of family life*

16.8 It should not be presumed by decision-makers that more distant family relationships are incapable of giving rise to protected family life. As was emphasised by the Court of Appeal (in the context of family life between a healthy adult and his adult siblings),\(^ 6\) decision-makers must assess the facts of each case and give adequate reasons for their findings as to the existence or lack of family life.

*Relationships that do not amount to family life*

16.9 Where a relationship or constellation of relationships does not meet the threshold for family life, it may nonetheless be protected as part of an individual’s private life. The approach to be taken to relationships amounting to private life rather than family life is discussed at para 16.36.

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Immigration status and family life

16.10 Protected family life may exist between two people neither of whom have any leave to remain in the host country. However, where the relationship is formed at a time that one (or even both) of the partners’ immigration status was known to be precarious, the relationship may attract lesser protections – see paras 17.37–17.40 below. For the special considerations applicable to the family members of refugees, see para 17.22.

Potential family life

16.11 ECHR article 8 imposes a duty on states not only to refrain from interfering with existing family life but also to refrain from inhibiting the development of family life in the future. ECHR article 8 therefore provides a degree of protection for intended family life. The ECtHR has found that article 8 may protect the potential relationships between a husband and wife who have not yet started to cohabit; between a natural father and an ‘illegitimate’ child; between adoptive parents and their adoptive child where the child had not yet been received; and between a father and a child for whom the father was seeking a contact order. Likewise, the Court of Appeal has recognised protected family life between two adult brothers, one of whom was severely mentally ill, who had lived together for only five weeks. In Singh v ECO-Delhi, the Court of Appeal also emphasised that article 8 protects the ‘potential’ for development of family life.

7 Krasniqi v Secretary of State for the Home Department [2006] EWCA Civ 391 concerned a woman who enjoyed protected ECHR article 8 rights with her partner, also an asylum-seeker. Though Krasniqi was dealt with in the context of private life because it concerned a same-sex couple, the same approach would plainly apply to family life.

8 R (Fawad and Zia Ahmadi) v Secretary of State for the Home Department [2005] EWCA Civ 1721 para 18.

9 Abdulaziz, Cabales and Balkandali v UK (1985) 7 EHRR 330 para 62.

10 Nylund v Finland App No 7110/95 recognised this in principle, although family life was not found to exist on the facts of the case.

11 Pini et al v Romania (unreported, decision of 22 June 2004) para 143.

12 Ciliz v The Netherlands [2000] 2 FLR 469.

13 R (Fawad and Zia Ahmadi) v Secretary of State for the Home Department [2005] EWCA Civ 1721.

14 [2004] EWCA Civ 1075 paras 38 and 77.

15 However, as is made clear in Singh at 38, ‘some degree of family life’ must already be established, whether by biological parentage, or by the genuine beginnings of an informal adoption process etc.
ECHR article 8, procedural obligations and contact proceedings

16.12 ECHR article 8 incorporates procedural rights\(^\text{16}\) including a right to participate meaningfully in contact proceedings. In *Ciliz v The Netherlands*\(^\text{17}\) the expulsion of a man at the start of contact proceedings breached ECHR article 8 in that it precluded his meaningful participation in those proceedings. In *Ciliz v Netherlands*, the parent facing expulsion had committed no criminal offences; however, in *MS (Ivory Coast) v Secretary of State for the Home Department*\(^\text{18}\) the Court of Appeal found it arguable that a woman’s removal would breach article 8 where expulsion would prevent her participation in contact proceedings for her children, notwithstanding that she had been convicted of grievous bodily harm, actual bodily harm and cruelty against the same children.\(^\text{19}\)

Different types of family relationships and family life under ECHR article 8(1)

Family life between biological parent and child

16.13 Family life exists between a mother and child which can only be broken in exceptional circumstances.\(^\text{20}\)

16.14 The Supreme Court has, summarising the ECtHR’s jurisprudence, suggested that a higher threshold applies to fathers than to mothers.\(^\text{21}\) We suggest below that the approach taken by the ECtHR to the family life enjoyed by fathers and their children has been inconsistent.

16.15 The ECtHR has stated that mere biological kinship is not enough to establish the existence of family life between a father and child.\(^\text{22}\)

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\(^{16}\) See, for example, *McMichael v UK* (1995) 20 EHRR 205 paras 87 and 91; *R (B) v Crown Court at Stafford* [2006] EWHC 1645 (Admin), [2007] 1 WLR 1524.

\(^{17}\) [2000] 2 FLR 469.

\(^{18}\) [2007] EWCA Civ 133, [2007] Imm AR 538.

\(^{19}\) See also *AC (Turkey) v Secretary of State for the Home Department* [2009] EWCA Civ 377 in which the Court of Appeal upheld an Asylum and Immigration Tribunal (AIT) determination allowing an appeal against a refusal to revoke a deportation order. The deportation of a woman convicted of grievous bodily harm with intent who had regular contact with her child would breach ECHR article 8.


\(^{22}\) *Lebbink v The Netherlands* (2004) 40 EHRR 417 para 37. In that case, although the parents had never lived together and the father had not sought to recognise the child, protected family life was found to exist. Relevant factors were that
But the ECtHR has also repeatedly stated that, save in exceptional circumstances, family life exists between parents (generally, without distinguishing between mothers and fathers) and their minor biological children.²³

... from the moment of the child’s birth and by the very fact of it, there exists between him and his parents a bond amounting to ‘family life’, which subsequent events cannot break save in exceptional circumstances.²⁴

16.16 Family life has in practice been found to exist between a father and child even where there is minimal or no evidence of close ties. For example, protected family life has been accepted by the ECtHR to exist:

- between a man and his minor child even where there was no evidence that the man had ever cohabited with the child’s mother or provided for the child or enjoyed parental rights;²⁵
- between a couple and their minor child, where the father had never lived with the child; the mother had been separated from the child for six years; and the separation from the child had been voluntary;²⁶
- between a father and his minor child who had been separated for over seven years since the child was three months old but continued to maintain links through visits;²⁷ and
- between a father and child after the child had been taken into care.²⁸

16.17 The factors to be considered where family life needs to be established between a father and child are summarised in Khan v UK²⁹ (where

there had been a real relationship between the parents, the father had been present at the child’s birth, had visited regularly, even changed her nappy a few times and babysat once or twice, and was in touch with the mother about the child’s impaired hearing.

²⁷ Gul v Switzerland (1996) 22 EHRR 93.
²⁹ (2010) 50 EHRR 47 para 34.
the ECtHR accepted the existence of family life between a man and his baby daughter despite not living together). Factors other than cohabitation which ‘may also serve to demonstrate that a relationship has sufficient constancy to create de facto family ties’ include:

... the nature and duration of the parents’ relationship, and in particular whether they planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child’s care and upbringing; and the quality and regularity of contact.

16.18 ECHR article 8 protections are the same for a parent’s relationship with his or her child regardless of whether the child is ‘legitimate’.30

Adoptive and foster parents and children

16.19 Adoptive parent–child relationships have been held to constitute protected family life, both in the ECtHR31 and in the domestic courts.32 Where an adoption is valid under national and international law, ECHR article 8 has been held to protect planned family life between the adoptive parents and child even where close ties have not yet been formed.33 Where the adoption is not legally valid, the existence of protected family life may still exist, particularly where close personal ties can be shown to exist.34 The ECtHR has also held (in the context of determining whether there existed a right to see files relating to fostering arrangements) that fostering engages ECHR article 8.35

Family life between heterosexual spouses

16.20 Where couples are legally married and this is not a sham marriage, the ECtHR has presumed that protected family life exists. Family life has been found between legally married spouses even where the couple had not yet begun to cohabit.36

33  *Pini et al v Romania* paras 144–148.
35  *Gaskin v UK* (1979) 2 EHRR 245. In *R (Mithokozisi) v Secretary of State for the Home Department* [2004] EWHC 2964 (Admin) the High Court found that a man did not have protected family life with his foster parents: however, the foster ‘child’ was 21 years old in that case.
Heterosexual unmarried partners

16.21 Where a couple has not married legally, the existence of protected family life under ECHR article 8(1) will depend on the nature of the couple’s ties and their duration:

When deciding whether a relationship can be said to amount to ‘family life’, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.\(^{37}\)

16.22 So, for example, a couple who had undergone a marriage ceremony and believed themselves to be married enjoyed protected family life regardless of the fact that the marriage might be legally invalid.\(^{38}\)

16.23 When assessing the existence of family life between an unmarried couple, cohabitation is an important factor but not a pre-requisite.\(^{39}\)

Same-sex partners

16.24 The ECtHR has yet to recognise stable relationships between same-sex partners as constituting family life\(^ {40}\) and has instead dealt with these relationships under the rubric of private life.\(^ {41}\) The ECtHR has, however, recognised that there is growing international consensus that same-sex and heterosexual relationships should be treated equally.\(^ {42}\)

16.25 The domestic courts have declined to go further than the ECtHR in this respect and have yet to find that same-sex relationships constitute family life for the purposes of ECHR article 8.\(^ {43}\) However, the domestic courts have nonetheless repeatedly held that relationships between same-sex couples (even if falling under the ‘private life’ rubric) require protection analogous to that of heterosexual relationships. The House of Lords has, in the context of housing and social

\(^{37}\) X, Y and Z v UK (1997) 24 EHRR 143 para 36.

\(^{38}\) Abdulaziz, Cabales and Balkandali v UK (1985) 7 EHRR 330 para 63.


\(^ {40}\) The ECtHR and European Commission of Human Rights (ECommHR) declined to recognise same sex relationships as family life in X v UK (1983) 32 DR 220; S v UK (1986) 47 DR 274; B v UK (1990) 64 DR 278; Estevez v Spain (App No 601/00) 10 May 2001. See likewise the ECJ in Grant v South-West Trains (1998) 3 BHRC 578.

\(^ {41}\) Roosli v Germany App No 28118/95, 15 May 1996.


welfare, held that a same-sex partner was capable of being a member of the original tenant’s ‘family’ within the meaning of the Rent Act 1977,\(^{44}\) and has made clear that the ties between a same-sex couple are no less close and merit no less protection than those between heterosexual partners:

A homosexual couple, as much as a heterosexual couple, share each other’s life and make their home together. They have an equivalent relationship.\(^{45}\)

16.26 See likewise the powerful affirmation by the Supreme Court in *HJ (Iran) v Secretary of State for the Home Department*\(^ {46}\) (a case concerning Refugee Convention protections) of the equal respect to be accorded to same sex relationships.

16.27 In the immigration context, the Court of Appeal has taken the position that the relationship between a same-sex couple may be considered ‘private life ... cognate with family life’.\(^ {47}\)

### Family life between adults and their siblings or parents

16.28 The older ECtHR jurisprudence has recognised the relationship between healthy adults and their parents and siblings as constituting family life protected under ECHR article 8(1) even where:

- the adult did not live with his parents or siblings;\(^ {48}\) and
- the adult had formed a separate household and family.\(^ {49}\)

16.29 However, particularly in the more recent jurisprudence, the ECtHR and ECommHR have stated that the family ties between adults and their parents or siblings attract lesser protection unless there is ‘evidence of further elements of dependency, involving more than the normal, emotional ties’.\(^ {50}\) The domestic courts have applied this test

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44 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.
47 *Krasniqi v Secretary of State for the Home Department* [2006] EWCA Civ 391.
for family life to relationships between adults and their siblings and parents¹ as well as to more extended family ties between adults. This principle reflects the fact-specificity of ‘family life’ under ECHR article 8: it should not be taken to mean that protected family life cannot exist between healthy adults and their siblings or parents or extended family members.²

16.30 We suggest that ‘more than the normal emotional ties’ exist where an adult lives with his or her parents or siblings.³ Overlapping with that consideration, the ECtHR Grand Chamber has found the existence of family life where a young adult had still formed no independent family of his own.⁴

16.31 The dependency may be by the applicant on his or her settled family members or vice versa.⁵ The dependency may be largely financial⁶ or may be emotional.⁷

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¹ Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 para 19: ‘Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds along that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8’. See also JB (India) v ECO [2009] EWCA Civ 234 and Odawey v ECO [2011] EWCA Civ 840.

² Zatoon Bi (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 834; MT (Zimbabwe) v Secretary of State for the Home Department [2007] EWCA Civ 455.

³ MT (Zimbabwe) v Secretary of State for the Home Department [2007] EWCA Civ 455.

⁴ In HK (Turkey) v Secretary of State for the Home Department [2010] EWCA Civ 583, the Court of Appeal held at para 16 that ‘normal family ties will exist between an adult child and his parents or other members of his family regardless of proximity and where they live’. We suggest that it follows that, where the adult continues to live with his or her parents or siblings, something more than the normal family ties exist and, as in HK (Turkey) family life is established. See likewise RG (Nepal) v Secretary of State for the Home Department [2010] UKUT 273 (UT) para 27, where Blake J sitting as President found family life between an adult son and his father where the son was still ‘a dependent member of his family’s household’. See likewise Senthuran v Secretary of State for the Home Department [2004] EWCA Civ 950.

⁵ Maslov v Austria [2009] INLR 7 para 62; see also Osman v Denmark App No 38058/09, judgment 14 June 2011, para 55; Bousarra v France App No 25672/07, judgment 23 September 2010 paras 38–39 (judgment currently available only in French).


⁷ Zatoon Bi (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 834.

16.32 The Court of Appeal cautioned in *HK (Turkey)* against rigid notions of the significance of a person reaching the age of majority: undoubtedly he had family life while he was growing up and I would not regard it as suddenly cut off when he reached his majority.59

**Grandparents and minor grandchildren**

16.33 Where close personal ties exist, the relationship between a minor grandchild and grandparents has been found to be protected family life both in the ECtHR60 and in the domestic courts61 (though these relationships, even where amounting to family life, may attract lower protections than relationships within the nuclear family62).

**Uncles, aunts, nieces and nephews and cousins**

16.34 Particularly where the natural parents are absent, family ties have been held to exist between uncles and aunts and nieces and nephews, both in the ECtHR63 and in the domestic courts.64 Protected family life may also exist between adult cousins.65

**Private life**

**Scope of private life generally**

16.35 Private life as protected by ECHR article 8 is a broad concept, encompassing personal, social and economic relations; moral and physical integrity; personal identity including sexuality; personal information; and personal or private space. The first three of these aspects of private life feature prominently in immigration and deportation cases.

59 *HK (Turkey) v Secretary of State for the Home Department* [2010] EWCA Civ 583 para 16.
60 *Marckx v Belgium* (1979) 2 EHRR 330 para 45; *Bronda v Italy* (1998) 33 EHRR 81, para 50.
63 *Boyle v UK* (1994) 19 EHRR 179; *Jucius and Juciuiene v Lithuania* (2008) 49 EHRR 70.
64 *R (Lekstaka) v IAT* [2005] EWHC 745 (Admin).
65 *MT (Zimbabwe) v Secretary of State for the Home Department* [2007] EWCA Civ 455.
Relationships and private life

16.36 Where the relationship between relatives is not accepted to amount to family life, it may nonetheless be protected private life. The President of the Immigration and Asylum Chamber of the Upper Tribunal (UT-IAC) has suggested that in these circumstances, private life carries particular weight. In an example of this approach, the Court of Appeal has treated a same-sex relationship as amounting to private life cognate with family life.

Private life and social and economic relations

16.37 Private life encompasses the network of relations that a person has established such as work, education, friendships, reliance on medical or therapeutic services:

... the network of personal, social and economic relations that make up the private life of every human being.

... the totality of social ties between settled migrants and the community in which they are living.

... a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.

Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of ‘private life’ within the meaning of Article 8. Regardless of the existence or otherwise of a ‘family life’, the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the ‘family life’ rather than the ‘private life’ aspect ...

66 *Khan v UK* (2010) 50 EHRR 47 paras 32, 42, 43 and *Onur v UK* (2009) 49 EHRR 38 paras 45–46 where, in each case, the adult applicant had private life, although not family life, arising from his relations with his mother and adult siblings.


70 *Onur v UK* (2009) 49 EHRR 38 para 46.


72 *Maslov v Austria* [2009] INLR 47 para 63.
There appears to be no reason in principle why this understanding of
the notion of ‘private life’ should be taken to exclude the activities of
a professional or business nature, since it is, after all, in the course of
their working lives that the majority of people have a significant if not
the greatest opportunity of developing relationships with the outside
world.73

Composite family and private life cases

16.38 Many ECHR article 8 cases will combine both family and private life
aspects, as was noted by the Immigration Appeal Tribunal (IAT) in
the early guideline case on ECHR article 8, *Nhundhu and Chiwera v
Secretary of State for the Home Department*.

In the context of immigration and asylum cases, the Court has come
to view the right to respect for private and family life as a composite
right. This approach requires the decision-maker to avoid restricting
himself to looking at the circumstances of ‘family life’ and to take into
account also significant elements of the much wider sphere of ‘private
life’: *Chorfi v Belgium* 7 August 1996, *Bouchelkia v France* judgment
of 29 January 1997 (paragraph 41), *El Boujaidi v France* 26 September
1997 and *Mehemi v France* 26 September 1997 and *Nasri v France*
(1996) 21 EHRR 458. One consequence of this approach is that a per-
son may be able to establish a protected right under Article 8 either by
reference to significant elements of family life or significant elements
of private life or a mixture of both.

16.39 In a number of cases, mental ill-health has tipped the balance in
the individual’s favour in an ECHR article 8 family life case. In *HM
(Malawi) v Secretary of State for the Home Department*,75 the Adminis-
trative Court found that when assessing whether it is reasonable
to expect other family members to relocate with the deportee, the
impact of deportation on the health of the deportee and his or her
family members is a ‘potentially critical matter’. The medical condi-
tion of the deportee and family member, and the availability of treat-
ment in the country of deportation would all be relevant. In *Krasniqi
v Secretary of State for the Home Department*,76 the Court of Appeal
upheld a determination allowing the article 8 appeal of a profoundly
mentally disturbed woman in a same-sex relationship with another
asylum-seeker with whom she was rearing a child. The Court of

76  [2006] EWCA Civ 391.
Appeal found the effect on the appellant of the loss of the only people she considered to be her family would be exacerbated by her fragile mental and emotional state. In *R (X) v Secretary of State for the Home Department* the Administrative Court found arguable the case of a highly disturbed woman whose brother was settled in the UK: her dependency on her brother had been heightened by her history of trauma and fragile mental state and the feared consequences of the separation included suicide. The interplay between family life and mental and physical illness in ECHR articles 3 and 8 cases is discussed in further detail at paras 18.40–18.41.

77 [2006] EWCA Civ 391 para 33.