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Birth relationships after adoption - is there a role for Article 8?

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Abstract

The movement towards open adoption from public care in the UK has been emerging from research with patchy application in practice. The possibility of continued relationships between birth relatives and adopted children, in particular between siblings, gives cause to consider the implications of those relationships in the legal framework, in particular in relation to rights under the European Convention on Human Rights. This article considers the existing jurisprudence both domestic and European on the engagement of Article 8 and argues that further consideration is required of its possible engagement post-adoption.

Keywords

Article 8; post-adoption; contact; birth parents; adoption; siblings

A. Introduction

This article questions how Article 8 of the European Convention on Human Rights is considered in post-adoption relationships between birth parents and adopted children and also between adopted children and their siblings. It does so through consideration of existing jurisprudence on the engagement of Article 8 and comparing the principles applied in other family contexts to the approach taken in the post-adoption context. It is argued that particularly within an open model of adoption, in appropriate circumstances, engagement and consideration of the right to respect for family life between adopted children and their birth relatives as well as adoptive relatives could improve decision making and recognise the rights of the child as distinct from the rights of adults.

First, principles will be identified from the European case law on the engagement of the right to respect for family life in contexts other than post-adoption. The current context and extent of open adoption within England and Wales and Northern Ireland will then be outlined before the approach to the engagement of Article 8 in the post-adoption context both domestically and in the European Court is discussed in relation to both birth parents and siblings.

A. The engagement of Article 8 in relation to respect for family life

It is useful to identify the approach taken by the European Court to the engagement of the right to respect for family life in family contexts other than adoption to explore how and why they contrast with the application of Article 8 post-adoption. This is particularly useful in the context of criticism that the Courts in England and Wales have been limited in their engagement with Article 8 in the past.¹

Article 8 of the ECHR sets out the qualified right to respect for family and private life.

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.

The well versed test applied to consider whether the right to respect for family life is engaged is ‘essentially a question of fact depending upon the existence of close personal ties’.² The ECtHR has had to consider whether Article 8 was engaged in a number of different factual circumstances relating to different forms of parent/child relationship; from these cases we can distil certain principles about when Article 8 might apply which go beyond the straightforward test of whether ‘close personal ties’ exist.

The first area to consider is the role of parental status, whether legal or biological. The influence of legal status has been dealt with in the ‘illegitimate’ parent-child relationship cases. Article 8 was held to be engaged in *Marckx v Belgium* where under national law, a mother would be required to adopt a child born outside marriage in order to acquire the legal rights which arose automatically upon the birth of a child within a marriage.³ The Court considered that the mother had assumed responsibility for the child from birth and had cared for the child continuously such that ‘real family life’ existed between parent and child as a matter of fact.⁴ In doing so, the Court looked beyond the legal relationship and status of the parent/child and considered the biological and relational reality for the parties.

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¹ K Hughes and B Sloan, ‘Post-adoption photographs: welfare, rights and judicial reasoning’ [2011] 23 CFLQ 393 in which they note at p410 ‘English courts are not renowned for genuine consideration of Article 8...’.

² *Emonet v Switzerland* (Application No 39051/03) (2009) 49 EHRR 11 at para [33].

³ *Marckx v Belgium* (Application No. 6833/74) (1979) 2 EHRR 330 at paras [17] – [19].

⁴ (1979) 2 EHRR 330 at para [31].

In *Kopf and Liberda v Austria* the ECtHR recognised Article 8 as engaged by foster carers who had cared for a child for 46 months and then pursued contact after the child was reunited with their mother.⁵ Unlike in *Marckx*, in *Kopf* there was no biological relationship, it was a factual relationship. In both this and the *Marckx* case, the Court looked beyond the legal relationship between adult and child and considered the factual reality for those involved when considering whether Article 8 was engaged but in *Kopf* they also looked beyond the biological relationship and considered the relationship from the parties' perspective, noting the genuine concern and emotional connection between the foster parents and child as being similar to that of a parent/child relationship.⁶ As neither a legal nor biological relationship seems to be a determinative factor in whether Article 8 is engaged, what then is required of the factual relationship to reach the threshold of engaging Article 8? This is the second area to consider.

Under Article 8, 'family life' may be engaged not only where legal status in relation to a child is absent but also where the factual relationship is in the early stages; potential relationships seem to be able to engage Article 8. In *Keegan v Ireland* the Commission found Article 8 engaged by an unmarried father who had only seen the child briefly at birth on the basis of the father's relationship with the mother, that the child had been planned, the father 'felt an emotional bond with the child' and he 'had a bona fide desire for custody'.⁷ There was a biological relationship, no legal relationship and a limited factual relationship but the Commission seems to have considered the parents' relationship as well as the father's psychological relationship to the child and found Article 8 to be engaged. Factors such as the potential for a relationship, the parent's interest in and commitment to the child were considered. The Court considered whether Article 8 was engaged based on the relationship between the parents. They weighed up features of the adult relationship leading to the conception to determine if Article 8 was engaged between the father and child in the absence of a post-birth factual relationship, noting that the very fact of birth makes a child part of the family unit into which it is born and viewing the subsequent breakdown of the adult relationship as insufficient to break the Article 8 bond.⁸

In *Keegan*, a birth father was able to establish a right to respect for family life on the basis of his relationship with the mother, biological connection to the child and desire for and intention to have a relationship with his child; adopters have established a right to respect for family life which does not derive from the adults' relationship nor from a biological connection but from legal status and intention. In *Pini and Bertani and Manera and Atripaldi v Romania* two Italian adoptive couples who had been unable to enforce adoption orders in respect of two Romanian girls claimed a breach of various provisions of the ECHR.⁹ The Court had to consider if 'family life' existed such as to engage Article 8 in circumstances where the adopters had met the children once, there had been indirect contact (but there was a question as to whether these had been received by the children) and the children themselves were contesting the adoption.¹⁰ The

⁵ *Kopf and Liberda v Austria* (Application No. 1598/06) [2012] 1 FLR 1199.

⁶ [2012] 1 FLR 1199 at para [37].

⁷ *Keegan v Ireland* (Application No. 16969/90) (1994) 18 EHRR 342 at para [49].

⁸ *Ibid* at para [45].

⁹ *Pini and Bertani, Manera and Atripaldi v Romania* (Applications 78028/01 and 78030/01) (2005) 2 FLR 596.

¹⁰ *Ibid* at paras [12]-[99].

Court found that ‘family life’ did exist, relying on jurisprudence that the intended or potential relationship between a parent and child can engage Article 8, the lack of cohabitation was not due to the actions of the adopters and that the adopters ‘always considered themselves to be the children’s parents and always behaved accordingly towards them by the only means open to them’.¹¹ In addition, the Court relied on the international instruments which reference adoption as the conferral of all rights and obligations from birth parents to adopters.¹²

In *Anayo v Germany*, the Court considered the fact that there was a biological relationship combined with the fact that the lack of factual relationship was not attributable to the actions of the father could result in the right to respect for family life being engaged. The Court considered that the father had intended to have, had shown an interest in and a commitment to a relationship as evidence that it could not exclude engagement of Article 8 in relation to the right to respect for family life and indeed that the right to respect for private life would certainly be engaged.¹³ This was in the context of the father never having met the children.

It seems from *Keegan, Pini* and *Anayo* that beyond the biological or legal connection to the child, even when the factual relationship with the child is limited, close personal ties might be founded on the parties’ intention to parent and consideration will be given to what has prevented them from doing so. That potentially strays the engagement of Article 8 into the subjective – how does a party view themselves and what is their intention towards the child? While intention might be an additional factor to biological or legal status, it won’t always tip the scale to engage Article 8. In *Paradiso and Campanelli v Italy*, the intention of ‘the intended’ parents of a child born out of a surrogacy arrangement and the existence of a relationship with the child (for 8 months which was described as short) was insufficient to engage Article 8 where there was no biological connection and an uncertain legal status with the child.¹⁴

The third area to consider which may be of relevance post-adoption, is what happens to the right to respect for family life if an existing factual relationship has been broken for a period? It’s clear that breaks in contact between a parent and child are insufficient to sever the parent-child bond which engages a right to respect for family life under Article 8. In *Gul v Switzerland* Article 8 was engaged even though the Father had been living in a separate country to the child from when the child was 3 months old until he was 7 years old with ‘a number of visits’ in that time to see the child.¹⁵ In *Kroon and others v The Netherlands* family life was found to be established even when the parties had not cohabited but where there was an enduring relationship, the Court went beyond that to suggest that a child was part of the family unit by virtue of birth and so there was family life between the father and son ‘whatever the contribution of the latter to his son’s care and upbringing’ (though on the facts the applicants claimed the father had contributed to the care and upbringing of the child).¹⁶

¹¹ Ibid at paras [143], [146] and [147].

¹² Ibid at para [142].

¹³ *Anayo v Germany* (Application No. 20578/07) [2011] 1 FLR 1883 at paras [59]-[62].

¹⁴ *Paradiso and Campanelli v Italy* (Application No. 25358/12) (2017) 65 EHRR 2 at para [157].

¹⁵ *Gul v Switzerland* (Application No. 23218/94) (1996) 22 EHRR 93 at paras [30] –[33].

¹⁶ *Kroon and Others v The Netherlands* (Application No. 18535/91) (1995) 19 EHRR 263 at para [30] and [15].

In summary, deriving from the existing European case law on the engagement of Article 8 the additional factors which might be combined with legal or biological status beyond the test for close personal ties are:

- i. To determine if Article 8 is engaged, look beyond legal status or biological status alone and consider the relational reality for the individuals involved;
- ii. The relationship between the parents may confer an Article 8 relationship between parent and child;
- iii. Potential relationships can be a relevant factor to establish Article 8 where in the future a relationship is sought or intended even where the current factual relationship is very limited;
- iv. Cohabitation, frequent contact or even having met a child are not pre-requisites for the engagement of Article 8.

These principles and this selection of cases shows that there is a level of adaptability within the European Court as to what it means to hold family life between individuals. The differing combinations of factors taken into account and weight attributed to them in the determination of the engagement of Article 8 appears responsive to the nature of the applicants coming before the Court – their sex, relationship, biological and legal status. This results in a shifting consideration of factors under the umbrella of ‘close personal ties’.

If Article 8 is engaged, any interference is only lawful where it complies with Article 8(2) which requires consideration of whether there is a fair balance between the individual and the community and within which states enjoy a margin of appreciation.¹⁷ In addition, where there has been a state intervention leading to admission to the public care system, a positive obligation exists to take measures to reunify a parent and child.¹⁸ This positive obligation may be context sensitive within cases of removal of a child to public care to when adoption is not planned and it will also not require ‘endless’ attempts at reunification.¹⁹ In addition, states will enjoy a margin of appreciation around their positive obligations.²⁰ Therefore recognising a right to family life as engaged between individuals will require consideration of any interference with it, balance of the individual right and the community, consideration of how that right interacts with other overlapping rights and potentially consideration of positive obligations.

There are two modern frontiers for the right to respect for family life. The first, is when Article 8 is engaged and how it operates in the realm of modern reproduction practices. The second, which is the focus of this article, is when the right to respect for family life under Article 8 is engaged and how it operates in relation to adoption in the context of a move towards more ‘open’ practices. After considering what is meant by open adoption, the legal position in

¹⁷ *Pini and Bertani, Manera and Atripaldi v Romania* (Applications 78028/01 and 78030/01) (2005) 2 FLR 596 at para [149].

¹⁸ *Eriksson v Sweden* (Application No. 11375/85) (1990) 12 EHRR 183 at para [71] and *Andersson v Sweden* (Application No. 12963/87) (1992) 14 EHRR 615 at para [91].

¹⁹ *Olsson v Sweden* (Application No. 10465/83) (1989) 11 EHRR 259 at para [81]; *R and H v United Kingdom* (Application No. 35348/06) (2011) 2 FLR 1236 at para [88].

²⁰ *I.S. v Germany* (Application No. 31021/08) [2014] ECHR 31021/08 at para [70].

England and Wales and Northern Ireland will be considered in light of the factors identified above.

A. Open Adoption

In adoption from public care, there have been calls to move towards greater openness and in some areas of the UK those calls have been answered in practice. ‘Openness’ is not a uniform concept. In adoption ‘openness’ can refer to ‘semi-open’ adoption or ‘open adoption’. Semi-open adoption being indirect contact where parties know of the other and share information often via social services while open adoption refers to face-to-face contact taking place.²¹ Indirect, letterbox or semi-open adoption may not sit squarely within the idea of ‘openness’. It may or may not involve the child as a participant, it is often via social services so may not involve direct engagement between birth and adoptive parents and the extent of the knowledge the parties have of each other may vary. The sliding scale from closed to open in adoption practice means the reality and experience of adoption may be very different for those involved depending on the form.

Summarising some of the benefits and difficulties there may be with contact from three research studies in the UK, Elsbeth Neil suggests adopted people may benefit from contact in terms of their identity and reducing feelings of rejection though contact can be an emotional strain on them.²² Adoptive parents may benefit from finding out information from birth parents, talking to their child about adoption and feeling less threatened though they too face an emotional strain and in addition may find the practicalities of contact challenging.²³ Birth relatives may benefit from contact in relation to their feelings of grief and loss but they too may face an emotional strain through contact.²⁴ The appropriateness or otherwise of particular forms of contact may depend on a number of factors, not least a consideration of the harm or potential harm the child has suffered or was at risk of suffering which led to their adoptive placement. In addition, the studies must be considered in light of whether practice has screened out contact which might be harmful; the findings will not necessarily be universal. Taking into account the benefits and risks in the individual case, consideration of the potential for greater openness within adoption has been promoted in England and Wales.

The level of post-adoption contact taking place in the UK is not recorded in a publicly available format but an idea of practice can be gleaned from existing studies. Though the majority of children in recent studies in England and Wales and Northern Ireland have some form of contact with their birth family this could be with a sibling, extended family member or birth parent and it could be direct or indirect, therefore the reality behind that may vary greatly.²⁵

²¹ This is the terminology currently being used in the consultation on the potential introduction of such adoption in Ireland; <https://dcya.fs.ie/>, last accessed 24 May 2019.

²² E Neil, ‘Rethinking adoption and birth family contact: is there a role for the law?’ (2018) *Fam Law* 1178.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ See Neil, n 22 above; M MacDonald, ‘Connecting or Disconnecting? Adoptive Parents’ Experiences of Post Adoption Contact and their Support Needs’ (Belfast Health and Social Care Board, 2017).

In terms of direct contact, there is a perception that Northern Ireland has a more open practice with higher levels of direct contact.²⁶ Based on the available information, this may be the case in relation to contact with parents. In Northern Ireland, a small-scale survey of 93 adoptive parents whose children were having some form of contact found 47% of those having contact were having direct contact with their birth mother and 17% were having direct contact with their birth father.²⁷ This is compared with studies in England and Wales which have shown anywhere from 3% - 9% of adoptees within the sample as having direct contact with a birth parent, with the lower figure being the more recent and suggesting direct contact rates might in fact be falling.²⁸ Until statistics on the subject are routinely recorded and published, the only indications available are from such surveys which pose their own limitations. While indirect contact is perceived as the norm or starting point in England and Wales, its value, meaningfulness and the potential for it to succeed raise questions. The continued role of confidentiality in post-adoption contact practice in England and Wales compared to Northern Ireland, where there seems to be higher levels of direct post-adoption contact, is a subject meriting further comparative research.

In terms of sibling contact, again prevalence studies aren't available but from the information we have, studies in England and Wales have shown between a quarter and a third of adoptees with a sibling outside their placement had direct contact with the sibling.²⁹ In the 2017 survey of 93 adoptive parents in Northern Ireland whose children were having contact this number was higher with over half reporting their child as having contact with a sibling.³⁰ However, in both England and Wales and Northern Ireland inter-sibling contact was much more likely with siblings in placements away from their birth parents rather than with siblings remaining with birth parents. This raises practice issues around the potential difference in treatment between siblings based on factors outside of the children's' control.

A shift from closed adoption towards openness is happening, though it seems to be happening to varying degrees and in differing ways in England and Wales and Northern Ireland. The landscape of relationships have been further transformed by social media, through which traditional barriers to contact might be bypassed and the capacity for monitoring or controlling relationships is more limited.³¹ Consideration of open arrangements may come before the Court though developing practice within social work and through expert evidence.³² In this changing landscape of adoption where a level of relationship may be maintained, the legal framework

²⁶ B Featherstone, A Gupta and S Mills, 'The role of the social worker in adoption – ethics and human rights: An Enquiry' (Birmingham, BASW, 2018).

²⁷ See MacDonald, n 25 above.

²⁸ See Neil, n 22 above.

²⁹ Ibid and S Meakings, A Coffey and K Shelton 'The Influences of Adoption on Sibling Relationships: Experiences and Support Needs of Newly Formed Adoptive Families' (2017) 47 *British Journal of Social Work* 1781.

³⁰ See MacDonald, n 25 above.

³¹ A McFarlane, 'Contact: a point of view' (2018) *Fam Law* 687; Al Coates, 'Hello I think you're my sister': How can we manage post-adoption contact in a social media age?' (2019) *Community Care*, www.communitycare.co.uk/2019/05/07/hello-think-youre-sister-can-manage-post-adoption-contact-social-media-age/, last accessed 16 May 2019.

³² *Re B (A Child) (Post-Adoption Contact)* [2019] EWCA Civ 29 paras [59]-[61].

around the relationships which exist merits further exploration and consideration, particularly in light of the existing approaches to the engagement of Article 8.

A. Article 8 and birth relationships after adoption

B. Birth parents

The strength of the Article 8 bond between parent and child was emphasised in *Gul*:

The Court reiterates that it follows from the concept of family on which Article 8 is based that a child born of a marital union is *ipso jure* part of that relationship; hence, 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.³³

Recognition of the strength or importance of the right to respect for family life between a birth parent and child when adoption is contemplated can be found within both the domestic and European case law which has considered decisions by the state to sever that relationship through compulsory adoption of the child.³⁴ The focus of those cases has been on whether decisions leading to or the adoption decision itself, which is an interference with the right to respect for family life, is justified and proportionate such that it falls within the qualification of the right.³⁵ Similarly, there has been recognition that the right to respect for family life between an adopted child and adopters is the same as other family relationships which fall within Article 8.³⁶

The question which has arisen less frequently in the European Courts is whether, in non-consensual adoption, the adoption brings to an end the engagement of Article 8 or whether through the exercise of post-adoption contact it might continue to be engaged or if extinguished through adoption, be re-engaged.

One case which did consider the effect of an adoption order on the engagement of Article 8 between a birth parent and child is *IS v Germany*.³⁷ The context of that case was not adoption from public care and although the consensual nature of the adoption had been challenged in the national court by the mother, it was not challenged in the European Court. Therefore, this authority might be said to sit more squarely with relinquishment adoption cases. However, it did involve an applicant who asserted post-adoption contact had formed part of the agreement to place her children for adoption and alleged a violation of Article 8 though the national court's

³³(1996) 22 EHRR 93 at para [32].

³⁴ See for example *Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33 at paras [32], [34], [195], [198].

³⁵ See for example *YC v United Kingdom* (Application No. 4547/10) (2012)2 FLR 332.

³⁶ *Pini and Bertani, Manera and Atripaldi v Romania* (Applications 78028/01 and 78030/01) (2005) 2 FLR 596 at para [140].

³⁷ [2014] ECHR 31021/08

failure to uphold this agreement or grant the applicant contact or information with the children. It therefore required some consideration of whether Article 8 was engaged between birth parent and child after a ‘consensual’ adoption.

Though the Court in *IS* notes that a biological relationship alone is insufficient to engage Article 8, it recognises the principle from other contexts that intended family life might fall within Article 8. However, just as the intention to have family life might bring one within Article 8, the Court in *IS* considered that intentionally severing family life might bring Article 8 to an end. This reflects the idea that the parties’ intent may be relevant where there is a biological or legal relationship. Going further, the Court considers that the new relationship between birth parent, adoptive parent and adopted child would constitute private life within Article 8 even if not amounting to family life, the Court is equivocal on whether there is family life.³⁸ What about birth parents of non-consensual adopted children who intend, so far as permitted, to maintain a relationship with their adopted child?

In domestic law, the potential for Article 8 to survive an adoption order raised its head in *Re J (A child) (Adopted Child: Contact)*.³⁹ In that case, when determining whether adoptive parents should be required by way of a court order under section 8 of the Children Act 1989 to provide the birth parents with a photograph of the adopted child, the High Court had asserted that Article 8 rights were capable of being engaged between birth parents and their adopted children after the making of the adoption order but the Court of Appeal in hearing the appeal made clear that whether Article 8 remained engaged for the parents was not something they were determining.⁴⁰ It is not an issue which has been dealt with head on, in the context of public law open adoption, by the Strasbourg Court, though Brian Sloan considered that some of the case law suggested indirectly that Article 8 might be applicable.⁴¹

In *Re A (A Child) (Adoption: Human Rights)*⁴² Jackson J grasped the nettle and determined that the right to respect for family life between parent and child was brought to an end by an adoption order, a decision which ran contrary to the expectations of some (but not all) in this field.⁴³

In concluding that an adoption order brings to an end the right to family life between a parent and child the Court relied on four strands of argument:

- i. the legal effect and finality of the domestic provisions relating to adoption;

³⁸ [2014] ECHR 31021/08 at para [69].

³⁹[2010] EWCA Civ 581.

⁴⁰ Ibid at para [43].

⁴¹ B Sloan, ‘Post-adoption contact reform: compounding the state-ordered termination of parenthood?’ (2014) *Cambridge Law Journal* 378 at p 396-397. The Court has considered voluntary relinquishment adoptions – see *I.S. v Germany* (Application No. 31021/08) [2014] ECHR 31021/08.

⁴² [2015] EWHC 2609 (Fam).

⁴³ *Re A (A Child) (Adoption: Human Rights)* [2015] EWHC 2609 (Fam) [2(1)]. See A MacDonald QC, *The Rights of the Child*, (Family Law, 2011) para 8.15; S Harris-Short, ‘Making and Breaking Family Life: Adoption the state, and Human Rights’ (2008) 35 *Journal of Law and Society*, 35 and HH K Hollis, ‘Does Article 8 survive adoption?’ (UK Human Rights Blog, 6 October 2015) <https://ukhumanrightsblog.com/2015/10/06/does-article-8-survive-adoption/> accessed 8 November 2018.

- ii. acknowledgement of the legal effect and finality of adoption in the European Convention on the Adoption of Children;
- iii. case law from the European Court of Human Rights; and
- iv. the impact of contact considerations at the time an adoption order is made.

In England and Wales, as in Northern Ireland, an adopted child is treated in law as if born to adopters and any rights or responsibilities of the parents prior to the adoption order are transferred.⁴⁴ In Northern Ireland, as adoption law reform has not kept pace with England and Wales, a parent may lose all parental rights and duties if a freeing order is made prior to an adoption order while in England and Wales placement orders may restrict parental responsibility but it is not ultimately lost until the adoption order is made.⁴⁵ This legal status, the legal transfer of parentage was a key argument in *Re A* for the ending of any right to respect for family life between a birth parent and child. Yet the existing case law which is outlined above very clearly does not put such weight on legal status in other contexts.

The European Conventions on the Adoption of Children in 1967 and in 2008 both recognise the position that an adoption gives adopters the rights and responsibilities for a child and brings to an end the rights and responsibilities between a parent and child prior to the adoption.⁴⁶ One parent's, or set of parents', rights and responsibilities in relation to a child come to an end while another parent, or set of parents, acquire rights and responsibilities towards that same child. The echo within these international instruments of the domestic legal position was confirmatory for the Court in *Re A* that the transfer of rights and responsibilities included rights under Article 8. What is less clear is how a parent who hasn't acquired any domestic legal rights and responsibilities – such as in *Keegan* or *Anayo* – can engage Article 8 but a parent who has lost legal rights and responsibilities cannot.

A number of European cases, relied upon in *Re A*, emphasise how adoption ends the parent-child relationship. *P, C and S v UK* described a freeing order as 'severing all parental links with a child.'⁴⁷ Similarly *YC v UK* describes adoption as the permanent severance of family ties.⁴⁸ In *Keegan*, it is outlined that adoption 'would have had the effect of extinguishing any right he might have in respect of her' (though this may have referred to the right under domestic law to apply for guardianship or custody and not specifically to Article 8).⁴⁹ Finally, *Re A* relied on *Soderback v Sweden* which states that '...the adoption in the present case, like the contested measures in the Johansen case, had the legal effect of totally depriving the applicant of family life with his daughter...'.⁵⁰

Kirsty Hughes and Brian Sloan argue that such comments – which serve to highlight the depth of the interference with respect for family life which adoption causes – are unwelcome if they

⁴⁴ Adoption and Children Act 2002 s46(2) and s67(1). In Northern Ireland, the Adoption (Northern Ireland) Order 1987 Article 12, 17, 18 and 40. See *Re A (A child)* [2015] EWHC 2609 (Fam) [31] – [36].

⁴⁵ Adoption (Northern Ireland) Order 1987 Article 18 and 17; Adoption and Children Act 2002 s25 and s46(2).

⁴⁶ The European Convention on the Adoption of Children 1967 Article 10 and the European Convention on the Adoption of Children 2008 Article 11(1) cited in *Re A (A child)* [2015] EWHC 2609 (Fam) [43] – [44].

⁴⁷ (Application No. 56547/00) [2002] 2 FLR 631 at para [118].

⁴⁸ (Application No. 4547/10) [2012] 2 FLR 332 at para [134].

⁴⁹ (1994) 18 EHRR 342 at para [66]

⁵⁰ (Application No. 24484/97) [1999] 1 FLR 250 at para [31].

are taken to bring to an end respect for family life and ‘retrospectively... increase the magnitude of the interference with an Article 8 right...’.⁵¹ They accept that comments highlighting the impact of adoption may be the very thing which makes arguments that Article 8 could continue after it more difficult. An adoption order might have the practical effect of bringing any close personal ties to an end if the adopters to whom all rights and responsibilities are transferred exercise those rights so as to prevent or end any close personal ties between a birth relative and child, but the transfer of rights may not always have this practical effect. As outlined above, openness in adoption may increasingly mean an ongoing relationship of some sort between a child and birth relative.

Re A was determined without reference to *IS v Germany*; in *Re A* the possibility of a post-adoption relationship falling within private life was said to fail to get off the ground, despite the argument being successful in *IS v Germany* where there had similarly been little or no contact between the mother and child after the adoption.⁵² How then, can the existing principles of the European Court be applied in this context and how does that application compare with the current domestic authorities?

First, if the established test were applied, namely whether as a question of fact there exists in practice close personal ties, it is likely that Courts would have to assess, at the time of the decision, based on the individual circumstances of the case, whether such ties existed. Such an assessment would look beyond the legal and biological status of the relationship (as per *Marckx and Kopf*). It is conceivable that such ties would continue to exist, particularly as in reality relationships exist on a continuum.

As the Court has shown itself willing to look beyond the fact based approach, particularly where a parent has a biological or legal connection to the child, consideration should be given to whether a relationship was intended or a future relationship sought (as per *Keegan and Pini*). Whether the birth parent has intentionally severed the relationship might be relevant (as per *IS*). The inability to continue a factual relationship would also be a consideration where the inability to do so is not a reflection on the individual’s commitment but is as a result of being prevented from forming a relationship whether by a local authority or through the refusal of adoptive parents to so facilitate (as per *Anayo*). All of these factors could conceivably result in finding Article 8 engaged in respect to the right to family life and regardless, with reference to *IS*, to private life.

The domestic approach which uses the transfer of rights and responsibilities as a reason not to look behind legal status, fails to recognise the complex reality of modern adoptive relationships; this may be a reflection of Alan Brown’s argument that ideals of the traditional nuclear family underpin judicial conceptions of who amounts to family with the result that more complex family forms are sidelined.⁵³ Kinship practices and developing relationships

⁵¹ K Hughes and B Sloan, ‘Post-adoption photographs: welfare, rights and judicial reasoning’ (2011) 23 CFLQ 393, p 408-409.

⁵² [2015] EWHC 2609 (Fam) at 61.

⁵³ A Brown, *What is the Family of Law? The influence of the Nuclear Family* (Hart, 2019) at p40.

after adoption are complex in a way that has been acknowledged sociologically but perhaps not fully grappled with legally.⁵⁴

Acknowledgement that Article 8 might continue to be engaged between a birth parent and child need not detract from the Article 8 rights which are engaged between adoptive parents and their children. Distinct Article 8 rights can be engaged between a number of individuals, though it requires the courts to consider any tensions between competing asserted rights and to prioritise the child's rights. It may also require consideration of the differing types of close personal ties, the differing quality and nature which in turn requires a more head on consideration of the broader sociological questions facing society – who and what constitutes a family and what factors are considered in determining that question?

Whether Article 8 is engaged between any parent and child (adoptive or birth) is often analysed from an adult perspective. A useful exercise is to rotate the perspective of analysis and apply the existing principles about the engagement of Article 8 from the child's perspective. The making of an adoption order is unlikely to have the immediate effect for them of bringing to an end any close personal ties, intentions towards or interest in their birth parents. There is a risk that an analysis of the engagement of the right to respect for family life could subsume the child's rights into the those of the adults, something Sonia Harris-Short warns against, instead bestowing the benefit of recognising the child as the holder of 'separate and perhaps competing rights and interests'.⁵⁵ The advantage of such an approach, Harris-Short argues, is that it can 'illuminate the various and often competing rights and interests involved.'⁵⁶ Therefore an approach which considers the application of the principles around engagement from all three perspectives might assist with reasoned decision making.

Further, the other risk warned about by Harris-Short, namely that children's rights are conflated with not only the rights of adults but with their welfare could be assisted by a separate consideration of the respect for the child's right to respect for family and private life and the justification of any interference with it. Neil found that children placed younger with fewer adverse experiences may be more able to cope with the emotions of contact while those who have spent longer with their birth relatives pre-placement and potentially have suffered harm may find direct contact more difficult.⁵⁷ One can see how on the one hand, a stronger claim to the right to respect for family life under Article 8 might not necessarily tally with welfare considerations and vice versa but without separate consideration of those issues one cannot identify and weigh up those factors clearly in decision making.

Recognising that a child might have a right to respect for their family life with both a birth parent and an adoptive parent could create a transition ground in which there is dispute about

⁵⁴ See for example C Jones and S Hackett, 'Redefining family relationships following adoption: adoptive parents' perspectives on the changing nature of kinship between adoptees and birth relatives' (2012) 42 *British Journal of Social Work* 283 and M MacDonald, 'A picture of who we are as a family; conceptualizing post-adoption contact as practices of family display' (2017) 22 *Child and Family Social Work* 34.

⁵⁵ S Harris-Short, 'Making and Breaking Family Life: Adoption the state, and Human Rights' (2008) 35 *Journal of Law and Society* 28 at p30, 33 and 38.

⁵⁶ *Ibid* at p33.

⁵⁷ Neil, n 22 above.

how those rights sit alongside each other at a time when a child is settling into a new home. Further, if the birth parent-child relationship invokes a right to respect for family life, this raises questions about the positive obligations on the state.⁵⁸ These might be considered policy implications rather than principled arguments. The balancing of rights and consideration of interferences as well as the reasonableness limitation on positive obligations might provide principled responses to such policy implications.⁵⁹ However, *Re A* as the current authority does not require consideration of such issues as it brings to an end the right to respect for family life on adoption (and potentially in Northern Ireland on the issue of a freeing order).

Cobb J in *Re H (Care and Adoption: Assessment of wider family)* had reason to consider Article 8 again in the context of public law proceedings in which a father did not wish his extended family to be told of the existence of the subject child nor to be assessed as carers.⁶⁰ This case is distinct from the ‘relinquishment’ secrecy cases but required consideration of similar issues; it was also considering the operation of Article 8 prior to an adoption order. On the question of whether Article 8 was engaged between the child and the extended family who did not know of their existence, Cobb J considered whether there existed as a question of fact close personal ties and concluded there was not and as such Article 8 was not engaged between the child and their extended family.⁶¹ In his analysis he comments on potential relationships and whether they can engage Article 8 and considers that for a potential relationship to engage Article 8 the ‘level of interest and/or commitment’ shown before and after the child’s birth must be considered.⁶² Further, he notes that the potential relationship of birth relatives who do not know of the child is analogous with the potential relationship between the child and adopters with the only difference being a blood tie.⁶³

Re H serves to highlight the difference in the approach to Article 8 pre and post adoption order. It recognises the application of the orthodox test for the engagement of Article 8 and further recognises the principles derived from the European case law on potential relationships. This is in contrast to *Re A* where after adoption those considerations are usurped by deeming the adoption order to have acted as a guillotine on the engagement of Article 8.

B. Birth parents with a plan for continued contact

In *Re A*, Jackson J imagined a ‘rare case’ where a ‘significant post-adoption contact order’ would found a new and distinct Article 8 relationship between birth parent and child but stated that there is no right to re-established family life.⁶⁴ The reality is that court orders for post adoption contact are rare, with the Courts continuing to express extreme reluctance to impose

⁵⁸ *Emonet v Switzerland* (Application No 39051/03) (2009) 49 EHRR 11 at para [64].

⁵⁹ Any interference must comply with Article 8(2) namely that it is in accordance with law, pursues a legitimate aim and is necessary in a democratic society, see for example *YC v United Kingdom* (Application No. 4547/10) (2012)2 FLR 332.

⁶⁰ [2019] EWFC 10.

⁶¹ *Re H (Care and Adoption: Assessment of wider family)* [2019] EWFC 10 at para [46].

⁶² *Re H (Care and Adoption: Assessment of wider family)* [2019] EWFC 10 at para [39].

⁶³ *Ibid* at para [41].

⁶⁴ *Re A (A Child) (Adoption: Human Rights)* [2015] EWHC 2609 (Fam) at para [50].

an order against the wishes of adopters.⁶⁵ Despite the limited number of situations in which a court order may be used, arrangements for direct face-to-face contact do exist in England and Wales and to a greater extent in Northern Ireland.

It's not clear why contact would be required to be significant or by way of a court order to establish a 'close personal tie' as a question of fact such that an Article 8 relationship would be established. This can be unpacked in two senses – first the suggestion that 'significant' contact is required to form a close personal tie and second that it may be required to exist on foot of a court order.

On the level of contact required to satisfy the close personal tie test the European case law discussed above contained a number of examples of Article 8 being engaged where little to no actual contact had taken place, particularly where there was a biological link but perhaps a fictional comparison might best illustrate the issue. A father without parental responsibility works overseas and returns to see his child twice a year, by agreement, the child lives with the mother and her new husband, the child's step-father. Another father has monthly contact with a child in a foster-to-adopt placement and after the adoption order direct contact occurs twice a year by agreement (not by court order). Should there be a difference in the engagement of the right to respect for family life in these two situations? Though potentially very different contexts, stripped back, a link or commonality between intractable private law cases and post-adoption contact identified by the current President of the Family Division, Sir Andrew McFarlane is that both involve the impact on the relationship between a child and an absent parent.⁶⁶

As an application of the existing principles, the continuation of post-adoption contact should surely be capable of preserving the right to respect for family life under Article 8 where the relationship maintained constitutes a close personal tie. Given the existing case law's rejection of the need for a legal relationship to establish a tie which attracts the protection of Article 8, it is not clear why there would be any difference between a relationship which developed by consensual agreement between adopters and birth parents and any relationship which developed on foot of court ordered arrangements.

Therefore, it is suggested that whether ongoing contact between birth parents and a child engages Article 8 remains a question to be considered by the application of the 'close personal tie' test to the facts of each case, in conjunction with consideration of the principles developed in the application of that test, regardless of whether there exists any court order facilitating such a relationship. Any limitations on the relationship would remain to be analysed through consideration of the legality and proportionality of same and the balancing exercise of the rights between child and adopter and child and birth parent. Recognising family life between a birth parent and child as well as between an adoptive parent and child feeds into broader questions about what kinship means – the nature and quality of differing kinship relations – and how

⁶⁵ See *Re B (A Child) (Post-Adoption Contact)* [2019] EWCA Civ 29 at paras [19] – [25] for a summary of the authorities on the reluctance to use court orders to facilitate post-adoption contact.

⁶⁶ McFarlane, n 31 above.

those are balanced, questions for which reference to sociology and the lived experience might assist.⁶⁷

B. Siblings

Where it is in children's best interests, the importance of sibling relationships being maintained after state intervention in the life of a child has been recognised internationally and domestically.⁶⁸

The reasoning in *Re A* that the effect of an adoption order brings to an end the right to respect for family life between a parent and child has been applied to the right to respect for family life between siblings who have not developed a relationship through contact. In the matter of *TJ (Relinquished Baby: Sibling Contact)* the question before the Court was whether the half siblings of the subject child who had been relinquished for adoption should be informed of that child's existence.⁶⁹ One of those half-siblings lived with the Mother's former partner and his partner who had adopted the half-sibling. The half-siblings had never met the subject child. The mother claimed to have been harassed by the father of the half sibling who did not reside with her and both her and the intended adopters of the subject child did not want any wider family members to be informed about the child's existence.

Relying by analogy on *Re A*, Cobb J found that Article 8 rights between siblings/half-siblings were brought to an end with an adoption order.⁷⁰ On the facts, the court granted the declaration sought by the Adoption Agency that they need not inform any wider family members, including the two half siblings, about the existence of the subject child. He goes further to comment *obiter* that even if there were indirect contact between the siblings it would be 'highly unlikely in itself to create Article 8 rights.'⁷¹ A series of cases concerning whether paternal family members of children relinquished for adoption require to be told of the existence of the child have come before the English courts and they require consideration of issues quite apart from those which arise post adoption.⁷² The knowledge of the existence of a child is in itself a topic worthy of consideration but of particular interest from this case is the approach to the engagement of Article 8 between siblings before and after adoption.

The approach in *TJ* to Article 8 differs from comments in an earlier case, *Re B (A Child)*, in which Article 8 was considered not only engaged but to go beyond knowing about a brother and extend to having a relationship with him and was described by Thorpe LJ as 'a very strong

⁶⁷ T Murphy, 'Human Rights in Technological Times' in R Brownsword, E Scotford and K Yeung (eds), *The Oxford Handbook on the Law and Regulation of Technology* (OUP, 2017) p 968.

⁶⁸ See Chapter 1 of D Monk and J Macvarish (2018) *Siblings, contact and the law: an overlooked relationship*, London: Birkbeck for a full discussion.

⁶⁹ [2017] EWFC 6.

⁷⁰ *TJ (Relinquished Baby: Sibling Contact)* [2017] EWFC 6 at para [27].

⁷¹ *Ibid* at para [28].

⁷² See for example *Re Hannah (A Child)* [2017] 2 WLUK 133; *Re C (A Child) (Care Proceedings: Adoption)* [2018] EWHC 3332 (Fam).

Article 8 right'.⁷³ It also runs counter to Cobb J's acknowledgement in *Re H* of the European jurisprudence that potential relationships might engage Article 8 depending on the level of commitment or interest shown by (in the case referred to) a father. The principle from *Anayo* that Article 8 may be engaged where the individual is prevented through the actions of others from forming a close personal tie as a fact must surely be more apposite in the context of siblings who will have little to no agency over the development or otherwise of factual relationships. Why is it that a potential relationship from adult to child can engage Article 8 but the potential relationship between siblings cannot? It may be that interference with the right to respect for family life will be justified based on the circumstances of the case but surely the right itself must be engaged and considered.

Further, if siblings are aware of each other and do engage in indirect contact should their commitment and interest demonstrable through that not be taken into account in considering the engagement of Article 8? In their study into sibling contact and the law, Daniel Monk and Jan Macvarish identified 'notable ambivalence and uncertainty about the use and applicability of Article 8' among the professionals interviewed in relation to older siblings and contact.⁷⁴ This is perhaps unsurprising given the conflicting approaches to the engagement and use of Article 8 within the domestic and European case law and further within the cases considering rights from an adult centric perspective.

In the High Court in Northern Ireland, in a leave application for a contact order brought by an applicant birth mother and a new half-sibling in relation to adopted children, Keegan J, having noted the effect of the *Re A* judgment in relation to the applicant mother, commented that there was an Article 8 consideration for the half-sibling of the adopted child with whom there had been 'limited contact'; the level of 'limited contact' between the half-siblings is not clear from the judgment.⁷⁵ However, on the facts of the case the potential sibling Article 8 issue was not considered sufficient to justify the grant of leave for a contact application. This shows that there may be some sense that relationships between children are different from those between adult and child. If this is the case, the factors that lead to different considerations are of interest and should be teased out in the judgments.

Though in *TJ* the siblings had never met nor had contact with the adopted child, many children have knowledge of and relationships with full or half siblings at the time of their adoption and thereafter. The potential consequence of *Re A* is that the right to respect for family life between those siblings is brought to an end by the adoption order. However, if the established test for Article 8 were applied the question for the court would be whether there were real close and personal ties on the facts and if that were the case the court would then have to consider any interference with those rights and any positive obligation they had to fulfil them. In some cases, such as *TJ*, the interference may well be justified and proportionate on the basis of the child's best interests but a Court applying *Re A* may not get as far as such a considered analysis.

⁷³ *In the Matter of B (A Child)* [2011] EWCA Civ 509 at para [9].

⁷⁴ Monk and Macvarish, n 68 above at p121.

⁷⁵ *ZH v Mr and Mrs H and a Health and Social Care Trust (Post adoption contact: Article 8 application: leave)* [2016] NIFam 6 at para [10] and [47].

Julie Doughty *et al* note that there is a distinction between a child's rights and their welfare and that a child's welfare should not be assumed without balancing their rights with those of others.⁷⁶ In sibling cases, it is not just one but multiple children's best interests or welfare which requires consideration but it is also potentially multiple children's rights which also require to be balanced; such decision making is by no means be easy. However, is the potential extinguishing of the right to respect for family life upon an adoption order taking from children a balanced consideration of their rights as well as their welfare?

If a plan is made for ongoing sibling contact after adoption, whether by agreement between adopters and siblings' carers or by court order, could this found a new Article 8 relationship as imagined in *Re A* might rarely occur for parents and if so would indirect contact be sufficient? In relation to siblings, much remains to be explored.

A. Conclusion

Re A may or may not be the door shut to the recognition of the right to respect for family life under Article 8 surviving adoption or being reengaged thereafter. Certainly in open adoption arrangements the potential for the argument that such a right is continued or re-established exists. In the recent case of *Re B* in the Court of Appeal of England and Wales, an appeal against the refusal to grant an order for post-adoption contact under s51A of the Adoption and Children Act 2002 was concluded without reference to the potential or actual Article 8 rights of any party, suggesting that Hughes and Sloan's criticism of the English courts limited engagement with Article 8 may continue to ring true.⁷⁷

The principles applied in the question of whether relationships after adoption engage the right to respect for family life under Article 8 of the Convention have application beyond this context. In private law proceedings and in emerging family forms questions of when the right to respect for family life is engaged fall to be considered. Considering the matter from the perspective of not only the adults but also the children involved can assist in distilling issues of rights and welfare to assist with reasoned decision making. In relation to siblings, the possible engagement of Article 8 by potential relationships merits further exploration when the children's agency in forming close personal ties is constrained by the decisions and actions of adults which are out with their control.

⁷⁶ J Doughty, S Meakings and K Shelton, 'Rights and relationships of children who are adopted from care' (2019) 33 *International Journal of Law, Policy and the Family*, 1. Monk and Macvarish make a similar distinction about separating welfare considerations from balancing rights between siblings but do so in the context of the making of a placement order in D Monk and J Macvarish (2018) *Siblings, contact and the law: an overlooked relationship*, London: Birkbeck, p89.

⁷⁷ *Re B (A Child) (Post-Adoption Contact)* [2019] EWCA Civ 29. K Hughes and B Sloan, 'Post-adoption photographs: welfare, rights and judicial reasoning' (2011) 23 *CFLQ* 393 at p410.