Children's Right to Family Life in Finland: a Constitutional Right or a Side Effect of the "Normal Family"?

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1 Introduction

The protection of private and family life is an essential element of constitutional rights and human rights in late modern society. The right to private and family life involves a balancing act. The sphere of private and family life should be protected from outside interference, but, at the same time, we need to account for vulnerability and relationality within that sphere.¹ This balancing act is especially pertinent for children, as young children, in particular, are highly dependent on their families and caregivers.

The protection of private and family life is affirmed in article 8 of the European Convention on Human Rights (ECHR), which also calls attention to the inherent balancing acts involved in safeguarding this right. According to article 8(1), everyone has the right to respect for their private and family life, their home and their correspondence, while 8(2) lays out the criteria for limiting this right. Specifically, any interference with, for example, the respect for family life needs to be in accordance with the law as well as 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 text of the article applies only to interference made by public authorities specifically, but the European Court of Human Rights (ECtHR) has noted early on that States also have positive obligations to protect family life from interference by others in the context of private and family life.²

1 See eg John Eekelaar, *Family Law and Personal Life* (OUP 2009) 85.

2 See eg cases of *Hokkanen v Finland* App no 19823/92 (ECtHR, 23 September 1994) para 55, and *Keegan v Ireland* App no 16969/90 (ECtHR, 26 May 1994) para 49. For further discussion, see eg Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010) 9–10.

Similarly, the United Nations Convention on the Rights of the Child (CRC) starts out from the importance of family relations for children's well-being. Some of the key provisions expressing this importance are found in article 9(1), which states the obligation for State parties to 'ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child', and article 9(3), about respecting the right of the child to maintain contact with his or her parents on a regular basis.

Finland implemented the ECHR relatively late, in 1990, which meant that the 1990s saw the entry into force of both the ECHR and the CRC. Finland ascribes to a dualistic model with regard to international treaties, so both treaties have been implemented by means of national legislation. Since the implementation of the treaties a shift has been taking place in legal reasoning and decision-making, as treaty obligations and ECtHR case law are given increasing weight in legal decision-making as well as in legislative work. This shift affects national law in individual cases, for example, in Supreme Court cases where the reasoning is based on the interpretation of the conventions, and also more generally in the legislative drafting process and in the work of the parliamentary Constitutional Law Committee (*perustuslakivaliokunta*) that oversees the constitutionality of new legislation.³

In this chapter, I focus on children's right to family life specifically in the Finnish context.⁴ In families that are doing well, the children's constitutional rights align with those of the parents, and it may seem somewhat pointless to try and determine what protection is due to children in particular. However, there are many cases where children's right to family life may need to be traced out specifically. In cases where there is neglect or abuse in the family, it can be hard for the children to be heard and for them to get the support and help that the CRC decrees. Even then, the child's right to family life does not suddenly disappear just because her right to protection and her best interests need to take precedence at a given moment.

3 See eg the Constitutional Law Committee's memorandum on the reform of constitutional rights (Perustuslakivaliokunnan mietintö n:o 25 hallituksen esityksestä perustuslakien perusoikeussäännösten muuttamisesta (PeVM 25/1994) 4–5), where the Committee emphasises the harmonisation of constitutional and human rights by means of interpretation.

4 It is worth noting that children's right to *private* life is a crucial constitutional right especially with regard to technological and social advances; however, the topic would demand a more focused and thorough examination than is possible here.

To try to trace out children's right to family life, in particular, I examine first whether the protection of family life is extended fully to children as well as adults, also considering what other constitutional or treaty-based provisions there are that aim at protecting children's family ties specifically. Second, I analyse how children's right to family life is realised in key legislation in Finland, such as in provisions on parenthood and adoption, child custody and contact as well as child welfare services, and how that right is implemented (or not) in relevant case law. Third, I discuss some difficulties in implementing children's right to family life: for example, the aforementioned tension between the best interests of the child and her right to family life, as well as the challenges involved in separating a child's right to family life from that of other family members.

2 The Finnish Context and the Current Constitutional Provisions on Family Life

The current constitutional rights provisions in Finland are based on a significant reform that took place in 1995, just a few years after the entry into force of ECHR. The reform was preceded by carefully considered preparatory works⁵ and had the goal of modernising the constitutional rights provisions that were then in force as well as that of broadening the personal and substantive scope of constitutional rights. The new provisions have been well received in jurisprudence⁶ and can be considered quite successful. Thus, it is noteworthy and at first glance quite surprising that there are two significant omissions in them as well.

Firstly, the constitutional rights provisions do not include any provisions specifically on the rights of the child even though the CRC had entered into force just a few years earlier. The logic here is rather sound, though as the preparatory works are clear that constitutional rights belong to children equally with adults except when otherwise noted.⁷ The preparatory works actually discuss whether to include a section specifically on the rights of the child, but

5 Government proposal HE 309/1993 vp. For some of the discussion on the reform, see eg Liisa Nieminen, 'Perusoikeuksien yksilöllisyys ja perhekäsitykset perusoikeusjärjestelmässä' (1996) 5–6 *Lakimies* 909–929, as well as the other articles in the same issue of the *Lakimies* journal.

6 See eg Pekka Hallberg and others, *Perusoikeudet* (WSOYpro 2011) 34–36.

7 Such a note exists eg with regard to political participation, where the corresponding provision (section 14) specifically restricts the right to vote based on age.

the idea was abandoned in order to highlight the fundamentally equal rights of children and adults. Thus, the current Constitution of Finland⁸ specifically provides for equal treatment of children in the same provision, section 6, that lays out the principles of equality and non-discrimination in general. According to the section, everyone is equal before the law, and discriminatory treatment prohibited. Section 6, subsection 3 concerns children, in particular:

Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.

Secondly, there is a curious omission in the definition of private and family life as the Finnish Constitution does not mention family life at all. Section 10 on the right to privacy only mentions private life, honour and the sanctity of the home alongside the secrecy of correspondence, and family life is omitted from the text. Section 10, subsection 1 reads as follows:

Section 10 – The right to privacy

Everyone's private life, honour and the sanctity of the home are guaranteed. More detailed provisions on the protection of personal data are laid down by an Act.

[...]

While family life is not mentioned in the section itself, the preparatory works make it clear that the concept of private life is meant to cover maintaining and enjoying family ties as well.⁹ It is somewhat unclear as to why family life was not mentioned specifically, since the intent of the provision was to include it in any case. The preparatory works refer briefly and cryptically to the 'problematic nature' of the concept of the family, as well as difficulties in defining families.¹⁰

8 Constitution of Finland 731/1999 (*Suomen perustuslaki*). The full unofficial translation of the Constitution is available at <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731_20111112.pdf> accessed 26 February 2019.

9 Government proposal HE 309/1993 vp (n 5) 53. The government proposal refers to the difficulty of defining the concept of a family and notes that family life is in any case part of the protected sphere of the right to privacy.

10 See HE 309/1993 vp (n 5) 53. It is, of course, true that defining the protected sphere of family life can be quite difficult and even politically charged; see eg Liisa Nieminen, *Perus- ja ihmisoikeudet ja perhe* (Talentum 2013) 115–122 and Päivi Hirvelä and Satu Heikkilä *Ihmisoikeudet: Käsikirja EIT:n oikeuskäytäntöön* (Alma Talent 2017) 747–755 on the case

In addition to sections 6 and 10, children are specifically mentioned in a few other sections of the Constitution. With regard to family life the third relevant provision is in section 19, which deals with right to social security and, among other things, guarantees the right to basic subsistence in the event of unemployment, illness, and disability. With regard to family life, section 19, subsection 3 provides as follows:

The public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population. Moreover, the public authorities shall support families and others responsible for providing for children so that they have the ability to ensure the wellbeing and personal development of the children.

This provision is grounded on the conception of the family as the natural environment for the child to live and grow up in. According to the preparatory works, the 'chief responsibility for a child's development and upbringing belongs to the family, in particular to the child's parents or other persons that are responsible for his or her custody according law'¹¹ The preparatory works here also refer to the CRC as a part of the normative framework, though the mention is somewhat vague.

In addition to the Constitution and the key provisions in ECHR and CRC, there are, of course, also other treaty obligations that are relevant for children's family ties. The EU Charter of Fundamental Rights provides for the protection of family life and the role of parents in several articles, such as article 7 on respect for private and family life, article 14 on the right to education, and article 33 on family and professional life. Article 24 on the rights of the child specifically decrees that every child 'shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests', thus echoing the provisions of the CRC.

law of the ECtHR on applicability of the right to family life, and Dorota Gozdecka and Sanna Koulu, 'What to do with the Other in Human Rights Law? Ethics of Alterity versus Ethics of Care' in Anne Griffiths, Sanna Mustasaari and Anna Mäki-Petäjä-Leinonen (eds), *Subjectivity, Citizenship and Belonging in Law: Identities and Intersections*. (Routledge 2016) 171–190 on a discussion of the ethical dimensions of defining families in law. However, similar difficulties also attach to the concept of private life, so singling out family life in particular may not provide the kind of clarity that was presumably the goal.

11 See HE 309/1993 vp (n 5).

While the role of the family and the protection of family life are well established on constitutional and human rights levels, their scope and weight in legal decision-making can be surprisingly hard to pin down. It is as if the importance of family ties and family life is often taken as given in the sense that it does not require in-depth examination or analysis. Here, one example can be found in the national implementation of the 1996 European Convention on the Exercise of Children's Rights, which was incorporated into domestic law in 2010.¹² Curiously enough, neither the text of the convention nor the national incorporating legislation refers specifically to the right to family life even though many of the issues are highly pertinent.¹³

3 The Role of Case Law in Developing the Constitutional Protection of Family Life

In the previous section I noted that the current Constitution of Finland does not explicitly mention the protection of 'family life' in its list of constitutional rights, though family life is implicitly included in the scope of 'private life'. Here, it is worth highlighting the role of the Finnish Supreme Court (in Finnish, *korkein oikeus*), as the court has taken up the challenge of elaborating on the right to privacy and examining the interplay between constitutional provisions and ECHR obligations in several published decisions.

The inclusion of family life within the concept of private life was addressed specifically in the Supreme Court decision KKO 2011:11 on compensation for emotional suffering due to child abduction. The case concerned the possibility of awarding damages on the basis of emotional suffering, as the relevant provision (Tort Liability Act, 412/1975, chapter 5, section 6)¹⁴ requires an

12 The implementation took place by act 906/2010, based on government proposal HE 66/2010 vp.

13 For comparison, see *Handbook on European Law Relating to the Rights of the Child* (European Union Agency for Fundamental Rights and Council of Europe 2015) 85. The handbook is available online at <https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.pdf> accessed 15 October 2018.

14 In Finnish *vahingonkorvauslaki*. An unofficial translation is available at <https://www.finlex.fi/fi/laki/kaannokset/1974/en19740412_19990061.pdf> accessed 31 August 2018, but it is rather out of date at this point in time. However, the relevant part of the section is factually similar in that it refers to 'anguish arising from an offence against liberty, honour or the domestic peace or from another comparable offence'.

infringement of specific constitutional rights such as the right to privacy. The Supreme Court noted that child abduction involves interference with family life and that in the circumstances of the case this comprised a violation of the rights safeguarded by section 10 of the Constitution even though family life was not expressly mentioned in the provision. Thus the court awarded the damages that were sought.

The relation between ECHR obligations and the Constitution was examined in the landmark decision KKO 2012:11 on the establishment of paternity. In this rare and significant plenary decision, the court considered whether a legislative choice made in the Paternity Act of 1975¹⁵ had to be overturned due to its lack of compliance with constitutional and human rights provisions. The original implementation of the 1975 Paternity Act had placed a rather restrictive time limit of five years from its entry into force on a child's right to bring a paternity case to court. This meant that some children born out of wedlock before 1976 lost their chance to establish paternity without ever having had the legal competence to bring action. The time limit had been ruled to be in violation of article 8 of ECHR in several ECtHR judgments against Finland, most notably in cases *Grönmark v Finland*¹⁶ and *Backlund v Finland*¹⁷ in 2010. In 2012, the Supreme Court noted that in examining the constitutionality of national legislation on the basis of the authorisation given to it in section 106 of the Constitution, it had to account for the provisions of ECHR and the case law of ECtHR as well. In effect, the decision meant including the human rights obligation to protect private and family life in the scope of constitutional protection. The court set aside the time limit that had been established almost forty years earlier and upheld the decision of the lower court that had established paternity.¹⁸

Moving on from the constitutional level, case law is also important in developing the protection of family life through applying substantive legislation. Many of the key provisions that help realise a child's right to family life can be found in the legislation on parenthood and adoption, custody and contact, child welfare services and care orders, and asylum and migration. These pieces of legislation have somewhat different aims and goals, though, and thus they emphasise different aspects of the right to family life.

15 Paternity Act 700/1975 (*isyyslaki*).

16 *Grönmark v Finland* App no 17038/04 (ECtHR, 6 July 2010).

17 *Backlund v Finland* App no 36498/05 (ECtHR, 6 July 2010).

18 The decision also reaffirmed the inclusion of family life within the concept of private life, echoing the preparatory works of the constitutional rights reform and the decision in KKO 2011:11.

A note on case law in Finland

The case law on child law has a few notable features in the Finnish context. In brief, the published case law of the Finnish Supreme Court (in Finnish, *korkein oikeus*) on family and child law does not comprise that many decisions per year, but the reasoning and the grounds that are examined in each decision have an important role in developing the law. Meanwhile, quite a few of the published cases consist of what Finnish jurisprudence loosely terms 'precedents giving instructions for reasoning',¹⁹ reflecting the difficulties in presenting firm rules on the nuanced and complicated subject matter. The procedural context also brings with it some uncertainty in that there may be issues where a Supreme Court decision would be necessary for clarifying the law, but for one reason or another such a case has not been brought before the court yet.

While the Supreme Court publishes relatively few decisions per year, the Supreme Administrative Court's case law is more numerous. The jurisdiction of the Supreme Administrative Court (in Finnish, *korkein hallinto-oikeus*) covers administrative law, taxation, social security and more; more specifically, care orders and other child protection matters as well as issues concerning migration law belong to the Supreme Administrative Court's ambit. Its decisions serve a somewhat different function from those of the Supreme Court, as the case law contributes to the overview of the legality of administration as a whole in addition to deciding individual cases.²⁰

As a result of the different traditions of the two supreme courts in Finland, along with the uncertainties of the procedural setting, the case law on children's right to family life has a few different strands that do not correspond directly to the issues emphasised in legislation. Some topics which are notable in legislation have not given much rise to case law, while some others have been the focus in relatively many cases. For example, the case law on adoption is rather sparse and does not elaborate all that much on the right to family life despite the topic being highly relevant for protection of family life. On the other hand, there is interesting case law on international child abduction that

19 In Finnish, *harkintaohjeprejudikaatti*, meaning precedents where there is no decisive legal rule being communicated by the court. See, for instance, Supreme Court judge Pertti Välimäki's essay on the procedural rules on appeal to Supreme Court, and on the role of precedent, available at <<http://korkeinoikeus.fi/fi/index/muutoksenhakijalle/valituslupahakemuksensisallosta.html>> accessed 1 September 2018.

20 Olli Mäenpää, *Hallinto-oikeus* (Alma Talent 2018) 849–851, Markus Kari (ed), *Oikeusvaltion rakentaja – Korkein hallinto-oikeus 100 vuotta* (Edita Publishing 2018).

also discusses the right to family life.²¹ In the following section, I wish to outline these differences briefly and consider how they reflect on case law on the respective issues.

4 Family Life in Substantive Legislation and Case Law

4.1 *Parenthood and Adoption*

The protection of family life in the Acts on parenthood and adoption (Paternity Act, 11/2015, *isyyslaki*²² and Adoption Act, 22/2012, *adoptiolaki*)²³ focuses on *biological descent and legal status*. Most recently, the newly enacted Maternity Act (253/2018, *äitiyslaki*) has extended the legal recognition of parenthood to co-mothers in certain cases. The acts are broadly similar in their approach to respect for family life. In short, the protection of private and family life is recognised as the constitutional right at hand, and the provisions of the acts try to strike a balance between the various parties' interests. Thus, for example, the child's right to private life is reflected in the provisions on the child's right to bring a paternity case to court and on his or her right of veto in certain circumstances, while the importance of family ties can be seen to underlie the time limit placed on the mother and the legal father if they want to bring action on revoking paternity to court (section 44).²⁴ The Paternity Act and Maternity Act also reflect the growing importance of intent as a factor for parenthood, as both allow for the possibility of registering parenthood on the basis of informed consent to assisted reproductive treatments.

Filiation and paternity fall within the scope of private life according to article 8 of the ECHR, and the protection of private life and legal status is a key concern in the provisions of the reformed the Paternity Act of 2015. However, established family ties are also pertinent and bring the protection of family life to the fore. For instance, section 44 of the Paternity Act provides that the mother or the legal father can only bring an action on annulling paternity within

21 Cases on international child abduction according to the Hague Convention are heard at the Helsinki Court of Appeals as the first instance. Thus, they do not require leave to appeal (in Finnish, *valituslupa*) in order to be brought before the Supreme Court on appeal.

22 The unofficial translation is available at <https://www.finlex.fi/fi/laki/kaannokset/2015/en20150011_20151596.pdf> accessed 1 September 2018.

23 The unofficial translation is available at <<https://www.finlex.fi/fi/laki/kaannokset/2012/en20120022.pdf>> accessed 1 September 2018.

24 See eg Markku Helin's systematic commentary of the Paternity Act, *Isyyslaki* (Talentum Pro 2016).

two years of the birth of the child as a rule,²⁵ a limitation that helps protect the child's established circumstances. One of the more interesting provisions for the protection of family life is section 42, subsection 3, which concerns situations in which the child's legal father knew that he was not the biological father and still acknowledged the child in writing as his. In such cases, the legal father is barred from bringing the case to court, thus indirectly protecting the child's right to established family ties.

The reform of the Paternity Act in 2014 also emphasised the role of human rights and the praxis of the ECtHR. The influence of ECtHR case law is visible throughout the Act, but two notable examples are found in section 42, subsection 2 and section 65. The first example, section 42, subsection 2, deals with the case where a man suspects he is the actual biological father of a child whose mother is married to someone else. The ECtHR has examined the human rights dimensions involved in somewhat similar circumstances in e.g. *Anayo v Germany*²⁶ and *Ahrens v Germany*²⁷ and noted that the member states could be considered to have a wide margin of appreciation.²⁸ The Finnish legislative approach in section 42, subsection 2 aims for a reasonable balance between the different interests. In brief, the putative father will have right to contest the husband's paternity if three criteria are fulfilled: the mother and the husband were living apart at the time, a relationship comparable to a family bond was formed between the putative father and the child, and the bringing of the action is in the best interests of the child.²⁹

The second example revisits the issues brought up in the Supreme Court decision KKO 2012:11. The key question in the case concerned the

25 The time limit is the same as in the previous act before the 2014 reform. Interestingly, the preparatory works for the reform only refer to the child's best interests, not her right to family life, as grounds for the limitation (see government proposal HE 91/2014 vp 57.) While the mention is brief, it can be surmised that the best interests of the child were seen as encompassing the right to family life as well.

26 *Anayo v Germany* App no 20578/07 (ECtHR, 21 December 2010). Here, the application concerned contact between the biological father and child as opposed to paternity itself, and the Court found a violation of article 8.

27 *Ahrens v Germany* App no 45071/09 (ECtHR, 22 March 2012). In cases *Ahrens v Germany* and *Kautzor v Germany* no violation was found, as the German courts were considered to have struck a balance between the conflicting interests.

28 Hirvelä and Heikkilä (n 10) 700.

29 It is worth noting, however, that the provision does not apply to the reasonably common case where the child's paternity is established on the basis of somebody acknowledging the child, even if the other criteria were met.

constitutionality (and compliance with human rights provisions) of the original implementation of the Paternity Act of 1975. As discussed earlier, the original act had set a restrictive time limit on a child's right to bring a paternity case to court. The time limit was determined to be unconstitutional by the Supreme Court in 2012, and in 2015 section 65 of the new Paternity Act removed this time limit completely.

In adoption cases, the importance of family life shows in two key aspects. First, the consent of a child's earlier parents is considered in assessing an adoption application, and in cases where consent is not given the decision may turn on whether there was family life between the child and the non-consenting parent. Second, the existence of established family life has also been relevant in earlier case law when considering whether to allow adoption of an adult, since Finnish law requires an established bond like that between a child and a parent.

In contrast to paternity, adoption decisions may not as a rule be revoked or annulled. However, an interesting Supreme Court decision took place in case KKO 2011:106. The case concerned a decision on adoption that had mistakenly been made a few days after the adoptive father had died, even though by law there were no grounds for the decision at that point. The child's right to family life was a crucial factor in not revoking the decision.

4.2 *Child Custody and Contact*

The legislation and case law on child custody and contact is based on the Child Custody Act, 361/1983 (*laki lapsen huollosta ja tapaamisoikeudesta*). The Act can be said to protect children's family ties both in formal terms (in *issues concerning the legal status of having custody*) as well as more pragmatically in protecting *relations of care*.³⁰ While the Act is still based on a rather traditional understanding of family life, a significant reform took place in late 2018³¹ and the new provisions also recognise the possibility of family life being established between a child and a step-parent or grandparent, for example.³² When the reform enters into force, it will be possible to establish a legally enforceable

30 For discussion on care and ethics of care in relation to child custody and contact, see eg Carol Smart and Bren Neale, *Family Fragments?* (Polity Press 1999) and Choudhry and Herring (n 2), as well as in the Finnish context Sanna Koulu, *Lapsen huolto- ja tapaamissopimukset: Oikeuden rakentee ja sopivat perheet* (Lakimiesliiton kustannus 2014).

31 HE 88/2018 vp. The proposal is available online at <<https://www.finlex.fi/fi/esitykset/he/2018/20180088.pdf>> accessed 15 October 2018.

32 See HE 88/2018 vp (n 31) 54–55.

right for the child to have contact with, for example, a step-parent if the criteria in the proposed section 9 c are met. This could also indicate that there will be more emphasis on protecting family ties even when they are not based on biological or legal status.

The case law of the ECtHR has established that the mutual enjoyment of family life by parents and children is a core part of the right to private and family life in article 8.³³ This stance is reflected also in Finnish case law on contact between parents and children, such as the Supreme Court case KKO 2017:54. The decision itself was somewhat technical in nature, as it dealt with how the Court of Appeal should have handled the case, but the reasoning also considered the protection of family life. In the case there had been a dispute concerning contact between two young children and their mother who lived separately, and the father had refused to bring the children to the previously-agreed meetings because of the mother's earlier lateness in returning the children. The District Court (the court of first instance) had refused the mother's application for enforcement, and the Court of Appeal had declined to hear the case. The Supreme Court noted, *inter alia*, that the original decision had interfered with the mother's and the children's right to family life, and thus the Court of Appeal should have heard the case.³⁴ Interestingly, the decision does not mention any specific constitutional provisions. Instead, it discusses 'constitutional and human rights' as a whole, and only refers specifically to the provisions of ECHR and the case law of the European court. A similar model of reasoning was arguably adopted in the 2018 preparatory works for the reform of the Act on Custody and Contact in that the government proposal discusses the constitutional rights of children only briefly and focuses more on the ECHR obligations and case law.³⁵ However, the government proposal does include a weighty section on the compatibility of the proposed provisions with the Constitution and with international treaty obligations.³⁶ Here, the proposal considers the interplay of constitutional provisions, ECHR and CRC obligations, and other international

33 See eg Hirvelä and Heikkilä 2017 (n 10) and *Handbook on European Law Relating to the Rights of the Child* (n 13) 82.

34 The case also concerned the importance of the best interests of the children, as the mother's lateness in returning the children was due to her worry about the other child's visible bruises. However, it is worth noting that as the precedent concerned procedural issues, the Supreme Court did not carry out a full evaluation of the best interests of the children in the material case.

35 See eg the brief remarks on HE 88/2018 vp (n 31) 5, and the further discussion on ECtHR case law on 13–14.

36 HE 88/2018 vp (n 31) 73–75, on whether normal legislative procedure is appropriate for the reform.

treaties in a rather successful way. The protection of family life is only addressed briefly, though, and the constitutional provision most in the spotlight is section 9 of the Constitution on the freedom of movement.³⁷

4.3 *Child Protection and Child Welfare Services*

The act on child protection and child welfare services (Child Protection Act, 417/2007, *lastensuojelulaki*) is rather pragmatic with regard to the protection of family life. While the main focus is on the *legal position of the children themselves and their parents*, there are also provisions that recognise *the variability of family life* (e.g. section 32 on the child's close relations and section 54 on contact when the child is in care). Thus, section 32 provides, among other things, that before a child is placed away from home, the authorities should investigate whether it is possible for the child to live with their non-residential parent or with relatives or other close persons or whether these people can otherwise participate in supporting the child. Similarly, the section on contact after a care order (section 54) notes the following:

Children in substitute care must be guaranteed human relations that are important, continuous and safe for their development. Children have the right to meet their parents, siblings and other people close to them by receiving visitors or by making visits outside the place of substitute care and to keep in contact otherwise [...].

As mentioned above, there is a lot of case law on child protection and child welfare services.³⁸ In addition to the case law of the Supreme Administrative Court, many highly relevant issues are examined more closely in the praxis of the Parliamentary Ombudsman. The Ombudsman's role is overseeing that public authorities and officials act in accordance with the law and with constitutional and human rights obligations, and the Ombudsman can also carry out inspections, in youth homes or child protection facilities for example. The Ombudsman's praxis is especially relevant for those issues that rarely give rise to actual court cases, such as local practices in facilitating contact between

37 HE 88/2018 vp (n 31) 74–75. The issue here concerns a proposed provision (section 9 b) to the effect that in some rare circumstances a parent may have to hand over their passports before a visitation between parent and child can take place.

38 For an overview of the Finnish context see Tarja Pösö and Raija Huhtanen, 'Removals of children in Finland: A mix of voluntary and involuntary decisions' in Kenneth Burns, Tarja Pösö and Marit Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (OUP 2016).

children in care and their other family members, that are still significant for the actual realisation of children's right to family life.³⁹

However, while the protection of family life is an important concern in child protection cases, the consideration of family life is often tacit. The protection of family life obviously affects the interpretation of the Child Protection Act, especially when considering placement into substitute care, but a detailed examination of the elements of family life is uncommon. The slight exception here seems to consist of cases concerning contact during substitute care. For example, a recent Supreme Administrative Court decision in KHO 2017:54 referred to the protection of family life and noted that the provisions on contact must also allow for the establishment of new close relationships during the care order. While the circumstances of the case were somewhat unusual, the Court stated specifically that the child's right to close relationships as guaranteed in section 54, subsection 1 is not limited to relationships established before the child was placed in care, but that the provision also means that the child has the right to develop new relationships during care. The decision as a whole is rather thorough and carefully reasoned.⁴⁰ The Court also includes section 10 of the Constitution in its list of legislation that was applied and discusses the viewpoints that had been presented by the Constitutional Law Committee during the drafting of the Child Protection Act.

4.4 *Migration and Asylum*

Migration and asylum issues are covered by the Aliens Act, 301/2004 (*ulkomaalaislaki*),⁴¹ which might be described as having a somewhat ambivalent stance

39 Cf eg the case of *Gluhaković v Croatia* App no 21188/09 (ECtHR, 12 November 2011). For a discussion of legal safety in court settings, see Virve-Maria de Godzinsky, 'Legal Safety of the Child in Court Procedures of Care Orders' (2013) 7–8 *Nordisk socialrättslig tidskrift* 43–80.

40 Another thoroughly and carefully argued decision took place in case KHO 2015:38, which concerned restrictions placed on phone calls between father and child. There were restrictions on contact due to concerns about domestic violence, and the social authorities had determined that phone calls also needed to be restricted. The phone call had to be on speaker phone so that a member of the staff at the child's residential home could make sure that the child was not harassed. The Supreme Administrative Court examined this restriction in light of domestic legislation, constitutional rights, and ECtHR case law, and came to the conclusion that the restriction was unlawful. The decision mentioned but did not consider the significance of family life in particular; instead, the decision weighed the secrecy of confidential communications according to section 10 ss 2 of the Constitution (see above, n 8 for the unofficial translation).

41 The unofficial translation is available at <https://www.finlex.fi/fi/laki/kaannokset/2004/en20040301_20101152.pdf> accessed 26 February 2019.

on children's family life. The Act is one of the few pieces of legislation that is based on the existence of family ties and established family life rather than on legal status, but, in practice, its implementation can be challenging.

The existence of family ties is one of the grounds that are considered in granting residence permits. Family ties can be established on the basis of legal status (see section 37, subsection 1), biological kinship (e.g. section 65) or *de facto* family life (section 37, subsections 2–3). The section on defining family members is rather lengthy but valuable for examining the understanding of family life for the purposes of the act. Firstly, section 37, subsection 1 notes that when applying the act, 'unmarried children under 18 years of age over whom the person residing in Finland or his or her spouse had guardianship are considered family members'. Subsection 2 provides for the recognition of family membership with regard to marriage-like relationships. As a rule, the couple must have lived together in the same household for at least two years, but this time limit is waived if the persons have a child in their joint custody. While subsections 1 and 2 refer to guardianship and custody as legal concepts, subsection 3 makes it clear that *de facto* guardianship and care can also establish family ties for the purposes of the act:

(3) If an unmarried child under 18 years is in *de facto* care of a person and is dependent on such care, he or she shall be considered to be the guardian's child for purposes of ss 1 even when no official statement is available on the guardianship (foster child). This requires reliable evidence that the child's previous guardians have died or are missing and that the sponsor or his or her spouse was the child's *de facto* guardian before the sponsor entered Finland. If the sponsor is a foster child residing in Finland, reliable evidence is required to show that the person concerned was the sponsor's *de facto* guardian before the sponsor entered Finland. (549/2010)⁴²

The consideration of *de facto* family ties has proved to be highly relevant in practice, as a large amount of residence permits are issued on basis of family ties.⁴³ With the on-going conflicts in the Syria region official proof of family ties can be hard to obtain, and assessment of family ties often relies on less black-and-white evidence even in clear cases. Family ties are examined in the

42 Here, the available unofficial translation is somewhat misleading regarding ss 3, so the text included here is the author's own translation.

43 Eg Jaana Palander, 'Perheenyhdistäminen ja perhe-elämän suoja' in Heikki Kallio, Toomas Kotkas and Jaana Palander (eds), *Ulkomaalaisoikeus* (Talentum 2018) 357.

proceedings concerning the need for international protection or other grounds for asylum, and family ties also affect the consideration of the best interests of the child.⁴⁴

The amount of cases also shows in the case law of the Supreme Administrative Court, and an important strand in this case law is assessing how 'real' family ties are. For instance, in its decision KHO 2016:204 the court examined the case of a mother who had been granted asylum after leaving her 2-year-old child behind in her own mother's care. The mother had applied for a residence permit for her child as well, and the court assessed whether she should be considered as having relinquished the custody of the child. The court referred to articles 3, 7 and 10 of CRC as well as article 8 of ECHR among other applicable law, and came to the conclusion that the 2-year-old was the mother's child in the sense of section 37. The alternative approach would have been to consider the grandmother as the child's guardian according to section 37, subsection 3, which would have precluded the mother's role. The decision does not refer to any constitutional provisions or specific ECtHR case law, but the provisions of CRC and ECHR are given a lot of weight in the reasoning.

5 Conclusions

The Finnish Constitution does not explicitly mention the protection of family life in its list of constitutional rights and section 10 on the right to privacy only mentions private life. However, the preparatory works make it clear that the concept of private life is to be understood as encompassing family life as well, and this starting point has been reaffirmed in case law. All in all the two highest courts of Finland, the Supreme Court and the Supreme Administrative Court, have had a significant role in integrating the human rights obligations with our national legislation and constitutional rights protection, and their decisions can also influence legislative work. While case law has been noteworthy in elaborating on the protection of family, case law does have a few drawbacks as

44 See Hannele Tolonen, 'Children's Right to Participate and Their Developing Role in Finnish Proceedings' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019); Hannele Tolonen and others, Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same? in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019); Suvianna Hakalehto, 'Constitutional Protection of Children's Rights in Finland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

a way of developing law as well. First, since case law by its very nature concerns individual cases, it only rarely allows for the kind of universalistic legal argumentation that is necessary for in-depth analysis of concepts such as family life. A second, more fundamental issue is that judicial decision-making is not subject to the parliamentary process, so the courts' law-making powers need to be limited – as the Supreme Court recognised in its significant decision in KKO 2012:11.

Thirdly, the concept of family life can be somewhat hard to pin down, and this means that family life is surprisingly rarely discussed or elaborated on in case law. Family ties and their importance are either taken as a given or elided in published cases. Some of the more interesting case law is to be found in the field of migration and asylum law, where family ties are examined more plainly. However, the paradigmatic difference between this body of case law and more traditional family law cases is striking, as in family law cases family ties are rarely if ever examined in terms of whether they are authentic enough or whether they merit protection.

Especially in cases that concern the nuclear family, without direct interference from the State or from other parties, the child's right to family life is often conflated with that of the parents. Thus, for example, with regard to contact between child and parent, the child's right to family life is indirectly protected when the parent seeks contact. Meanwhile, a child has no independent legal standing according to the Act on Custody and Contact (361/1983) to demand for their right to family life to be upheld if the parent wishes to cut ties with the child. The recent reform of the Act does account for the possibility of the child having close relationships that are not based on parenthood, but here too the focus is on 'established relationships that are comparable to the relationship between parent and child' and the child has no independent procedural standing.

In effect, while children's rights are inextricably linked with the right to family life, children are not necessarily perceived as having an *independent* right to protection of their family life. While children's family life is protected on the basis of several constitutional and human rights provisions, that protection sometimes seems to derive from the protection of the family unit rather than from any independent right of the child. It is as if the protection of family life is a side effect of the family itself. Of course, the implicit conflation of different family members' right to family life is rather reasonable in cases where there is no internal conflict or tension between individuals' rights to family life. However, it may mean that it is harder to recognise and safeguard children's right to family life in situations that do not match with this ideal conception of the family.

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