Grandparents, child arrangements and Article 8 ECHR.

Damian Garrido, QC, Harcourt Chambers

1. Article 8 of the ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and 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 crime and disorder, for the protection of health and morals, or for the protection of the rights and freedoms of others."

2. In *Pretty v United Kingdom* [2002] 2 FLR 45 the European Court of Human Rights considered the ambit of Article 8 at para 61:

> "Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world".

3. Interpreting "the right to develop relationships", in *Anufrijeva v Southwark LBC* [2004] 1 FLR 8 the Court of Appeal said:

> "[12] The reference to the right to develop relationships with other human beings demonstrates the link between the right to private life and the right to family life. If members of a family are

prevented from sharing family life together, Art 8(1) is likely to be infringed."

4. "Family life" has been interpreted more widely by the ECtHR than the particular relationships specified in section 10 Children Act 1989. In *K v UK* (1986) 50 DR 199 that predates the Children Act, the Commission observed that:

   "The question of the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties."

5. This fact based flexibility was restated as the core principle of determining 'family life' in Lebbink v The Netherlands [2004] 2 FLR 463 at para 36 in identical terms.

6. In *Singh v Entry Clearance Officer* [2005] 1 FLR 308, Munby J (as he then was) undertook a comprehensive survey of the case-law relating to the existence of family life. At para 60, his Lordship noted that:

   "The Strasbourg court has never sought to define what is meant by family life, nor has it even sought to identify any minimum requirements that must be shown if family life is held to exist."

7. However, as long ago as 1979, in an important decision of ECtHR in *Marckx v Belgium* (1979) 2 EHRR 330, at para 45 family life was recognised to include:

"At least the ties between near relatives, for instance, those between grandparents and grandchildren, since such relatives play a considerable part in family life."

8. In *Bronda v Italy* [1998] HRCD 641 it was accepted, importantly however on the facts of that particular case, that a grandparent had sufficient relationship with her grandchild to establish 'family life'.

9. In *Marckx v Belgium*, the ECtHR also held that the 'right to respect' in Article 8(1) imposed a positive obligation to ensure an effective means of 'respect' for those rights.

10. In *Yousef v The Netherlands* [2003] 1 FLR 210 the paramountcy principle was reiterated by the ECtHR to be applicable to decisions about rights under Article 8:

"[73] …the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail."

11. Section 10 Children Act 1989 defines those people permitted as of right to make an application to the court for a section 8 order (ss.4 & 7) or child arrangements order (ss.5). It does not include a grandparent, who requires leave to make an application. Section 10(9) sets out the factors to which the court must have "particular regard":

(a) the nature of the proposed application for the section 8 order;

(b) the applicant's connection with the child;

(c) any risk there might be of the proposed application disrupting the child's life to such an extent that he would be harmed by it;

(d) if the child is being looked after by a local authority, (i) the authority's plans for the future, and (ii) the wishes and feelings of the child's parents.

12. In *Re B (Paternal Grandmother; Joinder as Party)* [2012] 2 FLR 1358, Black LJ reviewed the authorities addressing permission applications and gave guidance on the application of the section 10(9) factors:

> "[39] …Section 10(9) does not contain anything in the nature of a test by which an application should be judged, nor even criteria which must be satisfied before leave can be given… Neither does the subsection circumscribe the factors that can be taken into account in determining the leave application; it leaves the court to take into account all the material features of the case and merely highlights certain matters which are of particular relevance."

13. Black LJ went on to consider a particular factor that does not appear in section 10(9) but had developed in the authorities as being a key consideration in determining leave applications:

> "[48] …By picking out some factors to which the court should have 'particular regard', it acknowledges by implication that there may be other factors which the court has to consider. It would be

wrong, in my view, to try to list or limit these factors which will vary infinitely from case to case. One amongst them is plainly the prospect of success of the application that is proposed; leave will not be given for an application that is not arguable."

14. This approach may be considered to sit unhappily with the decision of the Court of Appeal 10 years earlier in *Re J (Leave to issue application for residence order)* [2003] 1 FLR 114 where Thorpe LJ said:

"[14] The statutory language is transparent. Nowhere does it import any obligation on the judge to carry out independently a review of future prospects…. [18] I am particularly anxious at the development of a practice that seems to substitute the test, "has the applicant satisfied the court that he or she has a good arguable case" for the test that Parliament applied in s 10(9). That anxiety is heightened in modern times where applicants under s 10(9) manifestly enjoy Art 6 rights to a fair trial and, in the nature of things, are also likely to enjoy Art 8 rights."

15. To add to the potential for confusion, Wilson LJ (as he then was) in *Re H (Leave to apply for residence order)* [2008] 2 FLR 848 said:

"[33] …I am clear that, in the discretionary exercise, the merits of the proposed application also fall for broad consideration".

16. In another seeming conflict with the later decision in *Re B (Paternal Grandmother; Joinder as Party),* Thorpe LJ emphasised the importance of properly considering the benefits that grandparents have to offer when he said:

> "[19] …Judges should be careful not to dismiss such opportunities without full inquiry. That seems to me the minimum essential protection of Arts 6 and 8 rights that [the grandmother] enjoys.'

17. Whereas, Black LJ came to the judgment that the preferred approach to the process of considering a grandparent's application is:

> "[50] …that there is room, in cases concerning children, for applications or proposed applications to be checked at a very early stage and without wholesale investigation. The court has a broad discretion to conduct the case as is most appropriate given the issues involved and the evidence available… [51] …there are various levels of investigation of the possibilities. At one end of the spectrum, the grandparent's proposals may need to be explored at a full hearing with reports and on oral evidence; at the other a careful but limited examination … may disclose overwhelming reasons why care by the grandparent is obviously not an option. I do not think, therefore, that what Thorpe LJ said should properly be interpreted as a requirement that any grandparent who wishes to put forward proposals … should be permitted to air their case at a full hearing on evidence."

18. Having obtained permission, there is no presumption that a child should have contact with a grandparent. More than 20 years ago, Butler-Sloss LJ (as she then was) in *Re A (Section 8 Order: Grandparent Applicaton)* [1995] 2 FLR 153 stated that there could not be said to be:

> "a presumption that once leave is given a grandparent should have contact unless cogent reasons are given for refusing it… it certainly cannot be said that because an applicant has been given leave in the family court that means that the respondent to that application has to prove the case. Save in the case of the special position of the natural parent, each person who wishes to have contact with a child has to show the grounds for wishing to have that contact. That may be easy, it may be difficult. Then once they have established a case for contact it will be necessary for the mother to show, as in this case, why there should not be contact."

DGQC

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