ARTICLE

Grandparents' and grandchildren's right to contact under the European Convention on Human Rights

*Prof. K. Sandberg**

1. Introduction

Whether grandparents have or should have a right to contact with their grandchildren, is a hot topic in many countries,[1] and it has been brought to the European Court of Human Rights (ECtHR) on some occasions. It may also be addressed from the point of view of the child, whether the issue is that they would like to have contact or rather would not. The objective of this article is to establish the extent of a right to family life in this regard, based on the jurisprudence of the ECtHR, with a particular view to how children's rights and interests are taken into account. The right to family life under Article 8 of the European Convention on Human Rights (ECHR) is often discussed as a right existing between parents and children, but family life is not subject to any formal delimitation. Rather, family is a changing construction[2] open to a variety of interpretations.[3] According to the ECtHR it is "essentially a question of fact depending upon the real existence in practice of close personal ties".[4] Thus, in several cases the Court has accepted that there may be "family life" within the meaning of Article 8 ECHR between grandchildren and grandparents, provided there are sufficiently close family ties between them.

Most of the relevant ECtHR cases concern children in the public care system or being considered for adoption, and the potential obligation of the authorities to ensure access in that situation, although some of the cases have private family law aspects. An overarching question is to what extent the principles to be drawn from these cases are applicable not only where public authorities are involved in the care of the child, but in private family law cases as well. I will return to this towards the end.

The cases examined below are *Kruškić v. Croatia*, 2014, *Manuello et Nevi c. Italie* (in French), 2015, *T.S. and J.J. v. Norway*, 2016, *Beccarini et Ridolfi c. Italie* (in French), 2017, and *Bogonosovy v. Russia*, 2019. These cases have been chosen as apparently being cases dealing with the topic of grandparents' right to contact over the last

* Kirsten Sandberg is Professor of Law at the University of Oslo Faculty of Law.

1 Regarding Spain, see Ribot in this issue. For the UK, see Kaganas & Piper (2020), Jarrett (2020). For Norway and the US, see Evenshaug (2004), pp. 72-77.

2 Khazova (2019), pp. 162-163.

3 Breen et al. (2020), p. 720, Crowley (2015), p. 56..

4 *K. and T. v Finland* (2001) at 150.

doi: 10.5553/FenR/.000050

few years in any detail.[5] Some older cases will be referred to but not presented in detail. I will not include all five cases in each part but will emphasise points of particular interest.

The objective is not to discuss whether contact with grandparents is good or bad for children. In an ordinary family situation, if such a thing exists, with no conflict between the parties, children's contact with their grandparents generally is considered beneficial for children.[6] On the other hand, the relationship between grandparents and grandchildren in certain cases may be detrimental to the child. The child being at the centre of attention in these cases, a topical question is whether the Court applies a child rights approach, based on the Convention on the Rights of the Child. That would primarily mean taking into account the child's right to family life as well as the views and best interests of the child. As the cases are brought by the grandparents, the potential right of a child to contact only appears indirectly from the cases, if at all.

The first parts of the article contain a legal analysis of the case law. The issues for examination are what is considered to constitute 'family life' in this respect within the meaning of Article 8 ECHR, and when does an interference with this right by the state amounts to a violation of Article 8 ECHR. The latter mainly depends on whether the interference is necessary in a democratic society, *i.e.* the assessment of proportionality. The relationship between grandparents and grandchildren is compared to that of children and their parents. Based on the case analysis, a separate section of the article questions the varying attention paid by the Court to the fact that there is a child involved, with its own rights and interests. The issue of whether the child may reject or limit contact is raised, along with the procedural issue of children as applicants. Another issue to be discussed towards the end is the applicability of the principles to private family law cases. The article is concluded by some critical comments on the case law.

2. Brief presentation of the facts of the cases

First, briefly on the circumstances of the cases (in chronological order). In *Kruškić v. Croatia* (2014) the two children lived with their parents and paternal grandparents from their births in 2005 and 2006 until their mother left in 2008 and their father in 2011. Shortly after, a dispute arose between the father and his parents concerning the children's place of residence. From the end of 2013 onwards, when the children were 'handed over' to their father, the grandparents had no contact with the children. The mother had access rights and is not part of the dispute. This is a high conflict case with the child protection authorities involved, supervising the parental care. The local social welfare centre described the grandmother as having manipulated the children whose every reaction, movement and gesture were controlled by her.

5 In *Mitovi v. The Former Yugoslav Republic of Macedonia* (2015) the grandparents were in the same position as the father, in that the domestic contact orders had not been enforced. A violation was found without much discussion, based on the principles laid down in *Kruškić v. Croatia* (2014).

6 Kaganas and Piper (2020), p. 194, Evenshaug (2004), pp. 69-70.

Family & Law 2021
doi: 10.5553/FenR/.000050

Manuello et Nevi c. Italie (2015) concerns a girl who lived with her parents from her birth in 1997 until her mother, in May 2002, notified her father that she wanted to separate from him. In June 2002, the director of the girl's kindergarten reported the father to the police for sexually touching the girl. The father was acquitted in 2006, but the girl lived with her mother who did not allow her paternal grandparents to see her. They had not met since 2002. Meetings had been ordered by the domestic court and planned by the social services but were never carried out. In 2006 the psychologist charged with monitoring the girl asked for the possibility to suspend a meeting because the girl had a sense of fear and anguish towards her father and associated her grandparents with him.
The boy in *T.S. and J.J. v. Norway* (2016), born in 2003, first lived in Poland and then in Norway with his parents. He was taken into public care in 2011 by the Norwegian authorities after the death of his mother. From 2013 onwards, the Polish maternal grandmother had visitation rights with the boy in Norway during two periods a year, each consisting of three visits of three hours. In 2014 the visits were reduced to twice a year for four hours, and the question was whether this limited amount was a violation of the grandmother's contact rights.
In *Beccarini et Ridolfi c. Italie* (2017), the three children, born 2001, 2002 and 2004, moved in with their maternal grandparents between 2003 and 2004. The grandparents were awarded custody since their mother was incapable of caring for them. The children suffered from various difficulties and behavioural problems and in 2012 were taken into public care. The authorities started a process concerning the adoptability of the children, and the grandparents did not see them for five years. The children moved back to their mother in 2016, but she was opposed to visits between them and their grandparents.
The child in *Bogonosovy v. Russia* (2019) was born in 2006 and in 2008 she and her mother moved in with her maternal grandparents. After her mother's death in 2011, her grandfather was appointed her guardian. A couple, who were relatives of the grandparents and who had helped out with the upbringing of the girl, adopted the child in 2013 with the consent of her grandfather (and guardian). The adoptive family denied the grandmother contact with the child and from November 2014 onwards also the grandfather. After the grandmother died in 2018 the case was continued by the grandfather.

3. Family life

As established by the ECtHR in the Marckx case of 1979:

> '… "family life" within the meaning of Article 8 (art. 8) includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life' (at 45).

Later the Court has specified this to require "sufficiently close family ties" between them (*Kruškić* 2014 at 108, with reference to Commission decision *Lawlor v. the United Kingdom* 1988). Where the child has lived with its grandparents for some

time, this is normally sufficient to constitute family life. Yet, cohabitation is not a prerequisite, as "close relationships created by frequent contact" also suffice (*ibid*).[7] In *Manuello et Nevi* (2015) and *Beccarini et Ridolfi* (2017), however, while referring to *Kruškić*, the Court does not mention the requirement that those family ties be sufficiently close. Reference is made to the case of *Bronda c. Italie* (1998), but there the Court includes in family life "the relations between a child and its grandparents, with whom it had lived for a time" (at 51), in that case until the girl was around five years old (at 10-15). In *Beccarini et Ridolfi*, the grandparents had in fact been caring for their three grandchildren for approximately eight years, from when the children were very young. In *Manuello et Nevi*, on the other hand, there is nothing to indicate that they had ever lived together, and nevertheless the existence of a family life is not questioned (see 3.2 below).

Turning back to the existence of "sufficiently close family ties" between grandparents and grandchildren, which is normally required: The point of departure is different where they have lived together and where they have not. After cohabitation for some time, the starting point is that family life in the meaning of Article 8 ECHR exists. Where they have not lived together, they need to prove that there is a "close relationship" between them, which should be "created by frequent contact" (*Kruškić* at 108, *T.S. and J.J.* at 23).

Regarding family life in practice, in *Kruškić* the grandparents had lived with their grandchildren for around seven or eight years since they were born. Without further ado the Court found this to constitute "family life" within the meaning of Article 8 ECHR (109). In *Beccarini et Ridolfi* the three children had lived with their grandparents for several years from the age of 1-2 years and the State did not contest the existence of a family life. Similarly, in *Bogonosovy* the girl had lived with her grandfather for five years. He had taken care of her from when she was one year and eight months old, during her mother's serious illness and death and for another two years until she moved out to live with her future adoptive parents. He was her guardian after her mother died. The Court was satisfied that family life existed between him and his granddaughter, which had not been disputed.

In *Manuelli et Nevi*, the government did not contest the existence of a family life between the grandparents and their granddaughter. Apparently they had never lived together, but under "facts" the judgment mentions that the grandparents regularly visited their son to see their granddaughter. In summer she spent a lot of time in their house where she had her own room and toys. The fact that the existence of a family life was not contested may imply that to all involved it was obvious that there had been frequent contact. Nevertheless, it is surprising that the judgment leaves out the requirement of "sufficiently close family ties" as well as the facts to substantiate such ties.

T.S. and J.J. illustrates the Court's assessment of the need for frequent contact when the child had never lived with his grandparent. At the age of four, the boy moved with his mother from Poland to Norway to join his father who had moved the year before. While still living in Poland, the boy and his maternal grandmother had "good contact" (6, 23). After he moved to Norway they talked on the phone

7 Herring (2009), p. 244, briefly presents the issue of grandparents' family life with their children.

doi: 10.5553/FenR/.000050

once or twice per week, and until his mother's death when he was eight years old, he visited his grandmother in Poland regularly. Because his father could not take care of him he was taken into public care later that year. His grandmother subsequently visited him in Norway three times between 2011 and 2013. The Court accepted their contact as family life:

> "After the death of X's mother, this contact, even if less frequent because of geographical distance, became more significant. The Court is thus satisfied that there is family life within the meaning of Article 8." (23)

Thus, the frequency of contact with a grandparent need not be decisive, especially if they live at a distance and in the light of their previous good contact while the boy lived in Poland. Taking into account the significance of the contact for the child, the Court accepted three visits in three years as constituting family life, together with frequent phone conversations. Digital meetings, often including video, should be all the better.

4. Interference with family life

The Court has repeatedly stated that in principle the relationship between grandparents and grandchildren is different in nature and degree from that between parent and child and thus, the relationship "generally calls for a lesser degree of protection" (*e.g. Kruškić* at 110). Whereas denying a parent access to a child taken into public care in most cases would constitute an interference with the parents' right to respect for their family life, this is not necessarily so for the grandparents.[8] Only if the grandparents are refused "the reasonable access necessary to preserve a normal grandparent-grandchild relationship" (*Kruškić* at 110, *T.S. and J.J.* at 24) may there be an interference.

The obligation of the State in this context is to act in a manner calculated to allow the ties between grandparents and their grandchildren to develop normally (*Kruškić* at 110, somewhat differently formulated in *Bogonosovy* at 82). However, the Court underlines that contact normally takes place with the agreement of the person who has parental responsibility, thus at the discretion of the child's parents (*Kruškić* at 112).

In *T.S. and J.J.*, where the boy was in public care, the authorities had granted the grandmother access to the child for four hours, twice a year. Considering that she needed to travel from Poland to Norway for each visit, the Court found the very limited number of hours per visit to be an interference with her right to respect for her family life.

In *Bogonosovy* the issue was post-adoption contact between the grandfather and his granddaughter. Although the obligation of the State will necessarily change when the legal relationship between the child and its biological parents is terminated by adoption (83), the issue of post-adoption contact between the grandfa-

8 Kilkelly (1999), p. 280.

ther and his grandchild should at least be examined by the domestic court, which had not happened. The State acknowledged this as an interference with the grandfather's right to respect for his family life.
In *Manuello et Nevi*, meetings had been authorised by court decision but not carried out. After a couple of years, the courts prohibited such meetings. As a result, it was impossible for the applicants to see their granddaughter, a situation which had lasted for twelve years. This amounted to an interference.
The grandparents in *Beccarini et Ridolfi*, with whom the grandchildren had previously lived, had not seen their grandchildren for five years, despite court decisions ordering the social services to organise meetings. There had been an almost total breakdown of the relationship between the grandparents and the grandchildren. Although it is not clearly stated, the Court finds this to be an interference with family life and goes on to consider whether it was justified.
In *Kruškić* the Court found the issue of access rights of the grandparents to be inadmissible as the domestic proceedings in this respect were still pending (112) and it is not further discussed.
In the four cases where it was tried, the Court found that there was an interference. In *T.S. and J.J.* the interference was the strict limitation of contact. In *Bogonosovy* it was on a procedural issue. In *Beccarini et Ridolfi* it consisted in non-enforcement by the social services of a national court order. Similarly, in *Manuello et Nevi*, it was first about not enforcing court orders but then about the court's ban on contact.

5. When does the interference amount to a violation?

For an interference with family life to be acceptable under Article 8(2) ECHR, it must be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society.

5.1 In accordance with the law

The term "in accordance with the law" requires the measure in question to have some basis in domestic law. The measure should also be compatible with the rule of law. Thus, it should be "accessible, foreseeable and accompanied by necessary procedural safeguards affording adequate legal protection against arbitrary application of the relevant legal provisions" (*Bogonosovy* at 87, with further references). In most cases this does not pose a problem.
In *Bogonosovy*, however, the Court had doubts as to whether the domestic law on the issue of post-adoption contact between the child and his or her relatives was sufficiently clear and foreseeable in its application. The law did not expressly state that the rights of relatives of the adopted child were ceased on adoption unless they applied for contact in the course of the adoption proceedings. Presuming that this was implied, the Court considered the actions of the domestic courts. The grandfather had requested the procedural time-limit for lodging his appeal against the adoption judgment to be restored, which was granted by the courts. The City Court dealing with his appeal should then have examined the issue of his post-adoption contact with his grandchild. Instead the grandfather was led to believe that he could have the issue of contact settled after the adoption proceedings were over,

Family & Law 2021
doi: 10.5553/FenR/.000050

which in reality was not possible. Consequently, the domestic courts had not acted in accordance with the law and Article 8 ECHR had been volated.

5.2 Legitimate aim

In *T.S. and J.J.*, the Court finds no reason to doubt that the limitation of the grandmother's contact with her grandchild was intended to protect "health and morals" and the "rights and freedoms" of the child (26). This is in line with the Court's practice over a number of years in cases concerning disputes over children. Similar expressions are found in the other decisions examined or seem to be implicit. In *Beccarini et Ridolfi* the Court accepts that measures aimed at protecting the child may imply a limitation of contact with members of the family (at 55).

5.3 Necessary in a democratic society

5.3.1 General principles

The requirement of necessity under Article 8(2) ECHR implies an assessment of the proportionality of an interference in relation to the aim it pursues.[9] In cases concerning the family life of parents and children, if their interests are in conflict, a "fair balance" between them should be struck.[10] In the balancing process, "particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents" (*Strand Lobben v. Norway* 2019 at 206 with further references).

As mentioned in 4 above, the relationship between grandparents and grandchildren calls for a lesser degree of protection than that between parent and child (*Kruškić* at 110, *T.S. and J.J.* at 28). It is worth noting that in the case of grandparents, the Court does not mention the requirement of striking a fair balance, in comparison to the cases of parents and children. On the opposite, it explicitly makes a difference between parents and grandparents. Consequently, one would assume that the interests of grandparents carry less weight in the proportionality assessment than those of parents, in case of a possible conflict with the interests of a child.

On the other hand, in *Manuello et Nevi* (at 49) the Court refers to 'parent', noting that the obligation to take measures to reunite the child and the 'parent' with whom she does not live is not absolute. It goes on to state that the authorities only have a limited obligation to resort to coercion and cannot authorise a parent to take measures prejudicial to the health and development of the child, yet should take all the necessary measures to facilitate the visits that could reasonably be required of them. The latter seems to be the focus of the Court's concrete assessment. Curiously, this gives the impression of transferring the criteria for assessment from the situation of the child and its parents to that of grandchild and grandparent, which is contrary to what the Court said in *Kruškić* and repeated in *T.S. and J.J.* Furthermore, in *Manuello et Nevi* (at 53) the Court states that measures resulting in breaking the ties between a child and his family may only be applied in excep-

9 Jacobs *et al.* (2017), p. 359.

10 *Strand Lobben v. Norway* (2019) at 206, Kilkelly (2014), part 3.1.

doi: 10.5553/FenR/.000050

tional circumstances, which is precisely the formulation used in cases concerning parents and children. The Court considers that this applies to the present case as well, without making any reservation for the different character of the relationship. It is hard to harmonise this with the lesser degree of protection for the grandparent-grandchild relationship referred to above, which the judgment does not mention. The case of *Beccarelli et Ridolfi* repeats the line of reasoning from *Manuello et Nevi*, including the requirement of exceptional circumstances.

5.3.2 Proportionality in practice

Looking at the specific cases, in *T.S. and J.J.* the proportionality discussion is only about the best interests of the child (at 29-30). It seems, then, that the child's interests carry great weight, which fits well with the fact that "a fair balance" of the respective interests is not mentioned. Thus, even if the grandparents have a right to family life and the Court has found an interference with that right, the grandparents' interests do not carry the same weight as those of the child. The issues of the child's best interests and own views are further presented below (Section 6).

In *Beccarini et Ridolfi*, according to the Court, the main reason for the disruption of the relationship between the grandparents and their grandchildren was the pending adoption process. The Government's only argument for not facilitating contact appears to be that in carrying out the delicate task of balancing the protection and care of the child with preparations for reestablishing the family relationship, the Social Services could not act speedily (at 47). The Court accepts that measures aimed at protecting the child may imply a limitation of contact with members of the family. However, in this case five years had passed without contact. In spite of the grandparents requesting a reconciliation procedure and following the directions of the Social Services, the latter had taken no step to reestablish the family tie. The complete rupture of any contact had very serious consequences for the relationship between them, and the Social Services had not sufficiently considered how some form of contact could be maintained. The Court found that the domestic authorities had not made adequate and sufficient efforts to preserve the family ties, which amounted to a violation of Article 8 ECHR (at 55-59).

The judgment contains no real proportionality discussion, perhaps because there were no good reasons for the Social Services not to comply with the domestic court orders. If, instead, the Social Services considered contact to be contrary to the child's best interests, it does not appear from the judgment which renders the children and their interests almost invisible.

In *Manuelli et Nevi*, on the other hand, the authorities had a more specific reason for denying the grandparents to have contact with their granddaughter. When the girl was just under five years old, in 2002, her kindergarten reported her father for sexually touching her. Soon after, the girl's mother demanded that his parental responsibility be revoked and that he be banned from seeing his daughter. Since then, the grandparents had not seen the girl. Four years later he was acquitted, but according to experts' reports, the girl did not want to see her paternal grandparents because she associated them with her father and the psychological suffering he had caused her. The domestic courts in decisions of 2008 (Court of Appeal) and 2009 (Cour de Cassation) concluded that in spite of his acquittal, one could not

doi: 10.5553/FenR/.000050

exclude that the child's discomfort was caused by the sexual touching, and upheld the ban on the grandparents' contact with the child (at 29).
The Court, however, found a violation of Article 8 ECHR. At the outset, it recalled the State's obligation to protect children from any interference in essential aspects of their private life. While aware that great caution is required in such situations and that measures to protect the child may involve limiting contact with family members, it considered that the competent authorities had not made the necessary efforts to safeguard the family bond and had not reacted with the required diligence. The Court stressed the fact that the grandparents had not been able to see their granddaughter for twelve years, that on several occasions they had requested the establishment of a reconciliation process with the child, that they followed the prescriptions of social services and psychologists, and that despite all of this no measures to reestablish the family tie had been taken. The complete denial of any contact had very serious consequences for the relationship between the applicants and the child and the possibility to maintain any form of contact had not been sufficiently considered (at 58).
While great weight was attached to the serious consequences for the grandparents, the interests of the girl were not further discussed. In the first place the Court emphasised issues of a more formal character. These were that three years had passed before the domestic court made a decision on contact and that the decision was never enforced. However, it also criticised the later court decisions that prohibited any contact. A reflection on what it would have meant for the child to have to meet her grandparents in this situation and what steps could have been taken to help her separate her feelings towards her father from those towards her grandparents, would have been timely in a proportionality assessment. When instead almost solely focussing on the interests of the grandparents, the Court did not really undertake such an assessment.
Consequently, in neither of the two Italian cases does the Court undertake a proper consideration of the proportionality of the limitations of contact.

6. Best interests and the child's own views

As the UN Convention on the Rights of the Child (CRC) applies to all European states, it has to be taken into account in considering their obligations under the ECHR, and the ECtHR often refers to the CRC. Two of its general principles are Article 3(1) CRC stating that the best interests of the child shall be a primary consideration in all actions concerning a child, and Article 12 CRC giving the child a right to be heard in matters affecting him or her. It is a longstanding tradition of the ECtHR to include the best interests of the child in the consideration of whether an interference with the right to respect for family life is "necessary in a democratic society" under Article 8(2) ECHR.
In line with this, in *T.S. and J.J.* the Court notes that consideration of what is in the best interests of the child is of crucial importance. In the concrete examination of proportionality in this case, the Court discusses two arguments related to the best interests of the child, the child's own views and his cultural heritage.

As for his views, the boy, aged 12, did not want to have a lot of contact with his grandmother, but agreed to meet once a year. On that background, the domestic court limited the grandmother's contact rights to twice per year, for four hours (at 10). The ECtHR was satisfied that given the child's age, the domestic court was justified in giving weight to his own views in the consideration of whether increased contact would be in his best interests. The Court also took into account that there would be nothing to prevent him from initiating increased contact at any time in the future if he so wished (at 29).

Regarding cultural heritage, the Court recognised that the grandmother represented an important part of the boy's linguistic and cultural ties to Poland. Still, this did not necessarily entail an obligation on the part of the Norwegian authorities to grant the grandmother contact rights. The boy's father who was also Polish, lived in Norway and had visits with the boy. Besides, despite the foster parents' efforts to facilitate maintenance of his cultural heritage, the boy had shown little interest in Polish linguistic and cultural activities. The Court accepted the view of the domestic court that maintaining his Polish identity could not override his best interests.

It is to be noted that in the issue of culture as well, the weight placed on the child's own views by the domestic court is supported by the Court. In my view the conflict should not be seen as one between his cultural heritage on the one hand and the child's best interests on the other. It is rather a balancing exercise *within* the child's best interests, whether to place more weight on cultural identity than on the child's own views. But from the point of view of the grandmother, preserving his Polish culture would have a value of its own.

Thus, the compromise reached by the domestic courts in this respect, to sustain the contact between the child and his grandmother but on a rather limited basis, was accepted by the ECtHR.

In *Bogonosovy*, as mentioned, the Court found a violation in that the domestic court had not dealt with the grandfather's wish to have contact with the child, which they should have done under the relevant domestic law. In this context, when stating that the issue should have been examined, the Court added "in particular by deciding whether this corresponded to the child's interests" (at 93). Thus, the Court acknowledged that the child's interests should be at the core of a decision on post-adoption contact for a grandparent of an adopted child.

In the two cases against Italy, *Manuello et Nevi* and *Beccarelli et Ridolfi*, the best interests of the child are mentioned only at a general level, and the children are less visible in the concrete assessment. To a certain extent this may be justified in the latter case where the domestic court had ordered contact, presumably after considering the children's best interests, and the problem was the social services' non-compliance with the court order. Yet, one could have expected the children's best interests to be given some attention in the ECtHR case, including their own views. In *Manuello et Nevi*, the omission is even more striking, as the domestic courts had concluded that contact should be banned, based on psychological evidence regarding the girl's reactions to her father's alleged sexual touching. When in 2006 the psychologist asked for any meeting to be suspended because of the girl's sense of fear and anguish, the girl had explicitly refused to meet her grandparents. The psychologist considered that the grandparents had difficulties in taking an in-

doi: 10.5553/FenR/.000050

dependent position in relation to their son and in understanding their granddaughter's unease with regard to meeting them.
The ECtHR acknowledges that her reaction was the reason for the ban on her grandparents' contact with her, but then goes on to almost exclusively emphasise the interests of the grandparents, concluding that Article 8 ECHR was violated. The finding of a violation would have been easier to accept if the Court had demonstrated that it took the girl's interests seriously.
While in all of these cases the best interests of the child are mentioned, for some of them it is only at a general level. The failure to undertake an individual best interests assessment runs counter to Article 3(1) CRC and also to the ECtHR's own jurisprudence. Importantly, it also means that the views of the child are not taken into account. The decisions vary greatly as to whether the child's views are considered at all and what weight is attached to them. Whereas in *T.S. and J.J.* the Court accepts the weight placed on the boy's views by the domestic court, in *Manuello et Nevi* it does not seem to take the girl's resistance to contact seriously. The lack of reference to the child's views is a criticism raised with other ECtHR decisions as well, even where the child's best interests are individually assessed.[11] It seems to stand in contrast to other family law cases where the Court has been praised for paying adequate attention to the child's views.[12]

7. Children as applicants

Children who would like to see their grandparents more than they do, may not easily bring their case to Strasbourg. Besides being an impractical procedure for children, there are formal obstacles regarding standing and representation before domestic courts.[13] The easiest way for children to have a claim for more contact with grandparents tried by the ECtHR is if their grandparents include them as applicants and act on their behalf. However, there may easily be a conflict of interest, as the child, its parents and grandparents may all have varying views and interests. The question of whether adult applicants in cases concerning children may include them and act on their behalf, reaches far beyond the grandparent cases. In *Moretti et Benedetti c. Italie* 2010 (at 32-33) the Court considered that the children's foster parents who had applied to adopt them had no standing to lodge an application on behalf of the children. In the grand chamber case of *Strand Lobben v. Norway*, however, the Court's majority accepted the mother as representing her child, although her conflict with the child protection authorities to a large extent was about the child's best interests. A minority of two judges in that case strongly opposed the position of the majority, due to a conflict of interests between the mother and the child.
Out of the five cases examined in the present article, only in *Kruškić* did the grandparents include the children as applicants. This was blatantly dismissed by ECtHR, with reference to *Moretti et Benedetti* (at 102). Although the Court wanted to avoid

11 Breen *et al*. (2020) p. 740 regarding adoption of children in public care.
12 Kilkelly (2014), part 3.2, with reference to *Sommerfeld v. Germany* (2003) and *C v. Finland* (2006).
13 On the challenges of children's access to justice, see Skelton (2019), p. 67.

doi: 10.5553/FenR/.000050

a restrictive or purely technical approach to the representation of children, parental responsibility in this case had always rested with the parents and the children had never been under the guardianship of the first and second applicants or otherwise formally entrusted to them. In the domestic proceedings they had been represented by a guardian *ad litem*. In addition to these more formal arguments, the court added that the grandparents were, at least arguably, in a conflict of interest with their grandchildren (at 101). The family situation appears to be "extremely complex" (at 28) and the children obviously found themselves at the centre of a sharp conflict between their father and his parents, including about their place of residence. The conflict of loyalty must have been very damaging to the children psychologically. The local social welfare centre in its report placed the responsibility mainly with the grandparents with whom the children lived at that time:

> "In our view, the grandparents are the main problem, as they have 'instrumentalised' the children for their own goals … They are interfering with contacts and do not allow one millimetre of space for contacts between the father and his children. The children are anxious, not because of the father but because of the grandmother." (at 75)

On this background, by domestic court decision the children were moved from the grandparents to their father. The psychologist visiting the children after a couple of days noted that they had already adapted well to their new environment and their resistance towards their father had subsided. When visiting again on three subsequent days a week later she reported that the children were more and more relaxed, talkative and curious (at 80-81).

The case illustrates that in a situation of strong conflict it may be offensive, both to the children and to their parent(s), if the grandparents should be allowed to represent the children. In general, when these cases are brought before the ECtHR, the conflict level is likely to be high.[14] In such circumstances, for grandparents to represent their grandchildren the Court would need to ascertain in advance that the views of the child really are the same as those of the grandparents. Rather than creating a situation that would necessitate a pre-decision on the child's views and best interests, the Court should take great care to include an individual assessment of the child's best interests in its consideration of the substance of the case. Not least, great attention should be paid to the child's own views. The child may strongly wish to see its grandparents more than allowed by parents or authorities, or it may have firm views in the opposite direction. Or the child's views may be more nuanced as to the amount of contact, how and where. In any case the ECtHR should take the child's views into account and give them great weight, as argued above.

14 Similarly, in child protection cases concerning parents and children where the conflict level may also be high, the Court should be cautious about accepting parents as representing their children.

Family & Law 2021
doi: 10.5553/FenR/.000050

8. Are the principles applicable to private family law cases?

From the above there seem to be two lines of reasoning, one which is more restrictive towards the grandparents, following the line of *Kruškić*, and the other more lenient, as in the two Italian cases. In the two latter cases there is no mention of the requirement of "sufficiently close family ties". Even if the government did not contest the existence of such ties, the requirement could well have been mentioned, followed by a short description of the facts to substantiate it. Furthermore, by leaving out the reference to "a lesser degree of protection" and using the word "parent" in setting out the general principles, these two decisions seem to place the ties between grandparents and the child more or less on the same level as those between parents and the child. Additionally, these judgments apply the principle of "exceptional circumstances" as a requirement for severing the ties between grandparents and grandchildren, which is not included in any of the other judgments.
It is hard to tell why the Court seems to follow a different line of reasoning in these cases. All of the cases following *Kruškić* refer to that case, but the two Italian ones only do it partially and leave out essential elements of the principles laid down in that case. Potentially the difference could have to do with whether it is a matter of public or private law, but that does not seem to be the case. In three out of the five cases the children are either in public care (*T.S. and J.J., Beccarini et Ridolfi*) or in the process of being adopted (*Bogonosovy*). In *Kruškić*, on the other hand, although the child protection authorities are involved, it is only with supervision, and the issue of contact with the grandparents seems to be a private law matter between the father and his parents. The contact issue was dismissed as it had not yet been decided by the domestic courts.
Like *Kruškić*, *Manuello et Nevi* is a private family law case, as it is not about a child in public care or being adopted. The girl was living with her mother, and the grandparents repeatedly asked the domestic court and the social services to institute meetings with the girl. Being a case between the grandparents and the mother, it was not the responsibility of the social services in the first place to organise meetings when the mother was opposed to it. Only when the domestic court ordered meetings to take place did the social services have an obligation to implement the visits. One might think that where a child is in public care, there would be a greater responsibility resting on the domestic authorities for arranging contact, than in private law cases. This would be in line with the Court's thinking in *Kruškić* as mentioned above:

> "However, the Court underlines that contact normally takes place with the agreement of the person who has parental responsibility, thus at the discretion of the child's parents." (at 112)

As a similar case of conflict between the grandparents and a parent, *Manuello* should have included all the reservations to contact as a right of the grandparents mentioned in *Kruškić*. Instead, the Court in that case goes far in the opposite direction, requiring "exceptional circumstances" for denying the grandparents contact. Thus, it is hard to explain the different approaches as following from a difference

between private family law and public child protection law. Concluding from the *Manuello* case, there is no reason to make a sharp distinction between the two areas of the law. Even if as a point of departure contact with grandparents is at the discretion of the child's parent(s), in a conflict situation it is all dependent on the circumstances in the individual case. Looking at the cases altogether, the pattern is that the circumstances are special and that there has been a lot of conflict and uncertainty around the care situation of the children.
The exception perhaps is *T.S. and J.J.*, where, although the child is in public care, the care situation does not seem to be uncertain or disputed. The disagreement in that case is rather between the grandmother and the boy, who does not want to see his grandmother as often as she would like. Thus, it is not a question of respecting wish of the other parent, but that of the child. If the child's views are heard and taken as a starting point in all such cases, provided the child is able to form views, the private-public law divide should be of less importance.

9. Conclusion

So, do grandparents have a right to contact with their grandchildren and vice versa? The cases examined confirm that there may be such a right, but it depends entirely on the circumstances. A family life exists between grandparents and grandchildren if there are sufficiently close ties between them. However, the relationship between grandparents and grandchildren is seen as different in nature and degree from that of parents and children and "thus by its very nature generally calls for a lesser degree of protection" (*Kruškić, T.S. and J.J.* and *Bogonosovy*). The fact that these qualifications are not mentioned in the two Italian cases does not make them less valid.
Grandparents and parents acting as opponents in a courtroom may be harmful to the children involved. It does not facilitate an atmosphere of cooperation where the grandparents can act as a support for the child.[15] A case brought before the ECtHR often is a sign that there is not a peaceful relationship between the parties. In the private law cases, the parents for some reason do not want the grandparents to see the children, which is why the court system has become involved. For children in public care their care situation has been unstable and may still be, and their life situation often is turbulent with conflicts between various adults. The circumstances in the five cases examined vary greatly and most are rather complex.
Thus, rejecting or not facilitating the grandparents' access to a child is not necessarily a violation of their right to family life, as it would easily have been for parents. It is a violation only if the grandparents are refused the reasonable access necessary to preserve a normal grandparent-grandchild relationship (*Kruškić, T.S. and J.J.*). At this point, the Court in *Manuello et Nevi*, repeated in *Beccarini et Ridolfi*, rather emphasises the positive obligations arising from Article 8 ECHR for the State to adopt measures suitable for reuniting the 'parents' and the child. The same difference in the point of departure is present with regard to the assessment of

15 Evenshaug (2004), p. 70.

Family & Law 2021
doi: 10.5553/FenR/.000050

proportionality, where the two Italian cases require exceptional circumstances for breaking the ties between grandparents and grandchildren, a requirement which is not included in the other cases.

In my view, it is difficult to accept the approach of the Court in those two cases, apparently placing the rights of grandparents on an equal footing with those of the parents. The reasoning in the other three cases, on the other hand, takes into account the different position of parents and grandparents in children's lives, and their different relationships. While recognising that grandparents may have a right to contact with their grandchildren in certain situations, the Court in these cases adjusts the principles to the realities of those differences.

Children who want more contact with their grandparents have difficulties in accessing the ECtHR system and it is not a process well suited for children. If they are prevented by their parents from seeing their grandparents, there should probably be some form of mechanism at the domestic level that the child could turn to. In cases brought before the ECtHR by adults, children are not separately represented, whether they would like more or less contact than at present.[16] At best one would presume that the children are properly heard and their views given due weight.

On that background, the invisibility of the children in the two Italian cases is striking. The best interests of the child are mentioned at a general level but not discussed for the individual children involved. Particularly in *Manuello et Nevi* where the reason for the domestic authorities to deny contact was the girl's opposition to seeing her grandparents, the consequences of obliging her to meet with them should have been examined, as well as whether any measures could have been taken to help her overcome her discomfort. In *T.S. and J.J.*, on the other hand, the views and interests of the child are taken seriously, discussed thoroughly and given more weight than those of the grandmother. Whereas *Bogonosovy* for procedural reasons contains no concrete assessment, the Court notes that the domestic authorities should have examined the issue of contact and decided whether this corresponded to the child's interests.

Grandparents may be good for their grandchildren, including in conflict cases. However, decisions in individual cases cannot be based on this as a general presumption. Whether the grandparents' right to family life has been violated in a specific case should depend not only on the consequences for the grandparents but also – and more importantly – on whether contact is in the child's best interests. The best interests assessment has to be made individually, as required by Article 3(1) CRC. A result based on a general presumption may potentially be contrary to the best interests of the child in a specific case.[17] Once a child is capable of forming a view, which children are from an early age,[18] their best interests cannot be determined without hearing the child's own view.[19]

An awareness in this respect is all the more important as the ECtHR cases under Article 8 ECHR are brought by adults for violations of their right to family life. The best interests of the child only enter the case in the proportionality assessment

16 The Court has not developed procedural rights for children under Art. 8, see Kilkelly (2014), part 2.
17 Similarly, see Herring (2009), p. 254, and Ribot Igualada (2021, in this issue).
18 CRC/C/GC/12, para. 2.
19 CRC/C/GC/14, para. 43.

and children's own rights are absent from the scene. If their best interests are not even properly examined and their views taken into account, children are placed in a subordinate position that does not harmonise with their being at the centre of the case.

References

Breen, Claire, Jenny Krutzinna, Katre Luhamaa, and Marit Skivenes (2020), 'Family Life for Children in State Care. An Analysis of the European Court of Human Rights' Reasoning on Adoption without Consent', *International Journal of Children's Rights* vol. 28, no. 4, pp. 715-747.

CRC/C/GC/12, UN Committee on the Rights of the Child, General Comment No. 12 (2009) The right of the child to be heard.

CRC/C/GC/14, UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.

Crowley, Louise (2015), 'Defining the Family and the Scope of Protection Available Tensions between National Governance and International Expectations', *International Survey of Family Law*, pp. 55-74.

Evenshaug, Oddbjørn (2004), 'Samværsrett for besteforeldre?', *Tidsskrift for samfunnsforskning* vol. 45, no. 1, pp. 65-82.

Herring, Jonathan (2009), *Older People in Law and Society* , Oxford: Oxford University Press.

Jacobs, Francis J., Robin C.A. White, Bernadette Rainey, Elizabeth Wicks, Clare Ovey (2017), *The European Convention on Human Rights*, 7th ed., Oxford: Oxford University Press.

Jarrett, Tim (2020), 'Children: Child arrangement orders – grandparents and court orders for contact with grandchildren (Great Britain)', *Briefing Paper, House of Commons Library*, Number 8762, 10 February [last accessed 31 August 2020].

Kaganas, Felicity & Christine Piper (2020), 'Grandparent contact: another presumption?', *Journal of Social Welfare and Family Law*, vol. 42, no.2, pp. 176-203.

Khazova, Olga (2019), 'International Children's Rights Law: Child and the Family', in: Ursula Kilkelly and Ton Liefaard (eds.), *International Human Rights of Children*, Singapore: Springer, pp. 161-186.

Kilkelly, Ursula (1999), *The Child and the European Convention on Human Rights*, London: Routledge (eBook 2017).

Kilkelly, Ursula (2014), 'The CRC in Litigation Under the ECHR', in: Ton Liefaard and Jaap Doek (eds.), *Litigating the Rights of the Child*, Dordrecht: Springer (e-book), pp. 193-209.

Ribot Igualada, Jordi (2021), 'Enhanced Statutory Contact Rights for Grandparents under Spanish and Catalan Laws: A Critical View', *Family & Law*, www.familyandlaw.eu/tijdschrift/fenr/2021/02/FENR-D-20-00003.

Skelton, Ann (2019), 'International Children's Rights Law: Complaints and Remedies', in: Ursula Kilkelly and Ton Liefaard (ed.), *International Human Rights of Children*, Singapore: Springer, pp. 66-91.

European Court of Human Rights (ECtHR) decisions (alphabetical order):

Beccarini et Ridolfi c. Italie (Requête no.63190/16, in French), 7 December 2017.

Bogonosovy v. Russia (Application no. 38201/16), 5 March 2019.

C v. Finland (Application no. 18249/02), 9 May 2006.

Lawlor v. the United Kingdom (Application no. 12763/87), Commission decision of 14 July 1988, Decisions and Reports (DR) 57, p. 216) (European Commission of Human Rights).

doi: 10.5553/FenR/.000050

K. and T. v. Finland (Application no. 25702/94), Grand Chamber, 12 July 2001.
Kruškić v. Croatia (Application no. 10140/13), 25 November 2014 (chamber decision).
Manuello et Nevi c. Italie (Requête no 107/10, in French), 20 January 2015.
Marckx v. Belgium (Application no. 6833/74), Plenary, 13 June 1979.
Mitovi v. The Former Yugoslav Republic of Macedonia (Application no. 53565/13), 16 July 2015.
Moretti et Benedetti c. Italie (Requête no. 16318/07, in French), 27 April 2010.
Sommerfeld v. Germany (Application no. 31871/96), 8 July 2003.
Strand Lobben and others v. Norway (Application no. 37283/13), Grand Chamber, 10 September 2019.
T.S. and J.J. v. Norway (Application no. 15633/15), 11 October 2016.