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Case-Law of the European Court of Human Rights related to child rights, role of the families and alternative care[1]

The European Convention on Human Rights and Fundamental Freedoms (1950) primarily guarantees civil and political rights. It has been ratified by the 46 member states of the Council of Europe. Although it makes few direct references to children, some of its articles have been used effectively by the Court to protect and promote child rights in Europe. The main articles relevant for childcare are Articles 3, 5, and 8 of the Convention.

The case law of the European Court of Human Rights lays emphasis on both the requirement to protect the interests of the child and the role of the families in childcare. The balance between these competing interests is not easy to strike. Hence, the European Court of Human Rights concedes Member States a significant margin of appreciation when dealing with this issue. Procedural guarantees for the parents in the childcare cases are nevertheless imposed by the Convention, in order to prevent arbitrariness.

The Convention also compels Member States to prevent violence against children, whether they are in a classical family environment or in alternative care institutions. Thus, on the basis of Articles 3 and 8 of the Convention, Member States are requested in the first place to take preventive measures to protect the child's physical and sexual integrity; secondly, domestic competent authorities are expected to effectively investigate any allegation of ill-treatment within the family sphere or within foster-homes and finally to prosecute and punish the abusers.

One can identify three types of State obligations in the childcare cases:

1. Obligations no to interfere with the exercise of the rights protected by the Convention, i.e. the family life or not to submit a child to ill treatment.
2. Positive obligations to adopt legislation preventing other individuals to interfere with the rights protected by the Convention;
3. Procedural obligations concerning the decision-making process.

Article 8, for instance, contains all three types of obligations; by its nature, article 5 deals only with procedural issues.

The different issues concerning child rights can be classified in three parts:

1. Removal of children from their family ;
2. Custody disputes;
3. Violence against children.

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1. Removal of children from their natural family

a) What does the notion of 'family" mean?

The Court established in *Marckx v. Belgium* (judgement of 13/06/1979) that family life between an unmarried mother and her child is created by the fact of birth itself. There is an automatic and immediate transformation of the biological bound in a legal one and this attracts the application of article 8 of the Convention.

In a Romanian case decided in June 2004 (*Pini and others*), the Court considered, on the basis of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, the United Nations Convention of 20 November 1989 on the Rights of the Child and the European Convention on the Adoption of Children, that a relationship between the adopter and the adopted child amounted to family life even in the absence of any concrete direct contacts between them. The Court noted that, although family life had not yet been fully established in that case, seeing that the applicants have not lived with their respective adopted daughters or had sufficiently close *de facto* ties with them either before or after the adoption orders were made, that fact was not attributable to the applicants. In selecting the children solely on the basis of a photograph without having had any real contact with them that would have served as preparation for the adoption, the applicants were simply following the procedure put in place by the respondent State in such matters. Thus, a family life, in the sense of article 8 existed between the adopters and the adopted child.

b) Procedural guarantees concerning the removal from the family environment under article 8

The Court considers that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8. An interference with that right constitutes a violation of this provision unless it is "in accordance with the law", pursues a legitimate aim under paragraph 2 of Article 8 and can be regarded as "necessary in a democratic society". The fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the "necessity" for such an interference with the parents' right under Article 8 of the Convention to enjoy a family life with their child (see, *inter alia*, the judgement *K.A. v. Finland* of 14/01/2003)

In the *Johnston* judgment of 1986, the Court affirmed that the "respect for family life implies the existence in law of safeguards that render possible, from the moment of birth, the child's integration in his family." On the other hand, it has usually accepted that parents' violence, neglect or sexual abuse against their children may justify the latter's placement into public care, suspension of parental rights, including custody, or restrictions on the parents' contacts with their children. With some exceptions, this kind of measures is usually considered by the Court to be in the best interests of the child and so a large margin of appreciation is recognised to States in this respect. The European Court of Human Rights allows States a significant margin of appreciation when deciding of the necessity to remove a child from his family, on the ground that domestic authorities are better placed to asses the balance between the interest of the child and the family rights of his parents. Nevertheless, the Court requires the existence of judicial proceedings in which the parents' interests are fairly protected.

Therefore, where in *W. v. UK* (judgement of 8/07/1987) the local authority passed a parental rights resolution in respect of the applicant's child S. and decided unilaterally to place him in long-term foster-care with a view to adoption, the Court underlined the importance of the adequate protection of the parents' rights against arbitrary interference. In this case, the Court considered that the applicant had been insufficiently involved in the decision making process which affected his relationship with his child.

In *X & Y v Austria* (1962)[2] the Commission found it compatible with the Convention that a father who had assaulted his children, was denied contact with them, even when the children themselves complained it breached their right to family life. In *X v the Netherlands* (1963),[3] the award of custody of a child to her mother was found to be consistent with Article 8 because her father had been convicted of indecently assaulting her. However, *Nowacka v Sweden* (decision of 13/03/1989) later illustrated that even when the ill-treatment or abuse has not been judicially determined in the domestic courts, evidence that it has occurred can still be considered justifiable for interference in family life. The European Court had already adopted this approach in several cases concerning the placement of children into public care, as well as in cases concerning neglect, physical and sexual abuse by parents or the mother's partner, where the social services had not taken adequate measures (e.g. *O. v. UK* , 1987 cited above and *E and Others v UK*, 26/11/2002).

Inability for a natural father to challenge before national courts the adoption of his child disclosed a violation of article 8 in *Keegan v. Ireland* (judgment of 26 May 1994, Series A no. 290).

[2] Decision 8 May 1962, Application No.900/60
[3] Decision, 16 January 1963, Application No.1449/62

In several British cases concerning the placement of children into public care and the restrictions on the parents' contacts with their children, the Court did not criticise the measures taken as such, which it considered to have been taken within the State's margin of appreciation. However, it considered that, having regard to the impact of these decisions on family life, the decision-making process had to be such as to secure that the views and interests of the natural parents should be made known to and duly taken into account by the competent authority and that the parents are able to exercise in due time any available remedies. The Court may also have regard in this context to the length of the decision-making process or of any related judicial proceedings.[4]

This reasoning has been taken up subsequently by the Court in several judgments. For instance, in the case of *Covezzi and Morselli v Italy* (9/05/2003) the applicants' children were taken into pubic care, after a member of the family had denounced repeated sexual abuses by several adult members of the family against the applicants' children and their cousins. The adults in question, including the applicants, were later convicted for sexual abuse on minors and lost their parental rights. The Court considered that the children's urgent placement without hearing the applicants was based on relevant and sufficient reasons, as were the restrictions on contacts, having regard to the mother's lack of co-operation with the social services and the consistent refusal of the children to return to their home. However, in the Court's view, the length and shortcomings of the proceedings before the children's court left the parents without any remedy to contest the temporary placement decision. In another case against the United Kingdom[5] concerning the taking into care of a 17 year old girl's child, on suspicion that he had been sexually abused by her boyfriend, the Court arrived at the conclusion that the local authority's refusal to disclose to the mother a video of the child's interview with a psychologist deprived her of an adequate involvement in the decision-making process.

Article 8 contains also a positive obligation for States to reunite the parents with their children, the removal being seen as a temporary measure. In the *Johansen v. Norway* judgement (7/08/1996), the Court affirmed that measures such those aimed at permanently depriving a parent of contact or custody should only be applied in exceptional circumstances and could be justified only where there was no other alternative measure allowing the protection of the child's interest.

In the *Görgülü v. Germany* judgement of 26/02/2004, concerning the relationship between a father and his child born outside the wedlock and placed by his mother for adoption, the Court considered that the failure of the domestic courts to examine whether it was viable to unify the applicant with his son in circumstances that would minimise the strain put on the child violated

[4] See, amongst others, B. v. the United Kingdom judgment of 8 July 1987, Series A no. 121, §§ 63-65
[5] T.P. and K.M. v. the United Kingdom judgment of 10 May 2001, § 78-83.

Article 8. The Court underlined the fact that domestic courts apparently only focussed on the imminent effects which the separation of the child from his foster parents would have on the child, but failed to consider the long-term effects which a permanent separation from his natural father might have on him.

Removal from family environment is seen as a measure of last resort, which States can use only when other alternatives, less restrictive for family rights are not possible. In the case P.C. and S. v. UK (judgement of 16/07/2002), the Court found that, even though a emergency protection order was indeed necessary for a new born bay whose mother was suffering from the Munchhausen's syndrome, the implementation of this order : removal of the baby from the hospital into care rather then less drastic form of supervision of mother and baby within the hospital violated article 8.

The Court also attaches a lot of importance to the maintenance of the contact between parents and children, during the child's placement into care (*Couillard Maugery v. France*, 1 July 2004).

c) Procedural guarantees related to the detention of minors

Article 5 § 1 d) allows "the detention of a minor by a lawful order for the purpose of educational supervision" or "his lawful detention for the purpose of bringing him before the competent legal authority".

The first ground for detention concerns situations where an administrative or judicial authority decides to place a minor under supervision combined with a restriction of liberty such as enforced stay in a reformatory institution or in a clinic. In its *Bouamar v. Belgium* judgement (29/02/1988), the Court stated that the detention of a minor in reformatory institution or in prison prior to his speedy transfer to a reformatory was authorised by Article 5 § 1 d). However, the Court found a violation of Article 5 in the particular circumstances of the case (seriously disturbed and delinquent boy confined 9 times in a remand prison for 119 days during one single year). The Court also held that the detention of juveniles "in conditions of virtual isolation and without the assistance of staff with educational training" could not be regarded as furthering any educational aim. More recently, in its *D.G. v. Ireland* judgement of 16/05/2002, the Court stated that educational supervision was not to be equated rigidly with notions of classroom teaching and includes several aspects of the exercise by a local authority of parental rights for the benefit and protection of the juvenile. Still, in that particular case, the Court found a violation of article 5 § 1 d) where the teenager was held for a month in a penal institution where any educational or recreational activities were entirely optional and voluntary.

The second ground for detention covers situations where a minor accused of a crime is, for instance, placed under psychiatric observation, which will lead to a report recommending a decision with regard to his suitability to detention. It also covers the detention of a minor during court proceedings concerning his placement in childcare.

d) The right to information in the childcare cases

Another aspect of the protection conferred by Article 8 is the right to information. In the *Gaskin* judgement of 1989, the Court insisted on the positive obligation for the State to ensure the access to the personal file of the applicant, compiled and maintained by the local authority and which was related to the applicant's basic identity, and provided the only coherent record of his early childhood and formative years. In the Court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development.

2. Custody disputes

Family life continues after divorce or separation of the parents of the child. In this area, as well, States have a wide margin as appreciation when conferring the custody of a child to one parent. The development of procedural obligations under Article 8 is meant to balance, again, this wide margin of appreciation enjoyed by the States.

Failure to enforce court orders as to custody and contacts may also raise issues under article 8, as the judgement *Ignaccolo-Zenide v. Romania* (25/01/2000) points it out. The test appears to be whether the authorities have taken all necessary measures to enforce the decisions as it could be reasonably expected in the circumstances of the case. While the Court had emphasised that, in general, coercive measures in childcare cases are not desirable, it has also stated that the use of sanctions must be envisaged if the parent holding the children behaves unlawfully.

There are also some interesting cases related to discrimination (*Hoffman v. Austria*, *Salguiero Da Silva Mouta v. Portugal*) between parents when granting the custody of the child.

3. Violence against children

Much of the case law developed by the European Court of Human Rights concerning violence against children has centred on the issue of corporal punishment, but has direct relevance for all violence against children situations. A series of judgments from the Court, dating back to 1978, have challenged the corporal punishment of children in detention, schools and in some cases in the family home. They were largely based on Article 3 of the Convention which prohibits torture and inhuman or degrading treatment or punishment in absolute terms. Other violence-related cases, some of them dating back to the 1960s, have relied heavily on Article 8.

It has been well established that the right to respect for private life includes respect for physical integrity (e.g. *X & Y v the Netherlands*, 26/03/1985), and that the protection of children from violence may both permit proactive measures by States under paragraph 2 of Article 8 (e.g. *X & Y v Austria*, 8/05/1962, guardianship and contacts with children after divorce and *O. v. UK* 1987, placement of children) and there are also positive obligations for the State under Articles 2, 3 and 8 of the Convention to effectively investigate any allegation of ill-treatment and to establish an effective criminal law system which punishes all forms of rape and sexual abuse (*M.C. v Bulgaria*, 4/12/2003).

a) Domestic violence

The case of *A v UK* (23/091998), the first case concerning parental corporal punishment to be considered by the Court. The applicant was a boy who had been repeatedly caned by his stepfather, violence that caused him significant bruising. The stepfather was prosecuted in the UK for causing actual bodily harm but was found not guilty on the grounds that the punishment was "reasonable chastisement". The Court found that the punishment violated Article 3 of the Convention, concluding that the law "did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3" The judgment stated: "Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity"

This line has been subsequently followed in several cases concerning neglect, physical and sexual abuse within the family sphere. For instance in *Z and others v UK* (10/05/2001), the applicants were four siblings who, between the initial referral to social services in October 1987 and the final emergency foster care placement in June 1992, suffered severe neglect and emotional abuse in the hands of their parents, despite continuous monitoring and reporting by social services during that period. Proceedings against the local authority under domestic law, claiming damages

for negligence on the basis that the authority had failed to have proper regard for the children's welfare and to take effective steps to protect them, ultimately failed because the domestic courts ruled that public policy considerations were such that local authorities should not be held liable in negligence in respect of the exercise of their statutory duties safeguarding the welfare of children. The European Court held that there had been a violation of articles 3 and 13 (the right to an effective remedy), and made substantial awards in respect of pecuniary and non-pecuniary damages.

The first case to have been examined by the Court concerning sexual abuse within the family (and also within the school sphere), *Stubbings and Others v. the United Kingdom (22/10/1996)* did not concern Article 3, but Article 6 of the Convention, and the procedural requirements necessary for an effective protection of the children's rights in this context. The relevant limitation periods under English law prevented victims of child sexual abuse from commencing civil proceedings against the abuser (normally the father or stepfather) after six years from the date of their eighteenth birthday. However, the Court considered that the very essence of the right to access to court was not impaired because English law allowed a six-year period for initiating civil proceedings and a criminal prosecution, subject to the need for sufficient evidence, could be brought at any time.

b) Violence in public institutions

Violence in the school sphere has been dealt with by the Court mainly in several British cases concerning the use of corporal punishment by teachers or headmasters. This case-law is *mutatis mutandis* applicable to residential institutions.

In a case of school caning (*Warwick v UK*, 1986) which did not reach the Court, the former Commission found that the institutional nature of school was not of the same order as that of the judicial setting, illustrating the importance of the setting in which the punishment takes place, although this did not preclude the finding that the punishment was sufficiently degrading to breach Article 3. A similar decision by the Commissions was given in *Y v UK* (1991), but this also found that the treatment was unacceptable regardless of who administered it and what pedagogical reasons were given.

In *Costello-Roberts v UK* (25/03/1993) the Court found that the punishment of a boy in a UK private school, who was hit with a soft-soled shoe on his clothed buttocks, did not reach the level of severity to breach Article 3 of the Convention – although this judgment was by five votes to four, and the Court emphasised that it did not wish to be taken as approving in any way of school corporal punishment and that the treatment of the boy was at or near the borderline. Nevertheless, the case established that even in a private setting the responsibility of the state is engaged, if a violation of one of the Convention rights results from non-observance of its obligations. It found that a school's disciplinary regime fell under the scope of the right to education, and the state is

responsible for that right for all children, whether in public or private school. State responsibility is also incurred, if punishment violates Article 8, although this was deemed not to have occurred in this case.

In an Italian case (*Scozzari and Giunta v. Italy*, judgement of 13/07/2000), the Court also considered that the temporary placement of children in a residential institution whose leaders had been previously convicted for abuse on children violated Article 8. The Court estimated that the national authorities have failed to show the degree of prudence and vigilance required in such delicate and sensitive situation and have thus failed to protect the interests of the children.

As we have seen, the case-law of the European Court of Human Rights concerning child rights is diverse. I have focused in my presentation on the case-law under articles 3, 5 and 8 of the European Convention on Human Rights. Nevertheless, other articles of the Convention and of its Protocols concern directly children's rights.