Service de lutte contre la pauvreté,
la précarité et l'exclusion sociale

Steunpunt tot bestrijding van armoede,
bestaansonzekerheid en sociale uitsluiting

Dienst zur Bekämpfung von Armut, prekären
Lebensumständen und sozialer Ausgrenzung

Jurisprudence Book No. 2

Maintaining the ties between parents and children within the context of care orders

Research on the case law of the European Court of Human Rights concerning article 8 of the European Convention on Human Rights

April 2021

COMBAT POVERTY, INSECURITY AND SOCIAL EXCLUSION SERVICE

INHOUDSOPGAVE

This document provides a brief summary of the Cahier covering the maintaining of the ties between parent and child in the context of out-of-home placement, a case law study by the Combat Poverty, Insecurity and Social Exclusion Service. For more than 30 years the European Court of Human Rights has been dealing with situations involving out-of-home placement and the preservation of the ties between parent and child. We have tried to do an exhaustive study of this jurisprudence and to distil the main principles from it. These principles demonstrate that governments must adopt a particularly careful approach with respect to this sensitive matter and must act with a specific ultimate objective in mind: the objective to reunite the family.

I. INTRODUCTION

One of the most drastic measures the authorities can impose is to remove a child from its parents. This kind of intervention demands serious consideration in a constitutional state, which is to a large extent characterised by the fundamental rights of its citizens. To what extent does a decision of this nature need to be substantiated and does a state authority, which is intervening so dramatically in the personal lives of its citizens, also have certain obligations? Precisely because this is such a far-reaching measure, the welfare authorities will first and foremost concentrate on providing support and assistance. Further interventions will only take place if this does not suffice. However, the question remains as to how and when a decision should be made that support and assistance are no longer enough. What are valid reasons in such cases to remove a child from its parents? And if the child is effectively removed, what happens after? It is primarily this latter question that will be investigated here, although it cannot be considered separately from all the questions that precede it.

Our study focuses on the human rights aspect of the protection of the ties between parent and child in poverty-related situations. The mere fact that people are living in difficult socio-economic circumstances should not be a reason to sever the ties between parent and child. But children growing up in families living in poverty are more at risk of special youth welfare measures – such as out-of-home placement – than other children. This Cahier is not limited to poverty-related situations though. Matters relating to mental health, violence, drug abuse, sexual abuse etc. are also covered. We like to make clear that this is definitely not intended to evoke associations between these topics and poverty-related situations. On the contrary, with our study we aim to investigate which legal arguments are used in jurisprudence to legitimise the exceptionally far-reaching decisions concerning the out-of-home placement of a child. These legal arguments can certainly be useful within the framework of the exercise of rights by people living in poverty.

We start our article by briefly outlining the context and method used for the study, followed by our analysis of the examined jurisprudence. To this end we look in more detail at the existence of family ties and the interests that are protected by it. We also discuss the margin of appreciation available to member states and the measures that member states impose or must impose to maintain these family ties. Finally, we provide a concise summary of this content.

II. CONTEXT AND METHODOLOGY

The General Report on Poverty (Algemeen Verslag over de Armoede – AVA) of 1994 already stated that "*the protection of family life is the engine that governs the actions of the poorest amongst us*". Care providers, juvenile judges and experts, who were part of the various dialogue working-groups, witnessed the intense distress that affects people living in poverty when it comes to what is most dear to them: their family and their children. "*It is becoming increasingly clear that human rights are violated most frequently and most seriously in this area"*.[1]

The authors of the AVA already indicated that children growing up in families living in poverty are more at risk of special youth welfare measures – such as out-of-home placement – than other children. Scientific research has confirmed this.[2] Once an out-of-home placement measure has been put in place for one or more children, there is a considerable risk of them becoming alienated from their original family. Often the break-up can no longer be undone. The authors of the AVA already formulated proposals aimed at maintaining the ties with the original environment.[3] The proposals in the AVA are still valid today. The out-of-home placement of children living in poverty and the maintaining of the ties between those children and their families are still key issues that often resurface in the *activities of the Combat Poverty Service*. The Wallonia-Brussels Federation, for example, has also run a dialogue group concerning this issue, with support from the Service, for more than twenty years – involving participants from 'aide à la jeunesse' ('youth support'), the support services and associations with which people living in poverty can identify.

The guiding principle for the activities of the Combat Poverty Service is that poverty is considered a violation of human rights. Fighting poverty thus involves restoring the exercise of human rights. For this reason we decided to explore the human rights aspect framework concerning the protection of the ties between parent and child in poverty-related situations. An exploration of the jurisprudence of the European Court of Human Rights (ECtHR) seemed particularly appropriate. After all, the Court has been judging out-of-home placement situations for more than 30 years within the context of article 8 of the European Convention on Human Rights (ECHR), which protects everyone's right to respect for their private and

[1] ATD Vierde Wereld, Vereniging van Belgische Steden en Gemeenten (afdeling Maatschappelijk Welzijn), Koning Boudewijnstichting (1994). *Algemeen Verslag over de Armoede*, Brussel, Koning Boudewijnstichting, p. 27.
[2] Bouverne-De Bie et al. (2010). *Een link tussen leven in armoede en maatregelen bijzondere jeugdbijstand?*, Gent, Academia Press. This study, which was conducted at the request of the Combat Poverty, Insecurity and Social Exclusion Service, was financed by BELSPO.
[3] ATD Vierde Wereld, Vereniging van Belgische Steden en Gemeenten (afdeling Maatschappelijk Welzijn), Koning Boudewijnstichting (1994). *Algemeen Verslag over de Armoede*, Brussel, Koning Boudewijnstichting, p. 62-64.

family life. The Court's jurisprudence has considerable authority in terms of the interpretation of a specific right.[4] National judges must take the principles developed by the Court into account. These principles are thus also of particular importance to lawyers. An analysis of this jurisprudence can, therefore, provide inspiration to all those involved in the issue of out-of-home placement and the preservation of family ties.

The research on the Court's jurisprudence was done using the HUDOC database.[5] In the first phase a broad range of searches were conducted in order to arrive at the most exhaustive selection possible without restrictions in time. These searches were based on the search criteria and phrases used by the Court's press department in their factsheets on the topic of out-of-home placement. Due to the fact that not all decisions are published in English, we have used both English and French search criteria. The actual selection was made during the second phase. Having deleted duplicate results, we looked at which decisions really concerned out-of-home placements. We did this by reviewing the facts of each case and the final judgment of the Court. Whenever possible the Court's own *legal summaries* were also consulted. We then looked at which of these decisions dealt with the preservation of family ties. This selection procedure resulted in 92 judgements.[6]

The selection demonstrates that the Court has been considerably involved in the out-of-home placement of children and the preservation of family ties. This has resulted in extensive jurisprudence and the development of a substantial list of general principles. Most of these general principles were recently summarized in the case of *Strand Lobben and others/Norway (Grand Chamber)*[7]. With our study we have attempted to gather all the main insights from this extensive jurisprudence. In the Cahier we provide several examples by giving brief summaries of specific judgements. We have not included these examples here in order to keep the document clear and concise.

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[4] A. PALANCO, *Le précédent dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant, 2019, p. 562, n°876 in het bijzonder verwijzend naar: ECHR 9 June 2009, nr. 33401/02, Opuz / Turkije, § 163 : "*In carrying out this scrutiny, and bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States*."

[5] https://hudoc.echr.coe.int/eng#%20

[6] A final verification was carried out using the references in the judgements themselves. The Court frequently refers to earlier statements, which is why we checked whether these references are included in our selection. Where this was not the case, we checked whether the reference in question related to a placement decision. This procedure did not generate any new results. Finally, we looked at whether all of the case-law in the factsheets of the Court also appeared in our selection. Again this did not give us any new results.

[7] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber).

III. THE CONCEPT OF 'FAMILY LIFE' AND SAFEGUARDS UNDER ARTICLE 8 ECHR

The quick establishment of family ties

Article 8 ECHR safeguards family life. What exactly does this concept entail? When do we refer to a familial bond that is safeguarded under article 8 ECHR?

According to the Court the protection of family life is obviously not confined to marriage-based relationships and may encompass other *de facto* "family" ties. In essence the existence or non-existence of family life is essentially a question of fact depending on the real existence in practice of close personal ties. If definitely covers the bond between an individual and their child, irrespective of whether this child was born in or out of wedlock. In most cases cohabitation will be a requirement for a relationship of this nature, but in exceptional cases other factors can also point to the fact that a relationship is sufficiently stable and resilient to talk about family ties.[8]

The existence of family ties is, therefore, always a question of fact but the Court's case-law makes clear that actual situations are quickly qualified as proof of the existence of family ties. Even in extremely fragile situations – e.g. when the child has already been removed at birth[9] – the Court recognises that there may be a bond between parent and child. In fact, this kind of bond is not limited to parents and children. The ties with other relatives – brothers and sisters, aunts and uncles, grandparents etc. – can be safeguarded by article 8 ECHR.[10] Even the ties with foster parents and other foster children can be protected.[11]

The extent to which family ties are safeguarded does depend upon their strength. In cases where these ties are considered to be very limited, the protection provided by article 8 ECHR will have less impact.[12] The weaker the ties, the higher the margin of appreciation of member states.

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[8] ECHR 17 January 2012, n. 1598/06, Kopf & Liberda /Austria, §35; ECHR 13 January 2009, n. 33932/06, Todorova/Italy, §53.
[9] Refer to, for example, ECHR 13 January 2009, n. 33932/06, Todorova/Italy and ECHR 26 September 2013, n. 4962/11, Zambotto Perrin
[10] Concerning grandparents, refer to, for example, ECHR 9 June 1998, n°22430/93, Bronda /Italy; ECHR 27 April 2000, n. 25651/94, L./Finland; ECHR 13 July 2000, n°39221/98 – 41963/98, Scozzari & Giunta/Italy (GK); ECHR 14 January 2020, n° 21052/18, Terna / Italy;
Concerning siblings, refer to, for example, ECHR 21 November 2006, n. 10427/02, Roda & Bonfatti/Italy; ECHR 21/10/2008, n°19537/03, Clemeno e.a./Italy
[11] ECHR 17 January 2012, n. 1598/06, Kopf & Liberda / Austria; ECHR 9 April 2019, N°72931/10, V.D. / Russia
[12] Refer to, for example, ECHR 28 October 2010, n. 52502/07, Aune / Norway; ECHR 26 September 2013, n. 4962/11, Zambotto Perrin /France.

It is in the interest of both the child and the parent to maintain family ties

The interests of both parents and children are safeguarded by article 8 ECHR. But what happens when the interests of the child clash with those of the parents? In such cases article 8 ECHR stipulates that national authorities need to conduct a *fair balance* test. This test focuses in particular on the interests of the child. Depending on their nature and gravity, they can override the interests of the parents.[13] The question remains what this balancing of interests really amounts to, but the Court provides further information.

In the opinion of the Court there is a broad consensus, including in international law, about the protection of the family life of children. The child's interests are of paramount importance in all decisions. In decisions involving the care of children and contact restrictions, the child's interests take precedence over all other considerations.[14] At the same time, it should be noted that – in the event of separation – regard for family unity and family reunification are inherent considerations under Article 8 ECHR. When this right is curtailed – e.g. in the event of an out-of-home placement – the authorities have a positive duty to take measures to facilitate family reunification as soon as reasonably feasible.[15]

On the one hand it is in the interest of the child to maintain family ties, since severing those ties means cutting a child off from its roots. Family ties can thus only be severed in very exceptional circumstances. Moreover, every effort must be made to maintain personal relationships and, where possible, to 'rebuild' the family. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 ECHR to have such measures taken as would harm the child's health and development.[16]

National courts will have to weigh in a number of factors in order to determine the interests of the child and evaluate the proportionality of a specific measure. The Court has never actually composed a complete list of such factors, which could vary depending on the circumstances. However, in one of its judgements the Court refers to a summary of factors employed by the United Kingdom when assessing a placement with a view to adoption. In particular, it considers that in seeking to identify the best interests of a child and in assessing the necessity of any proposed measure in the context of placement proceedings, the domestic court must demonstrate that it has had regard to, *inter alia*, the age, maturity and ascertained wishes of the child, the likely effect on the child of ceasing to be a member of his original family and the relationship the child has with relatives.[17]

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[13] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §206.
[14] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §204.
[15] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §205.
[16] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §207.
[17] ECHR 13 March 2012, nr. 4547/10, Y.C./United Kingdom, §135.

IV. MARGIN OF APPRECIATION IS WIDER FOR OUT-OF-HOME PLACEMENT AS SUCH THAN FOR ASSOCIATED RESTRICTIONS

The margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. On the one hand, there is the importance of protecting a child in a situation which is assessed as seriously threatening his or her health or development. On the other hand, there is the aim to reunite the family as soon as circumstances permit. The Court thus makes a difference between the evaluation of the placement as such and the assessment of the measures thereafter.[18]

In terms of the necessity of a placement, the Court accepts that the authorities have a wide margin of appreciation. However, this margin is not unlimited. For example, the Court has attached weight to whether the authorities, before taking a child into public care, had first attempted to take less drastic measures, such as supportive or preventive ones, and whether these had proved unsuccessful.

The Court's supervision is stricter when it comes to further restrictions. Typical examples include restrictions of the parents' right to access, as well as legal guarantees that provide effective protection for the right to a family life for both parents and children. These further restrictions harbour a risk that family ties between parent and child will be severed.

The fact that the principle of a margin of appreciation does not always lead to unanimity is demonstrated by the *separate opinions* of certain judges in ten or so judgements. In certain cases, several judges maintain that the Court should impose stricter controls on member states.[19] However, in most cases the arguments in these *separate opinions* relate to allowing member states greater scope. They request that the Court should not become an ordinary, higher appeal body and they are of the opinion that local authorities are better placed to evaluate certain issues.[20]

In principle the national context has an impact on the actual assessment of a placement case. The Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State

[18] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §211.
[19] ECHR 10 September 2000, n° 40031/98, Gnahoré / France; ECHR 13 March 2012, nr. 4547/10, Y.C./United Kingdom, §135.
[20] ECHR 25 February 1992, n. 12963/87, Margareta & Roger Andersson / Sweden; ECHR 7 August 1996, N°17383/90, Johansen/Norway; ECHR 12 July 2001, n°25702/94, K. & T. / Finland (Big Chamber); ECHR 9 May 2003, n°52763/99, Covezzi en Morselli; ECHR 21 June 2007, n. 23499/06, Havelka e.a./Czech Republic; ECHR 06 October 2015, n. 58455/13, N.P./ Moldavia; ECHR 30 October 2018, n. 40938/16, S.S. / Slovenia; ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber)

intervention in family affairs and the availability of resources for public measures in this particular area. However, consideration of what is in the best interests of the child is in every case of crucial importance. Moreover, national authorities have the benefit of direct contact with all the persons concerned, often at the very stage when care measures are being envisaged or immediately after their implementation. For the Court, it follows from these considerations that is not its task to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the care of children and the rights of parents whose children have been taken into public care. Rather, the Court reviews under the Convention the decisions taken by those authorities in the exercise of their power of appreciation.[21]

[21] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §210.

V. MEASURES TO MAINTAIN FAMILY TIES BETWEEN PARENT AND CHILD

The leading principle in the Court's case-law is as follows: a care order must be regarded as a temporary measure, to be discontinued as soon as possible. Any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child.

Various issues arise within the framework of this principle: the concept of 'time', the contact arrangements between parent and child, the procedural guarantees in the event of a placement, and the assessment of further measures. Initially though we will focus on the placement situations themselves. An out-of-home placement is an interference with the right to protection of family life as stipulated in article 8 ECHR.[22] This interference can already have a major impact on the ties between parent and child. It would be interesting, therefore, to consider which situations may give rise to a placement.

Background context to an out-of-home placement

§ 1. Poverty should not be a reason to proceed with an out-of-home placement.

In approximately ten cases the Court emphasises the child's precarious background as one of the main reasons for the out-of-home placement and associated measures.[23] In these cases the ties between parent and child are severed because of a lack of financial means, a lack of suitable housing, a vague residence status, material deprivation etc.

In the opinion of the Court, poverty as such can never be the reason for the out-of-home placement of children.[24] The realisation that a child might grow up in a more favourable environment is not sufficient to remove a child from its parents. Neither can such a measure be motivated by a mere reference to the parents' precarious situation. After all, precarious circumstances can be remedied with less radical means than tearing a family apart. The Court refers to, for example, targeted financial assistance and social counselling.[25]

In fact, the role of social services is to help people in difficult situations. It is their task to guide them and, amongst other things, advise them on the various types of social benefits, on the

[22] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §202.
[23] ECHR 21 September 2006, n. 12643/02, Moser/Austria; ECHR 26 October 2006, n°23848/04, Wallova & Walla/Czech Republic; ECHR 21 June 2007, n. 23499/06, Havelka e.a./Czech Republic; ECHR 18 December 2008, n. 39948/06, Saviny/Ukraine; ECHR 18 June 2013, n°28775/12, RMS/ Spain; ECHR 16 July 2015, n°9056/14, Akkinibosun/Italy; ECHR 06 October 2015, n. 58455/13, N.P./ Moldavia; ECHR 16 February 2016, n°72850/14, Soares de Melo/Portugal ; ECHR 22 June 2017, n°37931/15, Barnea & Caldararu/Italy ; ECHR 24 October 2017, n°45959/11, Achim/Romania
[24] ECHR 24 October 2017, n°45959/11, Achim/Romania, §91.
[25] ECHR 18 December 2008, n. 39948/06, Saviny/Ukraine, §50.

available options that enable them to gain access to social housing or on other means to overcome their difficulties.[26]

It should be noted, however, that there is of course a certain margin of appreciation in the event of financial difficulties. It is not up to the Court to decide whether a family is entitled to a specific standard of living at the expense of society. It is, however, something that should at the very least be discussed by the local authorities and considered during legal procedures.[27] Moreover, there is no doubt that in cases involving vulnerable individuals the authorities should be particularly vigilant and offer them greater protection.[28]

Within this context the Court also refers to a recommendation concerning « positive parenting » from the Committee of Ministers of the Council of Europe, which stipulates that families in difficult socio-economic circumstances should receive special attention, and more specific support combined with a more targeted approach. [29]

§ 2. There is a lot of variation in the surrounding context

Obviously, placement cases are rarely so clearly delineated that only a single factor governs the fact that a child is being removed from its parents. Justification for this by national courts is consequently rarely based purely on living conditions or material deprivations. Other considerations, like the mental health of parents or their emotional weakness and lack of parenting skills are also mentioned.[30] The Court points to different factors that in principle will play a role in the evaluation of a placement decision. The extensive scope of jurisprudence shows that these factors are also subsequently important when assessing measures aimed at preserving family ties. The factors listed by the Court relate to violence or abuse, sexual abuse, emotional weakness, a state of health that gives rise to concern or mental instability. [31] The influence of these factors will obviously vary from case to case. No two placement decisions are the same, but sexual abuse and violence definitely receive special attention.

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[26] ECHR 26 October 2006, n°23848/04, Wallova & Walla/Czech Republic; ECHR 18 June 2013, n°28775/12, RMS/ Spain

[27] ECHR 18 December 2008, n. 39948/06, Saviny/Ukraine; ECHR 06 October 2015, n. 58455/13, N.P./ Moldavia; ECHR 16 February 2016, n°72850/14, Soares de Melo/Portugal

[28] ECHR 16 February 2016, n°72850/14, Soares de Melo/Portugal; ECHR 22 June 2017, n°37931/15, Barnea & Caldararu/Italy .

[29] ECHR 21 June 2007, n° 23499/06, Havelka e.a./Czech Republic, §61.

[30] ECHR 26 October 2006, n°23848/04, Wallova & Walla/Czech Republic;

[31] ECHR 26 October 2006, n°23848/04, Wallova & Walla/Czech Republic; see also ECHR 21 January 2014, n°33773/11, Zhou/Italy; ECHR 16 July 2015, n°9056/14, Akkinibosun/Italy; ECHR 13 October 2015, n. 52557/14, S.H./Italy;

The Court considers sexual abuse a particularly horrific vice that has a huge impact on its victims. Children and other vulnerable individuals are consequently entitled to expect protection from the state, based on effective prevention against such grievous instances of intrusion into essential aspects of their private lives.[32] If a child accuses one of their parents of sexual abuse, this should be taken seriously by social authorities. After all, one of their primary tasks is to protect children in vulnerable situations.[33]

Violence also plays a significant role. In exceptional cases there may even be a link with article 3 ECHR (prohibition of torture). States have a duty to protect individuals from torture or inhuman or degrading treatment or punishment. Typical examples of this kind of treatment relate to a parent caning their child, or children that are severely mistreated or neglected.[34] In cases to which both articles 3 and 8 of the ECHR apply, the Court emphasises the relevance of specific factors: the children's age and the need for state protection for these children. The necessity to take into account the vulnerability of children is also recognised at an international level.[35]

§ 3. Tensions between parents and the authorities - lack of cooperation from the parents does not relieve the authorities from their own obligations

In most cases an out-of-home placement is not voluntary. In such cases, parents and social authorities might be at odds with each other, with some parents less inclined to cooperate than others.

In principle, the Court maintains, the lack of cooperation from the parent is not an overriding factor, as it does not relieve the authorities from their obligation to impose measures to maintain family ties.[36] Although no overriding factor, it is nonetheless something that the Court will take into account. This is the case, for example, when a child can return to their family after a prolonged period of time. The reunification of parents and children, who lived

[32] ECHR 9 May 2003, n°52763/99, Covezzi en Morselli, §103.
[33] ECHR 08 June 2010, n. 67/04, Dolhamre/Sweden, §112.
[34] An violation of article 3 ECHR is usually connected with physical injuries or intense physical or mental suffering. However, in the absence of these aspects it still might involve dehumanizing treatment, if it humiliates an individual, shows a lack of respect for, or has an adverse effect on human dignity, or if it evokes feelings of fear or inferiority that could ultimately psychologically or physically break the individual. Within this context the Court also refers to the UN Committee on the Rights of the Child, which defines corporal punishment as any kind of punishment that involves physical force and is intended to cause a certain degree or pain or discomfort, even if it is only moderate in nature. The Committee emphasises that any kind of violence against children, however moderate, is unacceptable. (ECHR 22 March 2018, n. 72204/14, Wetjen e.a. / Germany; ECHR 22 March 2018, n. 11308/16, Tlapak e.a./Germany.)
[35] ECHR 22 March 2018, n. 72204/14, Wetjen e.a. / Germany; ECHR 22 March 2018, n. 11308/16, Tlapak e.a./Germany.
[36] ECHR 26 July 2007, n. 35109/02, Schmidt/France; ECHR 21 June 2007, n. 23499/06, Havelka ea/Czech Republic

with a foster family for a considerable time, requires due preparation. What this preparation entails and to what extent it is important will depend upon the circumstances, but it will always require active and understanding cooperation from all parties involved. For national authorities this implies that they must do their utmost to bring about such cooperation. However, their possibilities of applying coercion in this respect are limited, since the interests as well as the rights and freedoms of all concerned must be taken into account, notably the children's interests and their rights under article 8 ECHR.[37] Ultimately, a lot will depend on the specifics of an individual case.

The aspect of time - A placement should be temporary. The ultimate objective is to reunite the family.

> *[…] "decisions may well prove to be irreversible: thus, where a child has been taken away from his parents and placed with alternative carers, he may in the course of time establish with them new bonds which it might not be in his interests to disturb or interrupt by reversing a previous decision to restrict or terminate parental access to him. This is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences."*[38]

As mentioned earlier, the guiding principle is that a placement must be considered a temporary measure. An out-of-home placement should be terminated as soon as possible, which means that all associated measures must be in accordance with the ultimate objective of reuniting parent and child. The positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care. However, this will always be subject to its being balanced against the duty to consider the best interests of the child. There can obviously be no precise time limit, due to the fact that the actual circumstances are too complex. It is clear, however, that the authorities must terminate the placement as soon as possible. In this type of case the adequacy of a measure is to be judged by the swiftness of its implementation. The passage of time can have irremediable consequences for relations between the child and the parent with whom it does not live.[39]

Any relevant measure must be taken in the context of the obligation to focus the eventual reunion. Thus, where the authorities are responsible for a situation of family breakdown because they have failed in their obligation, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child. Moreover, this obligation also has consequences in terms of contact possibilities. The

[37] ECHR 13 July 2000, n°39221/98 – 41963/98, Scozzari & Giunta/ Italy (Big Chamber), § 175; ECHR 27 November 1992, n. 13441/87, Olsson/Sweden (2), §90
[38] ECHR 8 July 1987, n° 9749/82W./United Kingdom, §62
[39] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §208

bond between family members and the prospect of a reunion will obviously be weaker if impediments are placed in the way of their having easy and regular access to each other. [40]

When reviewing under article 8 ECHR, the Court will also focus on the procedural aspect. Further information is provided below, but here we need to mention the time factor which also plays a role, because the Court will take into account the length of the decision-making process and related legal procedures. With out-of-home placement cases there is a risk that a procedural delay will result in the *de facto* determination of the issue submitted to the court before it has held its hearing. Effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere passage of time.[41]

In certain cases new family situations are created with the passing of time. The concept of time can thus alter the course of a case, i.e. when a considerable period of time has elapsed since the child's out-of-home placement. It may be in the interest of the child at that time not to change their current family situation again and if that is the case the interests of the parents to be reunited with their child may be overruled.[42] It should be noted, however, that these are highly exceptional cases. A child's out-of-home placement should always be linked to the goal of facilitating a family reunion.

Contact restrictions have an adverse effect on the bond between parent and child.

> *"[…] the general and overall conduct of the authorities was such that the parents are permanently separated from their children, and this situation is now irreparable as a result of the refusal to allow access, a right which is not even refused to criminal parents in other countries. The Olsson parents have been definitively cut off from any family relationship. It is difficult to think of a more serious case of a violation of the fundamental rights protected by Article 8 (art. 8). ."*
>
> *Judge Pettiti, joined by judges Matscher & Russo, in their partly dissenting opinion of Olsson/Sweden (2)*[43]

The authorities are not at liberty to impose random restrictions on the contact options between parent and child following a placement. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.[44]

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[40] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §208.
[41] ECHR 29 October2019, N°67068/11, Stankūnaitė /Litouwen, §113; ECHR 9 April 2019, N°72931/10, V.D. / Russia, § 93 ; ECHR 22 June 2017, n°37931/15, Barnea & Caldararu/Italy, §86 ; ECHR 8 July 1987, n° 9749/82, W/ United Kingdom, §65.
[42] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §208.
[43] ECHR 27 November 1992, n. 13441/87, Olsson / Sweden (2).
[44] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §211.

Long term interruption of the contact between parents and children, or excessively long intervals between meetings can jeopardise any genuine chance of helping those involved to overcome the difficulties within the family.[45]

Right of contact plays an important role in most of the selected judgements. What kind of restrictions are involved? How long are they imposed? And when are they justified? We could discern several general aspects in the Court's jurisprudence.

§ 1. Extremely strict contact arrangements are usually incompatible with article 8 ECHR[46]

A complete ban on contact or extremely strict restrictions on contact are usually incompatible with article 8 ECHR. Indeed, such measures are incompatible with the ultimate goal of reuniting the family. A complete removal of contact options makes it virtually impossible to maintain or rebuild family ties.

Only in extremely dangerous situations – e.g. if violence or sexual abuse is involved – is a ban on contact feasible, but even then due caution is necessary. It is relevant, therefore, which parent is suspected of sexual abuse. If there are no reliable indications that the other parent was involved in this abuse, a complete ban on contact with respect to this parent seems more difficult to justify. The approach of the social services also matters in these cases. The Court sometimes observes an ungrounded negative attitude towards the parents. This kind of attitude can accentuate certain tensions between parent and child even more. The Court also

[45] ECHR 13 July 2000, n°39221/98 – 41963/98, Scozzari and Giunta/Italy [Big Chamber], § 177; ECHR 21 November 2006, n. 10427/02, Roda & Bonfatti/Italy, §115.

[46] The following insights are based on an analysis of a large number of judgements. The following cases were consulted with respect to a complete ban on contact: ECHR 7 August 1996, N°17383/90, Johansen/Norway; ECHR 16 November 1999, N. 31127/96, E.P. / Italy; ECHR 27 April 2000, n. 25651/94, L. / Finland; ECHR 13 July 2000, N°39221/98 – 41963/98, Scozzari & Giunta / Italy (Big Chamber); ECHR 01 July 2002, n°46544/99, Kutzner / Germany; ECHR 14 January 2003, n. 27751/95, K.A. / Finland; ECHR 09 May 2003, n°52763/99, Covezzi & Morselli / Italy; ECHR 26 September 2006, n. 36065/97, H.K. / Finland; ECHR 21 November 2006, n. 10427/02, Roda & Bonfatti / Italy; ECHR 26 July 2007, n. 35109/02, Schmidt / France; ECHR 21 October 2008, n°19537/03, Clemeno e.a. / Italy; ECHR 08 January 2009, n. 32147/04, Kuimov / Russia; ECHR 10 April 2012, n°19554/09, Pontes / Portugal; ECHR 16 July 2015, n°9056/14, Akinnibosun / Italy; ECHR 06 October 2015, n. 58455/13, N.P. / Moldavia; ECHR 16 February 2016, n°72850/14, Soares de Melo / Portugal; ECHR 26 April 2018, n. 27496/15, Mohamed Hasan / Norway; ECHR 28 August 2018, n. 8610/11, S.J.P. & E.S. / Sweden; ECHR 06 September 2018, n. 2822/16, Jansen / Norway; ECHR 30 October 2018, n. 40938/16, S.S. / Slovenia; ECHR 17 December 2019, N° 15379/16, Abdi Ibrahim / Norway; ECHR 17 December 2019, N° 60371/15, A.S. / Norway; ECHR 23 June 2020, N° 69339/16, Omorefe/Spain; ECHR 14 January 2020, n° 21052/18, Terna / Italy; The following cases were consulted with respect to very restricted contact arrangements: ECHR 22 June 1989, n°11373/85, Eriksson/Sweden; ECHR 25 February 1992, n. 12963/87, Margareta & Roger Andersson / Sweden; ECHR 27 November 1992, n. 13441/87, Olsson / Sweden (2); ECHR 30 May 2006, n. 34141/96, R / Finland; ECHR 21 September 2006, n. 12643/02, Moser / Austria; ECHR 08 June 2010, n. 67/04, Dolhamre / Sweden; ECHR 15 March 2012, n. 35141/06, Levin / Sweden; ECHR 12 July 2016, n. 45142/14, Krapivin / Russia; ECHR 22 June 2017, n°37931/15, Barnea & Caldararu / Italy; ECHR 29 October 2019, N°67068/11, Stankūnaitė / Litouwen; ECHR 19 November 2019, n° 64808/16, K.O. & V.M. / Norway; ECHR 10 March 2020, n. 39710/15, Pedersen e.a./Norway; ECHR 10 March 2020, n. 14652/16, Hernehult e.a./Norway;

looks at whether national courts have conducted a critical investigation of the facts and did not base their decisions solely on negative opinions of the social services.

What is important is that the authorities have sufficient information at hand when imposing contact restrictions, i.e. background information about the parents as well as evaluations of the situation. How does the child behave in the presence of the parents and vice versa? Is such behaviour necessarily due to the parents? After all, a child can also display negative reactions in other situations. What does the child itself indicate? Is a positive evolution of the situation feasible? Have the negative consequences of a placement decision and the associated restrictions been duly considered?

In other words, the authorities must act with a specific goal in mind – i.e. reuniting the family – in order to arrive at a sound evaluation of the situation. Moreover, they must always consider whether less impactful measures are possible. If a specific risk or danger is covered by less stringent restrictions, it is not necessary to impose a complete ban on contact. The Court also considers the contact methods. If physical contact is not possible or desirable, other alternatives may still be considered. Contact in writing, by telephone or skype could also be a means to maintain the bond with the child.

A final note in this respect relates to the difference between the out-of-home placement on the one hand and the possibility of imposing subsequent contact restrictions on the other hand. It may well be that a parent does not have a problem with an out-of-home placement. But this fact does not relieve the authorities of their duty to still maintain the family ties. At the very least this means that regular contact should be facilitated to the extent this is consistent with the child's interests.

§ 2. More relaxed contact arrangements are more compatible with article 8 ECHR[47]

More relaxed contact arrangements are easier to reconcile with the goal of a temporary placement and family reunion. It provides more regular contact opportunities and gives the parent more freedom. A more relaxed arrangement consequently goes hand in hand with a greater margin of appreciation for member states. The Court could consider the more relaxed arrangement as proof that the member state tries to maintain family ties. In any case the Court will be less likely to decide a violation has taken place, although the same questions will be asked in such instances as before. Have the national authorities made an in-depth

[47] The insights are based on an analysis of several judgements. This relates to: ECHR 22 April 1992, n. 12366/86, Rieme /Sweden; ECHR 1 July 2004, n°64796/01, Couillard Maugery / France; ECHR 1 December 2011, n. 26971/07, V. / Slovenia; ECHR 01 August 2013, n. 33774/08, Dmitriy Ryabov / Russia; ECHR 12 July 2018, n. 6360/13, D'Acunto & Pignataro / Italy;

assessment of the situation? Have they offered support measures where necessary? Is the situation being monitored? What is the impact of the measures on the bond between parent and child?

§ 3. Procedural guarantees

Parents should be able to rely on procedural guarantees at all times when it comes to contact rights. When parents' contact rights are restricted they should have access to the necessary appeal options, the institutions that impose the restrictions should be duly monitored and the decisions must have been made on the basis of properly substantiated motivation.[48]

§ 4. Proximity and keeping siblings together should be the preferred option

Various judgements highlight the fact that the location of a placement is an important factor to consider. In particular, distance can have an impact on the preservation of family ties. The circumstances in which the children are placed and the fact that siblings are placed separately can also have an effect, i.e. separate placements for the children can be an additional obstacle to the reunion of the family. Practical reasons – e.g. the fact that it is difficult to quickly place several children at the same location – can only play a secondary role. There will thus have to be more persuasive reasons to justify separate placements, such as the children's mental state or possibly their own wishes.[49] It is preferable, therefore, that a member state should place the child as near as possible to their parents and siblings should be kept together whenever possible.

§ 5. Institutional or foster care?

The Court leaves certain questions unanswered. One of these relates to the question as to what would be preferable: placement in an institution or in a foster family. The Belgian General Report on Poverty already made it clear that some parents have a more negative view of foster care than of placement in an institution.[50] It is perceived as more upsetting and one could argue whether foster care might make it more difficult to maintain family ties. However, we cannot immediately find anything specific on this subject in the Court's jurisprudence, even

[48] Refer to, for example, ECHR 26 September 2006, n. 36065/97, H.K. / Finland; ECHR 17 July 2014, n. 19315/11, T. / Czech Republic; ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber).
[49] ECHR 09 May 2003, n°52763/99, Covezzi & Morselli / Italy, §§126-129.
[50] ATD Vierde Wereld, Vereniging van Belgische Steden en Gemeenten (afdeling Maatschappelijk Welzijn), Koning Boudewijnstichting (1994). *Algemeen Verslag over de Armoede*, Brussel, Koning Boudewijnstichting, p. 63.

though it would have been interesting to hear the Court's opinion, bearing in mind the international trend to phase out institutional care and focus more on foster care.[51]

§ 6. The foster family's cultural or religious identity?

Another unanswered question relates to the foster family's cultural or religious identity. Does a parent have the right to choose which kind of foster family the child is sent to? The Court has included these considerations about identity and culture in several decisions[52], but as far as we know it has not made any judgements on matters of principle, although a case is currently pending that might change this. In *Kilic/Austria*[53] the Court is set to respond to the issue of whether the placement of Muslim children in a Christian family would pose a problem with respect to the retention of the family bond.

§ 7. Contact following adoption?

Although adoption is not the main focus of the Cahier, we do need to mention the fact that it plays a major role in various judgements concerning the preservation of the family ties in the event of out-of-home placement. In theory, adoption signifies the definitive termination of the bond between parent and child. There is, therefore, no right of contact following an adoption. Nevertheless, in some cases the Court will view the possibility of contact following an adoption as something positive.[54]

The decision making process

Even though the procedural aspect has already been touched upon earlier, the underlying principle merits a separate mention.

With out-of-home placement cases, the Court will also take into account the authorities' decision making process. This involves looking into whether the viewpoints and interests of the parents are made known to the authorities and duly taken into account. It also involves establishing whether the parents can exercise the legal means available to them in due time. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been

[51] Refer to, for example, the UN Committee on the Rights of the Child's recommendation to Belgium to focus more specifically on foster care: Committee on the Rights of the Child, *Concluding observations on the combined 5th and 6th periodic reports of Belgium*, 28 February 2019, 7.
[52] ECHR 17 December 2019, N° 15379/16, Abdi Ibrahim / Norway; ECHR 06 September 2018, n. 2822/16, Jansen / Norway.
[53] To be consulted via the HUDOC-database: http://hudoc.echr.coe.int/eng?i=001-174471
[54] Refer to, for example, ECHR 31 May 2011, n. 35348/06, R & H / United Kingdom

involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests and have been able fully to present their case. According to the Court it cannot be held against the parents if they are trying to reunite the family through legal means. In addition, in cases of this kind there is always the danger that any procedural delay will result in the *de facto* determination of the issue submitted to the court before it has held its hearing. Equally, effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time.[55]

Whether or not the decision making process adequately protects the interests of a parent depends upon the specific circumstances of each case. The Court observes that as a rule it is up to national judicial institutions to assess evidence, including the means to establish relevant facts.[56] The role of the Court is, therefore, to verify whether decisions were duly substantiated and are based on appropriate information. For instance, if a child has a negative reaction to contact with their parents it should not be decided at random that contact as such is undesirable. Perhaps the negative reaction is caused by something else that can be resolved. When authorities take decisions they must investigate such avenues and duly and extensively justify their decisions. Also, decisions and justifications must not be limited to a single moment in time. Situations change. Effective follow-up research is thus a necessity. Moreover, it is vital for a parent to have access to the information that the authorities use as a basis to justify an out-of-home placement.

What if a placement decision is based on incorrect assumptions? According to the Court, incorrect statements or assessments by professionals are not incompatible *per se* with the stipulations in article 8 ECHR. The authorities have a duty, in both medical and social terms, to protect children. They cannot be held liable each time it is subsequently demonstrated that genuine and reasonable concern about the safety of children vis-à-vis their family members, proves to be misplaced. This means that the decisions can only be investigated in the light of the situation as it occurred to national authorities at the time they were taken.[57]

Ultimate failure: removal of parental rights and adoption proceedings

More radical measures such as the removal of parental rights and authorisation of adoption, are only possible in very exceptional circumstances. They are only justified if they are triggered by a compelling reason relating to the interests of the child. With adoption, for example, there

[55] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §212
[56] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §213
[57] ECHR 14 March 2013, n. 18734/09, B.B. en F.B./Germany, §48; ECHR 30 September 2008, n. 38000/05, R.K. & A.K./United Kingdom, §36; ECHR 31 May 2011, n. 35348/06, R. & H./ United Kingdom, §81.

is no real prospect of a family reunion. It must, therefore, be in the interest of the child to be permanently placed in a new family. Even with adoption it might be possible in some cases to allow contact by the natural parents (open adoption). There is no general principle for such contact, but the Court does have a positive view of the possibility of still maintaining contact.[58]

Within this context we would like to reiterate the ultimate goal of an out-of-home placement: reuniting the family. With this goal in mind an adoption could be considered a failure. In exceptional cases it may indeed be desirable to abandon the possibility of a family reunion. What should be avoided at all times though is that failure with respect to this goal is due to the authorities. The duty to focus on temporary measures and on a reunion weighs heavily on the authorities. If they did not comply with their obligations and are consequently responsible for breaking up the family, they cannot then base an adoption decision on the absence of a bond between parent and child.[59]

Does a violation also have consequences for an adoption decision? The Court has only recently indicated what is expected from member states in such cases. Where appropriate the situation must be reinstated as much as possible to a situation in which article 8 ECHR had not been violated. This may imply that the adoption needs to be cancelled and contact is facilitated once again.[60]

[58] Refer to, for example, ECHR 31 May 2011, n. 35348/06, R & H / United Kingdom
[59] ECHR 10 September 2019, N°37283/13, Strand Lobben e.a. / Norway (Big Chamber), §208.
[60] ECHR 23 June 2020, N° 69339/16, Omorefe/Spain

VI. CONCLUSION

At the beginning of this paper, we stated that the removal of a child from its parents is one of the most drastic measures authorities can impose. The above mentioned principles demonstrate that authorities cannot take such a decision lightly. On the contrary, they need to adopt a particularly careful approach with respect to this sensitive matter and must act with the ultimate goal of reunification in mind. All measures must focus on this goal.

We hope, therefore, that this paper can inspire all relevant stakeholders within the context of an out-of-home placement. This applies first and foremost to parents and children, to whom we hope to be able to demonstrate the protective value of article 8 ECHR with respect to the preservation of family ties. We also hope that it provides inspiration to all other stakeholders. These principles can and must act as a guideline for legislators, judges, lawyers, the relevant youth protection authorities, other associations etc.

We would like to refer those wishing to read in more detail about this matter to the comprehensive Cahier. The many examples in the Cahier offer readers additional insight into the practical application of the principles outlined in this document. It also contains the list of selected cases. The Cahier can be consulted via the website of the Combat Poverty Service:

- Dutch version
- French version