



Doc. 13060

12 November 2012

Human rights and family courts

Report¹

Committee on Legal Affairs and Human Rights

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Summary

The Committee on Legal Affairs and Human Rights takes a look at the functioning of family courts in Europe. It is especially concerned about certain cases in which children have been withdrawn from their family against the wishes of their biological parents, in particular in Croatia, the Czech Republic, Germany, Portugal and the United Kingdom.

Children should only be separated from their biological parents as a last resort, given that a family environment offers the best conditions for the proper development of children. Children should only be adopted or placed in care in accordance with the principles established in the 1989 United Nations Convention on the Rights of the Child and the European Convention on Human Rights, and the courts should give priority to the child's best interests. Member States are also invited to give concrete assistance to families in difficulty so as to reduce, insofar as possible, the number of cases in which children are taken away from their parents.

Finally, member States are called upon to sign and/or ratify all relevant Council of Europe conventions on the rights of children and implement the 2010 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

1. Reference to committee: [Doc. 11742](#), Reference 3597 of 28 September 2009.



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A. Draft resolution²

1. The Parliamentary Assembly is concerned about the functioning of family courts in some member States of the Council of Europe, and especially about cases where children are taken away against the will of their natural parents and in violation of the right to respect for family life and the principle of a fair trial.
2. Recalling its previous work on this subject, and in particular [Recommendation 874 \(1979\)](#) on a European Charter on the Rights of the Child and [Recommendation 1121 \(1990\)](#) on the rights of children, the Assembly reaffirms its commitment to defend and promote the rights and welfare of children.
3. The Assembly recalls that a family environment offers the best conditions for the proper development of children. Before children are placed in the care of outsiders or in institutional care, their own families should be granted any assistance needed in order to cope with their problems.
4. Consequently, children ought to be separated from their natural parents only in very exceptional circumstances, subject to judicial review and in line with the requirements stemming from the European Convention on Human Rights (ETS No. 5) and the United Nations Convention on the Rights of the Child of 1989.
5. The Assembly therefore calls on member States to:
 - 5.1. fully implement the United Nations Convention on the Rights of the Child;
 - 5.2. if they have not yet done so, sign and/or ratify the relevant Council of Europe conventions on the rights of children, in particular the European Convention on the Adoption of Children (revised) (CETS No. 202) and the European Convention on the Exercise of Children's Rights (ETS No. 160);
 - 5.3. promote, disseminate and monitor the implementation of the 2010 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice;
 - 5.4. ensure that the domestic procedures concerning the adoption and placing into care of children are established in line with the principles stemming from the European Convention on Human Rights;
 - 5.5. ensure that the competent domestic authorities, when deciding on the adoption and/or placing into care of children:
 - 5.5.1. take into account the requirements stemming from the European Convention on Human Rights and the United Nations Convention on the Rights of the Child;
 - 5.5.2. give priority to the best interests of the child;
 - 5.5.3. provide practical assistance to families in trouble so as to minimise the number of cases in which a child must be separated from his or her parents;
 - 5.5.4. act speedily so as to avoid irreversible damage to the parties' family life;
 - 5.6. continue to support the relevant activities of the Council of Europe bodies in the field of child protection and welfare.

2. Draft resolution adopted unanimously by the committee on 27 June 2012.

B. Explanatory memorandum by Mr Chope, rapporteur

1. Introduction

1. The motion for a resolution entitled “Human rights and family courts” (Doc. 11742) was referred for report to the Committee on Legal Affairs and Human Rights on 28 September 2009. On 16 November 2009, the committee appointed Mr Paul Rowen (United Kingdom, ALDE) rapporteur. Following Mr Rowen’s departure from the Parliamentary Assembly, the committee appointed me as rapporteur at its meeting on 8 March 2011 and decided to request the Bureau for an extension of the reference until 30 June 2012, which the Bureau agreed to on 15 April 2011.

2. On 21 May 2012, the committee held an exchange of views with the participation of:

- Professor Judith Masson, Professor of Socio-legal Studies, University of Bristol Law School (United Kingdom);
- Judge Daniel Pical, Chairperson of the European Section of the International Association of Youth and Family Judges and Magistrates, Honorary Chamber President at the Versailles Appeal Court (France).

3. The above-mentioned motion for a resolution focuses on the protection of children as an integral part of the protection of human rights. Children are especially vulnerable and those who are tasked with protecting them need to be accountable for their actions and need to operate in a way which protects the human rights of all the people they are dealing with, including the parents’ rights. Proceedings before family courts may give rise to issues not only under Article 8 of the European Convention on Human Rights (ETS No. 5, “the Convention”) guaranteeing the right to respect for private and family life, but also under Article 6 (right to a fair trial) and Article 13 (right to an effective remedy).

4. The motion for a resolution points out some worrying recent examples concerning the operation of family courts in Croatia, Portugal and the United Kingdom and calls for a thorough inquiry into the situation in these member States of the Council of Europe. It recalls the 2008 judgment of the European Court of Human Rights (“the Court”) in the case of *X. v. Croatia*,³ finding a violation of Article 8 of the Convention on account of the applicant’s exclusion from the proceedings, which resulted in her daughter being adopted. Moreover, the motion for a resolution expresses concerns about possible violations of Articles 6, 8 and 13 of the Convention by the United Kingdom in cases relating to proceedings before family courts and about the Portuguese system of “forcible” adoption, under which children may be placed for adoption against the will of their parents. Moreover, as some recent studies show, too many children are separated from their natural families and placed in care. For instance, according to UNICEF, the number of children in residential care in central and eastern Europe and the Commonwealth of Independent States is the highest in the world, with more than 626 000 children placed in care in the 22 countries from this region,⁴ and the rate for children in formal care is increasing.⁵ But the situation in Western Europe is not perfect, either; for instance, in France, out of 15 million children, almost 148 000 do not live with their natural parents. Amongst the latter, 48 600 are in residential care.⁶ In England, the number of children referred into care has recently increased.⁷

5. This report will therefore examine the functioning of family justice systems from a human rights perspective in these countries. A reminder of the existing international legal standards concerning children’s rights and a closer look at the case law of the European Court of Human Rights over the last two decades concerning the adoption and placing into care of children is helpful in identifying any shortcomings in this area. Examples from other member States are also taken into consideration. As regards concerns about the operation of family courts in my home country, which were at the origin of the above-mentioned motion for a resolution, I will base my work on the valuable contribution made by Professor Masson at the hearing which the committee organised in May 2012.

3. Application No. 11223/04, judgment of 17 July 2008.

4. At home or in a home? Formal care and adoption of children in Eastern Europe and Central Asia, UNICEF, September 2010, p. 4: www.unicef.org/protection/Web-Unicef-rapport-home-20110623v2.pdf. For more detailed data, see www.transmonee.org/.

5. Ibid., p. 5.

6. See the report by the French Ombudsman (*Défenseur des droits*) *Enfants confiés, enfants placés: défendre et promouvoir leurs droits, Rapport 2011 consacré aux droits de l’enfant*, p. 4: www.defenseurdesdroits.fr/sites/default/files/upload/defense_des_droits_des_enfants/rapport_ddd_2011_simples.pdf.

7. According to Cafcass, in January 2011, local authorities made 903 court applications to take children into care, the highest since it was established in 2001; see www.bbc.co.uk/news/uk-16958373 (of 9 February 2012).

2. Children's rights in international legal documents

2.1. *The Convention on the Rights of the Child*

6. Like all human beings, children enjoy human rights as guaranteed in international treaties. However, as children are particularly vulnerable, a number of rights have been added or reinforced in their respect in the United Nations Convention on the Rights of the Child, adopted in New York on 20 November 1989 ("the CRC").⁸ The CRC has been ratified by almost all States (except Somalia and the United States).⁹

7. The obligations under the CRC are of a rather general nature and require implementation measures (legislative, administrative and other) at the national level. Whilst the CRC imposes on the States parties the obligation to recognise various rights of the child, it also obliges them to respect the rights and duties of parents (Article 5). Separation of children from their natural parents should be an exceptional measure. According to Article 20, a child temporarily or permanently deprived of his or her family environment, or who in his or her own best interest cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State (paragraph 1) and ensured alternative care (paragraph 2). Adoption shall be carried out only if it is in the best interest of the child, with the authorisation of the competent authorities and with the relevant safeguards for the child and the parents (Articles 9 and 21). The CRC reaffirms that parents have joint primary responsibility for raising the child and that the State shall support them in this by providing appropriate assistance (Article 18). In particular, the States parties, in accordance with national conditions and within their means, shall assist parents in providing an adequate standard of living for their child and – in case of need – even material assistance and support programmes with regard to nutrition, clothing and housing (Article 27, paragraphs 1 and 3).

8. The CRC, and its Optional Protocol on the sale of children, child prostitution and child pornography of 2000¹⁰ contain several provisions related to the move towards so-called "child-friendly justice". This notion embraces the idea that courts can be a powerful tool to positively shape children's lives and at the same time recognises the reality that contact with the legal system is all too often a source of additional trauma rather than a remedy for children.¹¹ Consequently, decision-makers should develop policies that address the precarious situation of children in the justice system. Some major principles concerning child-friendly justice are included in the provisions of the CRC, in particular:

- a. the best interest of the child shall be a primary consideration (Article 3);
- b. a child can be separated from his or her parents against their will only if competent authorities subject to judicial review determine that it is necessary for the best interests of the child (Article 9);
- c. a child capable of forming his or her own views shall be able to express those views freely in all matters affecting him or her, in particular in judicial and administrative proceedings (Article 12);
- d. States should take all appropriate measures to protect the child from violence, injury or abuse, neglect or negligent treatment, etc. (Article 19).

9. The provisions of Article 12 of the CRC on the right of the child to be heard have been developed in the Committee on the Rights of the Child's General Comment No. 12 on the right of the child to be heard, dated 1 July 2009.¹² The Committee stressed that: "A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms."¹³

2.2. *Council of Europe activities in the area of child protection*

10. Several initiatives aimed at promoting children's rights and child protection have been taken under the auspices of the Council of Europe.¹⁴ In particular, the Council of Europe prompted the adoption of a number of conventions in this field;¹⁵ unfortunately, some of them have been ratified by only a few member States (in

8. http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

9. www.unicef.org/crc/.

10. www2.ohchr.org/english/law/crc-sale.htm.

11. See the website of the Child Rights Information Network: <http://crin.org/resources/infodetail.asp?id=24828#Child-Friendly%20Justice%20and%20the%20CRC|outline>.

12. www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf.

13. *Ibid.*, paragraph 34.

particular the European Convention on the Adoption of Children (revised) (CETS No. 202)¹⁶ and the European Convention on the Exercise of Children's Rights (ETS No. 160)).¹⁷ The Committee of Ministers has adopted a number of recommendations and resolutions on various aspects of child welfare and protection,¹⁸ including such issues as placement¹⁹ and parental responsibilities.²⁰

11. Several reports, resolutions and recommendations have been adopted by the Assembly in the last few years on the rights of children, and in particular regarding children witnessing domestic violence, children in care, and guaranteeing the right to education for children with illnesses or disabilities.²¹ But it is not the purpose of this report to describe all the Council of Europe's activities relating to child welfare.

12. The Council of Europe has also drawn up a number of rules on child-friendly justice. On 17 November 2010, the Committee of Ministers adopted its Guidelines on child-friendly justice,²² referring to the Council of Europe Programme "Building a Europe for and with children". The Guidelines are the first regional standards of their kind. They should apply in any sphere – civil, administrative or criminal – and "are not only a declaration of principles, but aspire to be a practical guide for the implementation of internationally agreed and binding standards" in proceedings both in and out of court.²³ They aim to ensure that in any proceedings in which children are involved, all their rights (such as the right to information, to representation, to participation and to protection) are fully respected with due consideration for the child's level of maturity and understanding and for the circumstances of the case. However, respecting children's rights should not jeopardise the rights of other parties involved (Part I. Scope and purpose). The existence of the Guidelines should not prevent member States from introducing or applying higher standards or more favourable measures.²⁴

13. From the perspective of family court proceedings, it is important that the Guidelines underline that children's best interests should be a primary consideration in all matters involving or affecting them (Part III.B.1. Best interests of the child, paragraph 1). They also focus on the protection of children's personal data (Part IV.A.2. Protection of private life and family life, paragraphs 6-10); they favour proceedings in camera: according to Section 9, "[w]henver children are being heard or giving evidence in judicial or non-judicial proceedings or other interventions, where appropriate, this should preferably take place in camera"; and they promote a multidisciplinary approach in dealing with children: co-operation between different professionals, such as lawyers, psychologists, physicians, police, immigration officials, social workers and mediators. The Guidelines also stress the need for speediness and exceptional diligence in family law cases, in order to avoid adverse and often irreparable consequences on family relations (Part IV.D.4. Avoiding undue delay, paragraphs 50-53).

3. The right to respect for family life (Article 8 of the Convention) in the case law of the European Court of Human Rights

3.1. Issues related to adoption and taking the child into care

14. Under Article 8 of the Convention, States have positive obligations to reunite parents with their children. It results from the case law of the Court that measures such as those aimed at permanently depriving a parent of contact or custody should only be applied in exceptional circumstances and could be justified only where

14. For instance, the programme "Building a Europe for and with children", launched in November 2011, or the "ONE in FIVE" campaign to stop sexual violence against children.

15. For a list of such conventions, see www.coe.int/t/dghl/standardsetting/family/Conventions_en.asp.

16. Adopted on 27 November 2008 in Strasbourg. So far, only ratified by six member States.

17. Adopted on 25 November 1996 in Strasbourg. So far, only ratified by 17 member States.

18. For a list of resolutions and recommendations, see www.coe.int/t/dghl/standardsetting/family/Resolutions_recommendations_cm_en.asp.

19. See, in particular, Recommendation Rec(2005)5 on the rights of children living in residential institutions and Resolution (77) 33 on placement of children.

20. See, in particular, Recommendation No. R (84) 4 on parental responsibilities and Recommendation No. R (87) 6 on foster families.

21. For instance, Resolution 1714 (2010) and Recommendation 1905 (2010) on children who witness domestic violence, Resolution 1762 (2010) and Recommendation 1939 (2010) on children without parental care: urgent need for action, Recommendation 1864 (2009) on promoting the participation by children in decisions affecting them or Resolution 1761 (2010) on guaranteeing the right to education for children with illnesses or disabilities. For a list of such documents, see also www.coe.int/t/dghl/standardsetting/family/Resolutions%20and%20Recommendations_pa_en.asp.

22. www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf.

23. The Guidelines, p. 16.

24. See Preamble to the Guidelines.

they are motivated by an overriding requirement pertaining to the child's best interests, as stated in the *Johansen v. Norway* judgment.²⁵ The best interest of the child remains the main criterion for the Court, although it is not mentioned in the European Convention on Human Rights. The rights of children encompass two distinct elements: the right to care within the family and the right to an adequate standard of care.²⁶

15. Considering the potentially irreversible nature of decisions taken by courts and other authorities in family matters, the Court has also established that certain procedural rights are implicit in the right to respect for family life under Article 8 of the Convention. Parents and, where relevant, other family members must be involved in any decision-making process concerning children to a degree sufficient to provide them with a requisite protection of their interests.²⁷ Therefore, the relevant authorities have to exercise exceptional diligence where there is a danger that a procedural delay may cause irreversible damage to the parties' family life.²⁸ Since the obligations stemming from Article 8 of the Convention include procedural obligations, when examining procedural deficiencies in family law cases, the Court refers to this provision rather than to that of Article 6 of the Convention, which provides for the right to a fair trial.²⁹ Article 8 is broader than Article 6 in family matters, because it includes not only the judicial proceedings, but also decisions made before a case is brought to a court and afterwards, when court orders are implemented. In some cases, the Court has also found a violation of Article 13 (right to an effective remedy) when the applicants could not effectively appeal at the national level in cases concerning their right to respect for family life.³⁰

16. Article 8 of the Convention covers substantive and procedural issues relating to freeing for adoption and/or deprivation of parental rights. On several occasions, the Court has dealt with deficiencies in such proceedings: when the child was removed too quickly from its natural parents,³¹ when adoption was decided too quickly or the child was placed too quickly in a foster family,³² when the natural parents were not sufficiently involved in such proceedings or adoption was decided without their consent,³³ when the natural father lacked *locus standi* in the adoption proceedings,³⁴ or when the proceedings concerning the natural parents' access to a child or its placement into public care were too lengthy.³⁵ However, the Court does not confer any right to adoption,³⁶ although it has found violations of Article 8 because of national courts' shortcomings in the course of adoption proceedings.³⁷ In adoption cases, the Court must always strike a balance between the rights of the natural and of the adoptive parents; the child's ties with his or her natural family can only be broken in exceptional circumstances.³⁸

17. The Court has also examined numerous cases concerning children taken into care,³⁹ assessing the proportionality of measures taken by local authorities; when the parents had not been sufficiently involved in the decision-making process, the Court found violations of Article 8.⁴⁰ According to the Court, a decision on taking the child into care does not put an end to natural family relationships. The natural parents may retain a

25. See, in particular, *Johansen v. Norway*, Application No. 17383/90, judgment of 7 August 1996, paragraph 78.

26. *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, judgment of 6 July 2010, paragraph 136: "The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, 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 to have such measures taken as would harm the child's health and development."

27. U. Kilkelly, *A guide to the implementation of Article 8 of the European Convention on Human Rights*, Human Rights Handbooks No. 1, 2003, Council of Europe, p. 55.

28. *H. v. the United Kingdom*, Application No. 9580/81, judgment of 8 July 1987, paragraph 85.

29. See, for example, *Bajrami v. Albania*, Application No. 35853/04, judgment of 12 December 2006.

30. See, for example, *T.P. and K.M. v. the United Kingdom*, Application No. 28945/95, judgment of 10 December 1999.

31. For example, *Haase v. Germany*, Application No. 11057/02, judgment of 8 April 2004.

32. For example, *Keegan v. Ireland*, Application No. 16969/90, judgment of 26 May 1994.

33. For example, *Haase v. Germany* and *Keegan v. Ireland*.

34. For example, *Keegan v. Ireland*.

35. For example, *E.P. v. Italy*, Application No. 31127/96, judgment of 16 November 1999, and *B. v. the United Kingdom*, Application No. 9840/82, judgment of 8 July 1987.

36. *Fretté v. France*, Application No. 36515/97, judgment of 26 May 2002.

37. For example, *Pini and Bertani v. Romania*, Applications Nos. 78028/01 and 78030/01, judgment of 22 June 2004; *Wagner and J.M.W.L. v. Luxembourg*, Application No. 76240/01, judgment of 28 June 2007.

38. See also the speech by I. Berro-Lefèvre, Judge at the European Court of Human Rights, at the Council of Europe conference "Challenges in Adoption Procedures in Europe", Strasbourg, 30 November 2009:

www.coe.int/t/dghl/standardsetting/family/Adoption%20conference/Presentation%20I%2020BERRO-LEFEVRE%20REV.pdf.

39. For example, *W.H., O., B. and R. v. the United Kingdom*, judgments of 8 July 1987.

40. *Olsson v. Sweden (No. 1)*, judgment of 24 March 1998, and *Eriksson v. Sweden*, judgment of 22 June 1989.

right of access which forms part of family life and the State must take the necessary measures to reunite the family by creating opportunities for parents and children to meet and maintain or re-establish close relationships.⁴¹ The Court clearly attaches a lot of importance to the maintenance of contact between parents and children during a child's placement in care; restrictions imposed on such contacts have to be proportionate to the need they serve.⁴²

3.2. Recent case law of the Court concerning selected States parties to the Convention

3.2.1. Croatia

18. In the judgment *X. v. Croatia*, the Court criticised the use by the Croatian authorities of mental incapacity to exclude a person from involvement in her children's future. In this case, the applicant's daughter was given up for adoption without the applicant's knowledge, consent or participation in the adoption proceedings, despite the fact that she had never been formally divested of her parental rights. The applicant was denied the capacity to act on account of her mental health difficulties and addiction problems. The Court took issue with the government's stance that all those divested of capacity to act should automatically be denied the opportunity to take part in adoption proceedings concerning their child and accordingly found a violation of Article 8 of the Convention. It considered that the applicant should have had the opportunity to be heard in those proceedings and thus the possibility of expressing her views about the potential adoption of her daughter.⁴³ This case is still pending before the Committee of Ministers, which is supervising the implementation of the judgment by Croatia.⁴⁴

19. The Court is currently examining a similar problem in the case of *A.K. and L.K. v. Croatia*,⁴⁵ in which the applicants – a mother suffering from a mild mental disability and her son – complain that their right to respect for their family life was violated by divesting the first applicant of her parental rights in respect of the second applicant and by putting the second applicant up for adoption without the consent or even the knowledge of the first applicant.

3.2.2. Portugal

20. In Portugal, there has been some evidence of arbitrariness and even discrimination in the adoption process. In the case of *Salgueiro da Silva Mouta v. Portugal*,⁴⁶ it was held that the Court of Appeal had based its decision to award parental responsibility for the applicant's daughter to his ex-wife exclusively on the basis of the applicant's sexual orientation as a homosexual. The Court found a violation of Article 8 in conjunction with Article 14 of the Convention. Following a wide dissemination of this judgment to the relevant authorities and the re-examination of the question of the applicant's parental authority, the Committee of Ministers closed the supervision of the execution of this judgment.⁴⁷ In two recent cases, *Santos Nunes v. Portugal*⁴⁸ and *Pontes v. Portugal*,⁴⁹ the Court found violations of Article 8. In the first case, the violation was due to a lack of diligence on the part of the authorities, in particular the police, responsible for enforcing the decision awarding the applicant custody of his child, who had been placed in the care of another couple. In the second case, one of the applicants' children had been removed from them and ultimately adopted and their parental authority withdrawn. The Court found that the authorities had not taken measures enabling the applicants to have regular contact with their son and that the decision to place him for adoption was not based on relevant and sufficient reasons (two violations of Article 8). On the other hand, in the case of *Assunção Chaves v. Portugal*,⁵⁰ in which the applicant, a Brazilian national, complained about the placement of his daughter in an institution after her birth in a hospital and the forfeiture of his parental rights, the Court did not find a violation of Article 8,⁵¹ but only of his right of access to a court (Article 6, paragraph 1), as the applicant had not been duly informed about his procedural rights.

41. *B. v. the United Kingdom*, judgment 8 July 1987, paragraph 60.

42. *U. Kilkelly*, see footnote 27 above, p. 54.

43. Paragraph 53 of the judgment.

44. www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=CRO&SectionCode=

45. Application No. 37956/11, communicated on 6 July 2011.

46. Application No. 33290/96, judgment of 21 December 1999.

47. Resolution ResDH(2007)89 adopted on 20 June 2007.

48. *Santos Nunes v. Portugal*, Application No. 61173/08, judgment of 22 May 2012, not final yet.

49. *Pontes v. Portugal*, Application No. 19554/09, judgment 10 April 2012, not final yet.

50. *Assunção Chaves v. Portugal*, Application No. 61226/08, judgment of 31 January 2012.

51. With a majority of 4 to 3. The Court considered that the applicant and his parents were responsible for the breaking of ties with their daughter, as they had moved to Spain and did not exercise their right to visit the child.

21. Considering the timing and the type of cases, it would be premature to draw any far-reaching conclusions on the operation of family courts in this country. Many other judgments delivered by the Court against Portugal show some deficiencies and delays in the functioning of the general justice system (violations of Article 6); their implementation is closely monitored by the Committee of Ministers.⁵² The 2011 report by the French Ombudsman mentions Portugal as an example of good practices, following the publication of guidelines for persons working with children in residential care.⁵³ Therefore, the problem of the functioning of family courts would need to be assessed in this larger context.

3.2.3. The United Kingdom

22. In a number of cases against the United Kingdom, the Court found that State action lacked proportionality and was therefore contrary to the provisions of the Convention. For instance, problems caused by the irreversibility of adoption orders and the failure of the authorities to adequately investigate alternatives to removing a child from its parents at birth were highlighted for particular criticism in the case of *P., C. and S. v. the United Kingdom*.⁵⁴ These two issues led to a finding of a violation of Article 8 of the Convention. Indeed a similar set of facts had resulted in the same outcome in the case of *McMichael v. the United Kingdom*⁵⁵ seven years earlier.⁵⁶

23. Similarly, in the case of *A.D. and O.D. v. the United Kingdom*,⁵⁷ the Court found a violation of the right of the applicants (a mother and son) to respect for their private and family life due to the errors of local authority care services. The violation resulted from the following facts: as the applicant's new-born son suffered from unexplained injuries, the applicant and her partner were relocated to a family assessment centre for almost three months. Their child had been placed in foster care for four months due to the lack of a correct assessment by the local authorities and there had been an unreasonable delay in returning him to his natural family once the doctors established that he suffered from a rare bone disease. The Court found that "while there were relevant and sufficient reasons for the authorities to take protective measures, the subsequent failings both extended and exacerbated the interference with the applicants' right to respect for their family life and were not proportionate to the legitimate aim of protecting the applicants from harm".⁵⁸

24. In the case of *R.K. and A.K. v. the United Kingdom*,⁵⁹ the Court found a violation of Article 13 of the Convention because the applicants did not have an effective remedy to establish the local authority's responsibility for the damage they suffered following the placing of their daughter in short-term State care. Similarly, in the case of the *T.P. and K.M. v. the United Kingdom*,⁶⁰ the Court found a violation of Article 13 because a mother, T.P., who was not sufficiently involved in the decision-making process, was left without adequate redress to challenge a decision concerning the care of her daughter to the extent that she was considered to have been denied access to an effective remedy. However, according to the Committee of Ministers, which supervises the implementation of Court judgments, this is no longer a problem following the entry into force, on 2 February 2000, of the Human Rights Act.⁶¹

25. The Court is currently examining another application from a British national who has a significant learning disability and who is complaining, under Article 8 of the Convention, about the decision to take her daughter into local authority care and to place her for adoption (*R.P. and Others v. the United Kingdom*).⁶² The applicant also complains under Article 6 of the Convention that, as a result of the appointment of the Official Solicitor, she was prevented from presenting her case before a court and challenging the facts submitted by the local authority. In particular, she had no opportunity to challenge the psychologist's report.

52. *Figueiredo Simoes v. Portugal*, Application No. 51806/99, judgment of 30 January 2003. See also Interim Resolution CM/ResDH(2007)108 of the Committee of Ministers on excessive length of judicial proceedings in Portugal.

53. See footnote 6 above, p. 93.

54. Application No. 56547/00, judgment of 16 July 2002. The Court also found a violation of Article 6 of the Convention because the applicants (parents) were not assisted by a competent lawyer during the proceedings.

55. Application No. 16426/90, judgment of 24 February 1995.

56. The supervision of the execution of this case was closed by Committee of Ministers Resolution DH(97)508, following the entry into force of the Children's Hearings (Scotland) Rules 1996.

57. Application No. 28680/06, judgment of 16 March 2010, final on 16 June 2010.

58. Paragraph 91 of the judgment.

59. *R. K. and A. K. v. the United Kingdom*, Application No. 38000/05, judgment of 30 September 2008; *A.D. and O.D. v. the United Kingdom*, see footnote 57 above.

60. Application No. 28945/95, judgment of 10 December 1999.

61. Resolution CM/ResDH(2010)25, adopted on 4 March 2010, and Resolution CM/ResDH(2008)84, adopted on 8 October 2008.

62. Application No. 38245/08, judgment of 9 October 2012.

3.2.4. Other States parties to the Convention

26. Following a scrutiny of cases against other States parties, it could be argued that the system of adoption/placement in care might be deficient in terms of its compliance with the Convention also in other member States, in particular in Germany and the Czech Republic, concerning which some particularly shocking cases have been reported.

27. In the case of *Görgülü v. Germany*,⁶³ in which the mother of the son of the applicant (the natural father) gave the latter up for adoption without the applicant's consent, the authorities prevented the applicant from having access to and caring for his son although his ability and willingness to do so were not in dispute. The Court considered that the foster parents' rights were unjustifiably given preference over those of the applicant. Consequently, the Court found a violation of Article 8 of the Convention.⁶⁴ In the case of *Kutzner v. Germany*,⁶⁵ the child was placed in foster care because of the perceived intellectual shortcomings of the parents, in breach of Article 8 of the Convention.⁶⁶ Both cases were closed by the Committee of Ministers following the adoption of individual and general measures. The case of *Haase v. Germany*⁶⁷ concerned the removal from the applicants of their children, including a new-born daughter, in a decision-making process which did not meet the procedural requirements of Article 8 of the Convention. The Committee of Ministers closed the examination of this case following the re-establishment of contacts between the applicants and their children.⁶⁸ Recently, the Court also found violations of this article in two cases concerning the refusal to grant the applicants (the fathers) access to their natural children (*Anayo v. Germany*⁶⁹ and *Schneider v. Germany*⁷⁰).

28. In the Czech Republic, the case of *Wallowa and Walla v. the Czech Republic*⁷¹ reiterated the duty incumbent upon local authorities to respect the right to family life. The applicants' children were taken from them because of the poor living conditions in the family home. There was no permanent living arrangement available and the parents could not improve the situation because of their financial situation (the father had no stable employment, the mother was unemployed and they had not complied with the formalities which would have entitled them to social benefits). The children were separated from their parents for five years, and the two youngest children were relocated in another family. The Court held that the children were taken from their family because of material reasons, and that the shortcomings of their accommodation should have been redressed in a way other than by relocating the children. The couple should have been informed in a timely manner about social security, the availability of communal housing and other ways to improve the living conditions of their family. The Court held that even though the social services' concerns were relevant, the circumstances did not justify the interference with Article 8. A similar set of circumstances led to the finding of a violation of Article 8 in the case of *Havelka and Others v. the Czech Republic*.⁷² Both cases are pending execution before the Committee of Ministers.

4. Family courts in Europe

4.1. The example of the United Kingdom

29. Since the motion for a resolution focuses on the functioning of the family courts in the United Kingdom, it is necessary to have a closer look at this matter. Child protection issues in this country are governed mainly by the 1989 Children Act.⁷³

30. As stated in the above-mentioned motion for a resolution, some facts concerning the functioning of family courts in England and Wales are worrying. It has been alleged that in numerous cases in England and Wales the Official Solicitor, an organ of the State, displaced a parent in proceedings which have led to the

63. Application No. 74969/01, judgment of 26 February 2004.

64. This case was closed by the Committee of Ministers following the decision to grant the applicant the sole custody of his son; Resolution CM/ResDH(2009)4 of 9 January 2009.

65. Application No. 46544/99, judgment of 26 February 2002.

66. This case was closed by the Committee of Ministers after the child had been returned to his natural family; Resolution CM/ResDH (2004)40 of 20 July 2004.

67. Application No. 11057/02, judgment of 8 April 2004.

68. Resolution CM/ResDH(2011)213 adopted on 2 December 2011.

69. Application No. 20578/07, judgment of 21 December 2010.

70. Application No. 17080/07, judgment of 15 September 2011.

71. Application No. 23848/04, judgment of 26 October 2006.

72. Application No. 23499/06, judgment of 21 June 2007.

73. www.legislation.gov.uk/ukpga/1989/41/contents.

adoption of their child or children. Mothers had their children taken away from them because they were victims of domestic violence or on the basis of medical evidence for which there had been no second opinion. Some complaints referred also to the fact that England habitually gave judgment in family proceedings without the judgment being made public (which might be in conflict with Article 6 – there can be an argument for keeping the identity of the persons secret, but this does not apply to the reasoning of the court which it must remain accountable for). Moreover, the motion for a resolution is critical about the operating of Cafcass – the Children and Family Court Advisory and Support Service –, which provides guardians *ad litem* for cases of children in care in England and Wales (Cafcass Cymru operates in Wales).⁷⁴ In 2008, Ofsted (Office for Standards in Education) became the regulator for Cafcass and since then it has issued reports on Cafcass.⁷⁵

31. As stressed by Professor Masson at the hearing in May 2012, annual rates for child protection proceedings in England are approximately 3 per 1 000 children under the age of 16 and cases that reach courts are by their nature exceptional. Of the children subject to court proceedings for their protection, just under half become the subject of orders through which parents share care with the State (“care orders”). The others move to live with other family members or, more rarely, remain with the parent who cared for them when the proceedings began.⁷⁶ Care orders for placement with non-related carers and/or adoption plans are only made where no such persons are available to care for the child. The courts routinely consider contact arrangements for children subject to care proceedings, not only during the course of those proceedings but also when final orders are made; the requirement to do so is set out in legislation.⁷⁷ Adoption plans are made for approximately a quarter of children subject to care orders.⁷⁸

32. Concerning the Official Solicitor, which operates in England and Wales, she or he is a public official and qualified lawyer who only acts in cases where she or he is satisfied that the parent lacks capacity, and routinely requires evidence from a consultant psychiatrist to establish this. In any event, any compulsory child protection intervention necessitates obtaining an order from the family court.

33. According to Professor Masson, although domestic violence remains a problem⁷⁹ which may lead to compulsory child protection intervention,⁸⁰ contesting medical evidence in such cases does not imply a “right to a second opinion” under Article 8 of the Convention. Although decisions about the expert evidence necessary to decide a case are formally a matter for the judge, the parties have considerable influence on this through their legal representatives. Such decisions can also be appealed. Over 90% of child protection cases in the courts in England involve evidence from independent experts. The cost of expert witnesses for parents or children is paid by the legal aid fund.

34. Between 2006 and 2010, the issue of “court transparency”, specifically media access to the courts and the publication of judgments, was subject to government review and public debate in England and Wales.⁸¹ Although some restrictions on press access to courts were removed, strict reporting restrictions remain. Consequently, press attendance at family courts is extremely rare and is generally limited to “celebrity” cases. Press reporting does not provide an effective means of securing transparency; uncontested evidence in family proceedings is not given orally, only in writing, and cases are not heard continuously but over a series of short hearings. The fact that there is no public judgment does not mean that the reasons for the decision are not

74. Cafcass does not operate in Scotland or Northern Ireland, which have their own arrangements for welfare reporting.

75. www.ofsted.gov.uk/children-and-families-services/for-all-other-users/inspecting-children-and-families-services/inspecting-cafcass.

76. Children Act 1989, Section 22C(7); The paramountcy of the child’s welfare determines the order made. The local authorities and courts routinely consider whether there are suitable family members to care for a child subject to care proceedings; a placement hierarchy parents, family/friends, non-related persons is set out in legislation.

77. Children Act 1989, Section 34.

78. Academic research provides very good evidence of the practices in the family courts. For example: J. Brophy, J. Jhutti-Johal and E. McDonald, *Minority ethnic parents, their solicitors and child protection litigation*, London: Department for Constitutional Affairs (DCA); J. Brophy, *Research review: child care proceedings under the Children Act 1989*. DCA Research Series 5/06, Department for Constitutional Affairs, London; C. Davies and H. Ward, *Safeguarding across services*, Jessica Kingsley Publishers, London, 2012; J. Hunt and A. Macleod, *Outcomes of applications to court for contact orders after parental separation and divorce*, 2011, Ministry of Justice, London; J. Masson et al, *Care Profiling Study*, 2008, Ministry of Justice research study 4/08, Ministry of Justice, London; J. Pearce et al, *Just Following Instructions? The representation of parents in care proceedings*, University of Bristol, School of Law, Bristol, 2011.

79. In an extensive study of child protection cases in the English courts in 2004, almost half of the mothers had problems of both domestic violence and substance abuse.

80. J. Masson et al, 2008, footnote 78 above.

81. As part of that process there was research with children who had been subject to family court proceedings. It was clear that the majority of children did not support increased reporting of their cases. Children felt that private information would leak into the communities where they lived and they would be stigmatised; without confidentiality they would be unwilling to co-operate with expert assessments or other court processes. J. Brophy 2010, footnote 78 above.

given to the parties. All courts dealing with family cases give reasons for their decisions. In the case of *B and P v. the United Kingdom*,⁸² the Court held that the practice of holding some family proceedings in chambers (thereby excluding the public and press) did not contravene Article 6 of the Convention and that the nature of family proceedings and particularly the privacy of children justified private hearings in family cases.

35. As regards Cafcass officers in England and Wales,⁸³ they are accountable to the court for their professional judgment in their cases, not to their employer. They also provide welfare reports in disputes between parents in the family courts. According to Professor Masson, given that Cafcass provides welfare reports in only the more contentious cases, that is in about 10% of cases, it should not be a surprise that it rarely recommends that no order is necessary. In July 2011, the House of Commons Justice Committee⁸⁴ strongly criticised Cafcass for not focusing enough on the best interests of the children. It called in particular for a change in its management, in order to allow staff to spend more time with children.⁸⁵

36. The family courts and child protection practice in England and Wales have been subject to a series of reviews over the last few years.⁸⁶ Most recently, the Family Justice Review panel produced a report in November 2011⁸⁷ and the ideas from the Professor Eileen Munro Review into child protection⁸⁸ on strengthening social work skills and practice are currently being implemented. The Family Justice Review criticised in particular delays in proceedings before family courts (in particular, cases concerning removal of children from their families take over a year). Moreover, the government has announced new legislation which will create a single family court in England and Wales⁸⁹ and speed up the time taken to process care cases in the courts.⁹⁰

4.2. General overview

37. As stressed by Professor Masson at the hearing, there is no single model for delivering family justice in Europe; each State makes its own arrangements for deciding cases relating to family matters. A single family court may have jurisdiction over all matters as will be the case in England and Wales when the Crime and Courts Bill 2012 is enacted. But elsewhere in Europe it is common for matters relating to children to be dealt with separately from matters relating to family property, and for cases of child care and child protection (which involve State agencies) to be dealt with in administrative courts rather than civil or family courts. Practices differ as to, for example, the representation of children, providing specialist courts, allowing mothers to withhold their identity and give children up for adoption anonymously, accountability of those working with families (like State agencies), etc. As stressed by Judge Pical at the hearing, the institution of *accouchement sous X*, which allows a mother to give birth anonymously, is an example of conflicting interests between the natural mother, who would like to maintain her anonymity, and the child, who would like to know his or her origins.⁹¹ As it exists only in a small number of member States of the Council of Europe,⁹² it is a clear example of a lack of common European denominator on this issue.⁹³ The realities of adoption across member States might be another example of the wide variety of systems. As noted in the April 2011 issue paper by the Council of Europe Commissioner for Human Rights, while in some countries adoption is a well-established practice, in others it is still relatively unfamiliar. Some States allow their children to be adopted abroad, while others do not.⁹⁴

82. Judgment of 24 April 2001, Applications Nos. 36337/97 and 35974/97.

83. For more information, see www.norfolk-fjc.org.uk/publications/the_role_of_cafcass.pdf.

84. www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/518/51809.htm#a48.

85. www.nagalro.com/feeds/news/cafcass-requires-major-change-says-justice-committee.aspx.

86. In particular a review conducted jointly by the Department for Education and Schools and the Department of Constitutional Affairs (2006), *The Review of the Child Care Proceedings System in England and Wales*, London: DCA; and Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to procurement*, London, Department for Constitutional Affairs (2006). See also the Justice Select Committee 6th report 2010-2012 on the operation of the family courts: www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/518/51802.htm.

87. The Family Justice Review final report of November 2011:

www.justice.gov.uk/about/moj/independent-reviews/family-justice-review.

88. www.education.gov.uk/munroreview/.

89. The Crime and Courts Bill.

90. The Children and Families Bill.

91. See also the Court judgment in the case of *Odièvre v. France*, Application No. 42326/98, judgment of 13 February 2003 (Grand Chamber), in which the Court found that the French legislation allowing *accouchement sous X* was not in contradiction with Article 8 of the Convention.

92. *Ibid.*, paragraphs 19-20.

93. *Ibid.*, joint dissenting opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää, in particular paragraph 12.

94. *Adoption and Children: a Human Rights Perspective*, Strasbourg, 28 April 2011, CommDH/Issue Paper(2011)2;

38. Professor Masson also stressed that resort to compulsory measures is the exception, used only in cases of child abuse and neglect. Although policies and practices in Europe differ, the primary approach in all States is, wherever possible, to seek parental co-operation to secure the best possible care for children. As a consequence, courts are only seized where voluntary measures have been, or are considered to be, ineffective.

5. Conclusions

39. It is an unfortunate fact that there are parents whose mental health or incapacity or other circumstances makes them unable to provide adequate care for their children. In such cases, child protection authorities have a duty under international and domestic law to ensure adequate care for those children, bearing in mind that they are most vulnerable at birth and in early infancy. Adoption and placement in care are drastic measures in that they lead to the separation of children from their parents; therefore, these measures must be applied with due diligence, only as a last resort, in conformity with Article 8 of the European Convention on Human Rights as interpreted by the Court and the United Nations Convention on the Rights of the Child. Institutional care should be avoided as far as possible, as a family environment offers the best conditions for the proper development and well-being of a child. As stressed by the Commissioner for Human Rights, the current economic crisis should not undermine the process of supporting children at risk.⁹⁵ Given the exorbitant cost of decent institutional care, practical help for families in need, enabling them to care for their own children, may well be not only more respectful of our families' fundamental role, but also cheaper than placing children in institutions.

40. Although the motion for a resolution stressed some problems relating to the functioning of the family justice systems in Croatia, Portugal and the United Kingdom, it would be too early to make general critical conclusions on the operation of family courts in these countries on the basis of examples from the case law of the Court, which can provide only a fragmentary picture of the situation. The case of the United Kingdom shows that it is very difficult to have a clear picture of the overall functioning of family courts in a country and that an objective assessment can only be made on the basis of in-depth studies. Moreover, the overview of the Court's case law has shown that certain deficiencies may indeed exist not only in the three above-mentioned member States, but also elsewhere. In particular, some judgments delivered by the Court against Germany and the Czech Republic illustrate alarming problems relating to procedures concerning the placing of children in care or foster families, against the will of one of or both of the natural parents.

41. The wide range of different approaches to family matters within member States reflects the different histories, cultures and religious traditions and that is why the Convention and the Court effectively set only minimum standards for the protection of human rights in this field. Whatever arrangements are made, decision-making processes relating to "family life" must be compliant with Convention standards.

42. Taking into account the substantial work of Council of Europe bodies in the field of child protection and child welfare, there is no need to duplicate initiatives and activities. It is nevertheless important to encourage member States to sign and/or ratify, if they have not yet done so, the relevant conventions adopted under the Council of Europe auspices in this field, and to promote and implement the Committee of Ministers' Guidelines on child-friendly justice.

<https://wcd.coe.int/ViewDoc.jsp?id=1780157>.

95. Viewpoint by Thomas Hammarberg, Council of Europe Commissioner for Human Rights on "Children in unsuitable care institutions", in "Human rights in Europe: no grounds for complacency", 2011, p. 173.