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21 April 2015

## **Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States**

### **Committee Opinion<sup>1</sup>**

Committee on Legal Affairs and Human Rights

Rapporteur: Ms Olena SOTNYK, Ukraine, Alliance of Liberals and Democrats for Europe

### **A. Conclusions of the committee**

1. The Committee on Legal Affairs and Human Rights congratulates the Committee on Social Affairs, Health and Sustainable Development and its rapporteur, Ms Olga Borzova (Russian Federation, NR), on its excellent and comprehensive report. It fully supports the draft resolution and draft recommendation, subject to some amendments aimed at further clarifying and strengthening the draft resolution.

2. The committee is particularly pleased to note that, besides providing a useful overview of existing legislation and practice in Council of Europe member States relating to the separation of children from their families, the report addresses particularly sensitive issues such as adoption without parental consent, severing family ties completely, basing placement decisions primarily on the passage of time, and the removal of children from parental care at birth. These matters have a direct impact on both children's and their parents' right to respect for their family life, as well as the right to a fair trial and an effective remedy. In light of this, the committee considers that the report makes a valuable and timely contribution to a pressing social problem. The issues raised in the report deserve further examination and appropriate follow-up by all actors concerned.

3. The committee considers that the draft resolution could be strengthened from a human rights perspective by including the following amendments into the text.

### **B. Proposed amendments**

#### *Amendment A (to the draft resolution)*

After paragraph 8.6, add the following paragraph:

*“sign and/or ratify, if they have not yet done so, the relevant conventions of the Council of Europe relating to the rights of children, most notably 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), and implement all pertinent recommendations emanating from the Committee of Ministers;”*

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1. Reference to committee: [Doc. 13054](#), Reference 3926 of 21 January 2013. Reporting committee: Committee on Social Affairs, Health and Sustainable Development. See [Doc. 13730](#). Opinion approved by the committee on 20 April 2015.



*Amendment B (to the draft resolution)*

At the beginning of paragraph 8.1, replace the words “put into place” with the words “review existing (or, where necessary, put in place new)”.

*Amendment C (to the draft resolution)*

After paragraph 8.1, insert the following paragraph:

*“continue and strengthen their efforts to ensure that all relevant procedures are conducted in a child-sensitive manner, and that the children concerned have their views taken into account according to their age and level of maturity;”*

*Amendment D (to the draft resolution)*

At the end of paragraph 8.3, add the following words:

*“, in line with their obligations stemming from the European Convention on Human Rights (ETS No. 5, “the Convention”), as interpreted by the European Court of Human Rights, as well as the United Nations Convention on the Rights of the Child, as interpreted by the United Nations Committee on the Rights of the Child;”*

*Amendment E (to the draft resolution)*

After paragraph 8.3, insert the following paragraph:

*“ensure that any (temporary) placement of a child in alternative care, where it has become necessary as a measure of last resort, be accompanied by measures aimed at the child’s subsequent reintegration into the family, including the facilitation of appropriate contact between the child and his or her family, and be subject to periodic review;”*

*Amendment F (to the draft resolution)*

In paragraph 8.4, after the words “except in exceptional circumstances”, insert the words “provided for in law, and subject to effective (timely and comprehensive) judicial review”.

*Amendment G (to the draft resolution)*

At the end of paragraph 8.6., add the following words:

*“, while ensuring the effective protection of personal data;”*

**C. Explanatory memorandum by Ms Sotnyk, rapporteur for opinion**

1. I wish to congratulate Ms Borzova on her excellent report, which deals with a range of very sensitive issues relating to the removal of children from their families and corresponding responsibilities of social services, all by emphasising the principle of the best interests of the child.

2. I share the rapporteur’s firm stance that member States must guarantee every child’s right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her. This requirement constitutes one of the four general principles of the United Nations Convention on the Rights of the Child ([United Nations Treaty Series](#), Vol. 1577, p. 3).<sup>2</sup>

3. In the same vein, I appreciate that Ms Borzova’s report highlights the importance of the family environment, starting from the premise that parents have the primary responsibility for the upbringing and development of their children. I note that this is in line with the importance attached to the parent-child relation by the United Nations Convention on the Rights of the Child, which states, in Article 7.1, that “[t]he child ... shall have, as far as possible, the right to know and be cared for by his or her parents”.

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2. This has been clarified by the United Nations Committee on the Rights of the Child, in its general comments No. 5 (2003) on the general measures of implementation of the Convention on the Rights of the Child (paragraph 12), No. 12 (2009) on the right of the child to be heard (paragraph 2) and No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3.1) (paragraph 1).

4. I should like to recall that the removal of a child from his or her parents by State authorities constitutes an interference with both the parents' and the child's rights to respect for their family life, as guaranteed by Article 8.1 of the European Convention on Human Rights (ETS No. 5, "the Convention"). Such interference is only permissible if it is in accordance with the law, pursues a legitimate aim, and is necessary and proportionate in relation to the aim pursued, as set out in paragraph 2 of this provision.

5. I should like to mention, in this respect, a number of judgments of the European Court of Human Rights ("the Court") which I consider to be more relevant than the cases referred to in the lead committee's report, some of which did not expressly relate to the removal of children from their families. Most notably, the Court has established that a child ought not to be removed from his or her family unless there is a real and immediate danger to his or her health and development. The reasons for resorting to such a protective measure must be relevant and sufficient in light of the circumstances of the case at hand, and proportionate to the aim of protecting the child.<sup>3</sup>

6. In the case of *L. v. Finland*, the Court pronounced itself on the requirement that any interference must have a basis in national law, rather than being based solely on a (discretionary) decision of a social worker; and acknowledged that the protection of a child from abuse or suspected abuse, and in particular from injury to health and/or development, constitutes a legitimate aim for an interference with the rights enshrined in Article 8 of the Convention.<sup>4</sup>

7. In deciding whether the intervention was necessary, the Court concluded that it was important to consider whether the reasons used to justify the intervention were "relevant and sufficient".<sup>5</sup> Moreover, the interests of the child were of crucial importance:<sup>6</sup> "No public-policy considerations of the State authorities can take precedence over the best interests of a child."<sup>7</sup> According to the Court's recent judgment in the case of *Paradiso and Campanelli v. Italy*,<sup>8</sup> the removal of a child from his or her family is seen as an extreme measure that can be justified only in the event of imminent danger to that child.

8. Aside from being necessary, the interference must also be proportionate, which requires that the degree of interference into the child's family life be appropriate to the level of the existing danger. This requirement was considered in the case of *Wallová and Walla v. the Czech Republic*,<sup>9</sup> where the Court ruled that separating the family completely on the sole ground of their material difficulties had been an unduly drastic measure which violated Article 8 of the Convention. Similarly, in *Saviny v. Ukraine*,<sup>10</sup> the Court found a violation because the competent authorities had not provided sufficient evidence that the children's living conditions had been hazardous to their life and health.

9. Against the background of the Court's case law, I welcome the fact that the lead committee's report discourages unnecessary separation of children from their parents, highlighting instead the need to put into place appropriate (social, psychological and financial) family support policies to enhance or restore parents' capacity to meet their parental responsibilities, with the aim of preventing or reducing instances where separation becomes necessary in the best interest of the child. I agree that separation should occur only "in very exceptional circumstances" if there exist no less intrusive means for effectively protecting the child, as the Parliamentary Assembly emphasised in [Resolution 1908 \(2012\)](#) on human rights and family courts (paragraph 4). In this regard, I note with satisfaction that the report clearly enunciates, with reference to the relevant case law of the European Court of Human Rights, that poverty should never in and of itself lead to the removal of a child from his or her family.

10. It is also commendable that Ms Borzova's report and the draft resolution encourage member States to resolve prevailing problems concerning the lack of detailed statistical data on the ethnic and religious minority status, migrant status or socio-economic situation of children taken into care. The absence of tangible statistics impedes the drawing of conclusions about whether or not children from certain backgrounds are more affected by (unwarranted) removal decisions than others. Nevertheless, I wish to underline that all

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3. [R.K. and A.K. v. the United Kingdom](#) (Application No. 38000/05, judgment of 30 September 2008).

4. [L. v. Finland](#) (Application No. 25651/94, judgment of 27 April 2000).

5. [Olsson v. Sweden \(No. 1\)](#) (Application No. 10465/83, judgment of 24 March 1988).

6. [L. v. Finland](#), *supra* note 4.

7. [Paradiso and Campanelli v. Italy](#) (Application No. 25358/12, judgment of 27 January 2015, not yet final, available in French only).

8. *Ibid.*

9. [Wallová and Walla v. the Czech Republic](#) (Application No. 23848/04, judgment of 26 October 2006, available in French only)

10. [Saviny v. Ukraine](#) (Application No. 39948/06, judgment of 18 December 2012).

member States should pay special attention to the protection and support of particularly vulnerable families, such as families belonging to minorities (especially Roma children), large families living in poverty or social isolation, victims of discrimination, as well as migrant children.

11. Furthermore, I cannot but support the lead committee's call on member States to ensure that their social services are well-equipped to provide all the support to families necessary to minimise the number of cases where a child must be separated from its family. I share the rapporteur's concern about budget cuts resulting in a lack of resources and qualified personnel working in the social services, which have had a considerable negative impact on child protection. In order to be capable of providing multidisciplinary services tailored to the needs of each child in need, social services must be adequately funded. Last but not least, member States should develop adequate, regular professional training programmes for social workers, adopting a children's rights approach and preparing them to work with children from different cultural and religious backgrounds. There is an obvious need to raise awareness among the staff of social services, judges, law-enforcement officials and policy makers of the need to promote international standards, including standards protecting the best interests of the child, when deciding on the issue of removal of a child from a family by social services.

12. Lastly, I am pleased to note that the report addresses particularly sensitive issues such as adoption without parental consent, severing family ties completely, basing placement decisions primarily on the passage of time, and the removal of children from parental care at birth.

13. Against the background of these observations, and given the direct impact of the issues addressed in the report on children's (but also their parents') enjoyment of their human rights, I should like to propose some amendments to the draft resolution with a view to strengthening it from a legal and human rights point of view.

### **1. Amendment A (to the draft resolution)**

Explanatory note:

Proposed amendment A is arguably self-explanatory. The instruments referred to therein set binding minimum standards for the respect and protection of the rights of children, and the Assembly should urge those member States which have not yet done so to affirm their commitment to the rights of all children under their jurisdiction, by signing and/or ratifying the relevant conventions developed under the auspices of the Council of Europe and by taking all necessary steps to ensure their effective implementation.

### **2. Amendment B (to the draft resolution)**

Explanatory note:

This proposed amendment merely aims to make the draft resolution more precise, by clarifying that member States should both review their existing laws, regulations and procedures, revise them in case they are found to be incompatible with international standards and, if necessary, adopt new ones, in order to ensure that the best interests of the child are the decisive consideration in all child removal, placement and family reunification procedures.

### **3. Amendment C (to the draft resolution)**

Explanatory note:

By means of this proposed amendment, express mention of children's right to participation in decisions affecting them would be inserted into the draft resolution. Given the far-reaching impact on their lives, children should be heard in all stages of separation, placement and reunification processes (namely before an initial decision is taken, while it is being implemented and after it has been lifted), according to their age and level of maturity.

Children's right to participate in proceedings concerning them is reflected in the Committee of Ministers' [Guidelines on child-friendly justice](#) of November 2010. The United Nations Convention on the Rights of the Child stipulates, in Article 12, that 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. As has been highlighted by the United Nations Committee on the Rights of the Child, "the fact that the child is very young or in a vulnerable situation ... does

not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests".<sup>11</sup> This requires that proceedings be both accessible and appropriate for children, and that relevant information be provided in a child-friendly manner.

I believe that in order to guarantee the effective implementation of these generally recognised principles, we need to promote a change in attitudes. We must no longer regard children as mere objects of decisions taken by the competent authorities. They are bearers of rights, not only to protection, but also participatory rights. I wish to add that, by avoiding unduly inflexible and legalistic procedures and instead facilitating children's participation in these processes, member States create an important safeguard for giving real effect to the somewhat vague and flexible notion of the "best interests of the child", the particular content of which needs to be determined on a case-by-case basis, by evaluating and balancing all the elements necessary for taking into account the specific circumstances of each child.

#### 4. Amendment D (to the draft resolution)

Explanatory note:

In my view, the issue of assistance to be provided to families with the aim of supporting them in providing adequate care for their children is of crucial importance and therefore deserves to be reinforced in the draft resolution, by adding a reference to the international instruments setting out States' duties in this respect. The Committee on the Rights of the Child has recommended

*"that States parties develop, adopt and implement ... a comprehensive national policy on families and children which supports and strengthens families. The national policy should not only focus on the State subsidies and material assistance to families in need but to provide families with support in the form of so-called service plans, including access to social and health services, child-sensitive family counselling services, education and adequate housing".<sup>12</sup>*

Similarly, the Assembly has stated, in its [Resolution 1908 \(2012\)](#) on human rights and family courts (which was based on a report prepared by my colleague Mr Christopher Chope (United Kingdom, EC)<sup>13</sup>), that "[b]efore 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".<sup>14</sup> In the same vein, the European Court of Human Rights has underlined that States Parties to the Convention have a positive obligation to support parents in fulfilling their responsibilities and, where temporary separation has become necessary, to facilitate reunification.<sup>15</sup> It also considers that before deciding to remove a child from his or her parents, the authorities have to examine whether the parents are permanently incapable of providing appropriate care for their children, or whether any inadequacies could be eliminated by financial and social assistance and effective counselling.<sup>16</sup>

#### 5. Amendment E (to the draft resolution)

Explanatory note:

While I have already expressed my conviction that preventing family separation and preserving family unity are important components of the child protection system, I find it important to stress that maintaining the family unit should not be an aim in itself. Social services ought to strike a fair balance between the need to secure the holistic physical, psychological, moral and spiritual integrity of the child and its interest in being cared for by his or her natural family.

Proposed amendment E acknowledges that the overriding requirement of acting in the child's best interest sometimes means that social services will be obliged to place a child into care in order to ensure his or her protection. This does not, however, put an end to the family relationship. Where such measure is implemented, "the placement should not be longer than necessary and should be subject to periodic review with regard to the child's best interests that should be the primary consideration during his or her placement;

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11. General comment No. 14 (2013), *supra* note 2, paragraph 54.

12. Document CRC/C/153 of 17 March 2006, "Children without Parental Care", Day of General Discussion (Geneva, 12-30 September 2005), paragraph 645.

13. Doc. 13060.

14. Document CRC/C/153, *supra* note 12, paragraph 645.

15. [Wallová and Walla v. the Czech Republic](#), *supra* note 9; and [Olsson v. Sweden \(No. 1\)](#), *supra* note 5. (Available in French only)

16. [Saviny v. Ukraine](#), *supra* note 10.

the parents should be supported as much as possible with a view to harmoniously reintegrating the child in the family and society”, as stressed by the Committee of Ministers.<sup>17</sup> The European Court of Human Rights shares the view that taking a child into care should normally be a temporary measure, to be discontinued as soon as circumstances permit reuniting the child and his or her natural parents,<sup>18</sup> and that, to this end, the social services should take appropriate measures to enable the child to benefit from regular contacts with his or her parents.<sup>19</sup>

## **6. Amendment F (to the draft resolution)**

Explanatory note:

A direct correlate of States Parties’ positive obligations under Article 8 of the Convention to facilitate the reunification with their families of children temporarily placed in care – as outlined in the explanatory note accompanying proposed amendment E – is the rapporteur’s call, in paragraph 8.4 of the draft resolution, to avoid severing family ties completely. Resorting to such drastic measures will indeed only be justified in the very exceptional cases.

I am of the view that the draft resolution would benefit from making express mention of the need to guarantee that any decision which would result in the permanent severing of a child’s family ties with his or her parents (including, in particular, a child’s placement for adoption against the will of his or her parents) must be based on law and be subject to strict legal safeguards and effective (timely and comprehensive) judicial review. Given the profound and potentially irreversible consequences of any such decision both for the child concerned and his or her parents, such review should be undertaken with the strictest scrutiny so as to avoid irreparable adverse consequences for the parties’ family life.

## **7. Amendment G (to the draft resolution)**

Explanatory note:

As I have stated in my general remarks above, I share the rapporteur’s view that the collection of disaggregated data is of critical importance. Yet, I consider that the draft resolution could be strengthened by amending paragraph 8.6 in the proposed manner, thus emphasising that member States ought to guarantee that the privacy and personal data of the child concerned, as protected by Article 8 of the Convention (which guarantees the right to respect for private life and correspondence), be protected in all stages of proceedings affecting them. The technical and legal protection of the collected personal data is indispensable to prevent the abusive use of such information, which could result in re-victimisation of the child.

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17. See the basic principles set out in the Appendix to [Recommendation Rec\(2005\)5](#) on the rights of children living in residential institutions.

18. [Olsson v. Sweden \(No. 1\)](#), *supra* note 5, paragraph 81.

19. [Pontes v. Portugal](#) (Application No. 19554/09, judgment of 10 April 2012, available in French only); and [B. v. the United Kingdom](#) (Application No. 9840/82, judgment of 8 July 1987), paragraph 60.