



The Child Law Clinic
School of Law
University College Cork

**Research brief on ECHR case law concerning children in care and
the obligation to work towards family reunification**

12 September 2019

Director/Lead Author: Dr Conor O'Mahony

Researchers: Julianne Dowling, Abigail Flynn, Áine Horgan, Lorcan
Maule, John Murphy, Emily Rockett



Executive Summary

Since the early 1990s, the European Court of Human Rights (ECtHR) has developed a considerable body of case law concerning the obligation of States Parties under Article 8 of the ECHR to take positive steps towards the reunification of children in care with their families. This case law has established a number of consistent principles, including that care is to be regarded as a temporary measure to be discontinued as soon as possible; and that there is a positive obligation on State authorities to take reasonable measures designed to facilitate reunification (such as access and regular reviews). However, there are limits on the extent of these obligations. State authorities are not obliged to endlessly pursue family reunification, and other factors such as the best interests of the child may override the obligation to do so. In the most extreme cases, where the child is settled in his or her de facto family environment and there is no reasonable prospect of family reunification, the adoption of the child may be permissible. However, adoption orders will be subjected to the strictest scrutiny to ensure that less radical measures would not have sufficed to protect the interests of the child. This research brief will explore the parameters of this case law, highlighting key cases and the reasons offered by the Court for why violations of Article 8 were found or not found.

1. Care as a Temporary Measure

In a long line of cases, beginning with *W v United Kingdom*¹ in 1987, the ECtHR has repeatedly reiterated the principle that “[t]he mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life. Furthermore, the natural family relationship is not terminated by reason of the fact that the child is taken into public care.”² Building on this principle, the Court has repeatedly held that placing children in the care of the State should be regarded as a temporary measure, to be discontinued as soon as circumstances permitted; moreover, any measures of implementation of a care order should be consistent with the ultimate aim of reuniting the child with its family.³ Phrased slightly differently, the Court has held that “a mother’s right to respect for family life under Article 8 (art. 8) includes a right to the taking of measures with a view to her being reunited with her child.”⁴ This is the fundamental premise underpinning the approach of the Court to cases in this area.

2. Obligation to Facilitate Reunification

The principle that care should be a temporary measure to be discontinued as soon as reunification is possible creates numerous obligations for State authorities; these include negative obligations not to create impediments to reunification, and positive obligations to take steps designed to facilitate reunification.

¹ 9749/82, July 8, 1987.

² *Ibid* at [59]. This was quoted with approval in, *inter alia*, *Olsson v Sweden (No. 1)* (10465/83, 24 March 1988 at [59]; *Eriksson v Sweden* (11373/85, 22 June 1989) at [58]; and *Andersson v Sweden* (12963/87, 25 February 1992) at [72].

³ See, e.g., *Olsson v Sweden (No. 1)* (10465/83, 24 March 1988) at [81] and *Johansen v Norway* (17383/90, 7 August 1996) at [78].

⁴ *Eriksson v Sweden* (11373/85, 22 June 1989) at [71].

2.1 Access

The main issue that is addressed in the case law is access to the child in care by its parents. In the one of the earliest cases of *Olsson v Sweden*, a violation of Article 8 was found on the basis that the children were placed in care in separate locations at a significant distance both from their natural parents and from each other, with the result that access was frustrated. Having identified the ultimate aim of reunification, the Court noted:

“In point of fact, the steps taken by the Swedish authorities ran counter to such an aim. The ties between members of a family and the prospects of their successful reunification will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other. Yet the very placement of Helena and Thomas at so great a distance from their parents and from Stefan ... must have adversely affected the possibility of contacts between them. This situation was compounded by the restrictions imposed by the authorities on parental access; whilst those restrictions may to a certain extent have been warranted by the applicants’ attitude towards the foster families ... it is not to be excluded that the failure to establish a harmonious relationship was partly due to the distances involved.”⁵

Access is viewed by the Court as an essential means of facilitating eventual reunification, and there have been a significant number of judgments in which a violation has been found due to excessive restrictions on access. For example, in *Eriksson v Sweden*, the Court found that a denial of enforceable access over a period of six years “denied [the mother] the opportunity to meet with her daughter to an extent and in circumstances likely to promote the aim of reuniting them or even the positive development of their relationship”.⁶ In *Andersson v Sweden*, a violation was found in circumstances where access was curtailed over a period of several years, including a prohibition on correspondence by letter or telephone for a period of 18 months, without sufficient justification for the latter:

The reasons adduced by the Government are of a general nature and do not specifically address the necessity of prohibiting contact by correspondence and telephone. The Court does not doubt that these reasons were relevant. However, they do not sufficiently show that it was necessary to deprive the applicants of almost every means of maintaining contact with each other for a period of approximately one and a half years. Indeed, it is questionable whether the measures were compatible with the aim of reuniting the applicants.⁷

In *Johansen v Norway*,⁸ the mother had a history of trying to remove her son from his foster home, and of not informing the authorities when her son ran away from his foster home to be with her. She subsequently had a daughter who was taken into interim care shortly after birth. Six months later, a decision was taken to place her in a foster home with a view to adoption; to deny the mother access from that time, and to keep the location of the foster home secret. While accepting that the authorities had reason to fear that the mother might disrupt the foster placement, it noted that access had operated in a satisfactory manner during the six months during which the child was in interim care, and that the applicant’s lifestyle had improved somewhat even at the time of the full

⁵ *Olsson v Sweden (No. 1)* (10465/83, 24 March 1988) at [81].

⁶ 11373/85, 22 June 1989 at [71] to [72].

⁷ *Andersson v Sweden* (12963/87, 25 February 1992) at [96].

⁸ *Johansen v Norway* (17383/90, 7 August 1996).

care order.⁹ Indeed, less than a year later, a court found that her material conditions had improved to the point where she would have been able to provide her daughter with a satisfactory upbringing; while the court refused to terminate care at that point, its decision was informed by the lack of contact which had been brought about by the earlier decision.¹⁰ Therefore, the Court held that “it cannot be said that those difficulties and that risk were of such a nature and degree as to dispense the authorities altogether from their normal obligation under Article 8 of the Convention (art. 8) to take measures with a view to reuniting them if the mother were to become able to provide the daughter with a satisfactory upbringing.”¹¹ Accordingly, Article 8 was violated by the Norwegian authorities.

*R v Finland*¹² is another case in which a violation of Article 8 was found due to restrictions on access. The applicant was the father of a child taken into care at the age of 5. The applicant’s main grievance was not that his son had been taken into care but that there was a “subsequent refusal to terminate” this care and also heavily restricted access. The applicant was initially allowed to see his son once or sometimes twice a month; subsequently, this was reduced to only once every second month. These restrictions were initially based on a suspicion of incest having occurred; when this suspicion was not supported by a later examination, it was agreed at a meeting that “constant visiting could confuse the child’s situation”.¹³ The restrictions on access were not the subject of formal rulings, and this made it more difficult for the applicant to challenge them. The Court noted:

Whereas the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into public care, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed. The minimum to be expected of the authorities is to examine the situation anew from time to time to see whether there has been any improvement in the family’s situation. The possibilities of reunification will be progressively diminished and eventually destroyed if the biological parent and the child are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur ...¹⁴

The Court held that “any possibility of reunification was significantly hindered in the initial stages by the failure to issue decisions concerning the access restrictions and the termination of the care that could be appealed against. The restriction of contact between the applicant and his son, far from facilitating a possible reunification of the family, rather contributed to hindering it.” Moreover, although the applicant had requested that the authorities monitor the interaction between him and his son during periods of home leave, this did not occur.¹⁵ As such, the Court found a violation for the following reasons:

On the facts of the case the Court cannot discern any serious and sustained effort on the part of the social welfare authority directed towards facilitating a possible family reunification such as could reasonably be expected for the purposes of Article 8 § 2 during the many years throughout which the boy was in care. The picture transpiring from the facts

⁹ *Ibid* at [80] to [83].

¹⁰ *Ibid* at [84].

¹¹ *Ibid* at [84].

¹² 34141/96, 30 May 2006.

¹³ *Ibid* at [12].

¹⁴ *Ibid* at [90].

¹⁵ *Ibid* at [92].

of the case is one of determination on the part of the local social welfare authority not to consider the reunification of the applicant and his son as a serious option, instead firmly proceeding from a presumption that the boy would be in need of long term public care by substitute carers. Moreover, the severe restrictions on the applicant's right to visit his son reflect an intention on the part of the social welfare authority to strengthen the ties between the boy and the substitute carers rather than to reunite the applicant and his son.

Therefore, the Court concludes that the authorities failed to take sufficient steps towards a possible reunification of the applicant's family.¹⁶

Most recently, in *NP v Moldova*,¹⁷ a violation of Article 8 was found in a case where parental authority was found to have been withdrawn without sufficient justification being put forward by the public authorities. Since the mother was denied access to her daughter for over two years as an automatic consequence of a decision to withdraw parental authority, it followed that this also violated her rights under Article 8.¹⁸

2.2 Enforcement of Access

Given the importance of access to the goal of reunification, there is an obligation on States to ensure that proceedings and decision concerning access are not unduly delayed; and where access orders are in place, that they are actually enforced. *Ribic v Croatia*,¹⁹ while a private family law case, addresses this issue in a manner that has cross-over implications for public care cases. The Court commented that even though the primary object of Article 8 is to protect individuals against arbitrary action by public authorities, there are also positive obligations inherent in "respect" for family life; these include an obligation on the national authority to take measures with a view to reuniting parents with their children and to facilitate such reunions.²⁰ The Court formed the view that the lengthy delay in proceedings during which the applicant was unable to maintain contact with his child was *a priori* in breach of the State's positive obligations under Article 8 and could only be justified in "exceptional circumstances".²¹ Of specific relevance to the public care context, it was held that a lack of co-operation between parents is not sufficient to exempt the authorities from their positive obligations in itself; "[i]t rather imposes on the authorities an obligation to take measures to reconcile the conflicting interests of the parties, keeping in mind the best interests of the child as primary consideration".²² Thus, where a child is in care, a lack of co-operation with access arrangements on the part of foster parents will not justify a failure by the public authorities to ensure that access occurs. The Court noted that "any obligation to apply coercion in this area must be limited, since the interests, as well as the rights and freedoms, of all concerned must be taken into account, and more particularly the best interests of the child"; nevertheless, "[a]lthough coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of unlawful behavior by the parent with whom the children live".²³

¹⁶ *Ibid* at [93] to [94].

¹⁷ 58455/13, 6 October 2015.

¹⁸ *Ibid* at [82] to [86].

¹⁹ 27148/12, 2 April 2015.

²⁰ *Ibid* at [89].

²¹ *Ibid* at [91].

²² *Ibid* at [94].

²³ *Ibid* at [95].

In the similar case of *Stasik v Poland*,²⁴ the Court stated that “n cases of this kind the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who do not cohabit”. This is all the more pressing in cases where the question of who should ultimately have custody of the child is at issue, since the passage of time may also have an impact on the outcome of a pending custody dispute.²⁵ A delay of several years in enforcing an access order, including several unexplained delays of months of a time during which no court hearings were even scheduled, led the Court to find that the Polish authorities failed to make adequate and effective efforts to enforce the contact order, and had accordingly violated Article 8.²⁶

2.3 Review of Care Orders

A further measure that is required of public authorities with a view to working towards the discontinuation of care orders and eventual family reunification is the keeping under review of the circumstances grounding the care order. *K and T v Finland*²⁷ concerned a woman suffered from schizophrenia and spent frequent stints in hospital; as a result of her mental illness the view was formed that K was unable to provide satisfactory care for her children and as a result they were taken into public care. The Chamber noted that the competent authorities seemed to have consistently assumed long-lasting care and placement was necessary; obstacles had been placed in the way of reunification of the family by this attitude and these obstacles were increased by the restrictions placed upon access to the children.²⁸ It found a violation of Article 8 on the basis of a lack of consideration to terminate the care, despite evidence that K’s situation had improved; the Chamber considered this an unfair balance between the various interests of those involved.²⁹ Relevant to the authorities was evidence from K’s doctors which stated that, while at the present time she was unable to care for her children, her illness would not necessarily prevent her from permanently caring them.³⁰ However, this appeared to have been given little consideration in the circumstances by the relevant authorities.

The Grand Chamber, in reviewing the case, also referred back to the guiding principle that a care order should be regarded as temporary, to be discontinued as soon as circumstances permit and any measures implementing the care orders should be consistent with the ultimate aim of family reunification of the natural family.³¹ According to the Grand Chamber there is a positive duty on authorities to take measures to facilitate family reunification as soon as reasonably feasible; this is a duty which arises from the time the care order is made, subject always to the interests of the child.³² It noted that while enquiries had been made in order to ascertain whether the applicant’s would be able to bond with the children, these did not amount to serious or sustained efforts directed towards facilitating family reunification such as could be reasonably be expected under Article 8(2), especially as the court noted that they constituted the sole effort of the authorities during the seven years that the children were in care. The Grand Chamber held that the minimum to be expected by

²⁴ 21823/12, 6 October 2015.

²⁵ *Ibid* at [92].

²⁶ *Ibid* at [94].

²⁷ 25702/94, 12 July 2001.

²⁸ *Ibid* at [177].

²⁹ *Ibid* at [177] to [178].

³⁰ *Ibid* at [20].

³¹ *Ibid* at [178].

³² *Ibid*.

the authorities is to examine the case anew from time to time in order to assess whether there had been any improvement on the part of the family.³³

Aside from a general obligation to keep the situation under review, the case law shows that there is a specific obligation on public authorities and domestic courts to take into account any new evidence presented by the parents regarding their parenting capacity. The case of *Kocherov and Sergeyeva v Russia*³⁴ concerned a father who had a mild mental disability and lived in a care home until 2012. In 2008 he had a daughter who was the second applicant. The child was placed in a child care home after the birth. In 2011, after the first applicant obtained an apartment for himself, the child care home applied for a restriction of his parental authority, stating that the child living with her father would be dangerous and stressful for her.

In 2011, the father submitted an expert report concerning his condition that declared him as entirely focused, sociable person with reduced intelligence, and concluded that he would be able to exercise his parental authority fully. However, although they never contested this report, the social services and the domestic court nevertheless would not allow him to take his daughter into his care on the basis that this would not be in the child's best interests. The domestic court held that the living with her father after such a long separation would be stressful for her and that the father had no skills and experience with bringing up children.

The ECtHR held that the failure to take into account this new evidence as to the applicant's parenting capacity, taken together with insufficient weight attached to evidence presented regarding potential risks to the child, meant that there was insufficient justification for the restrictions on this parental authority. Accordingly, there had been a violation of the applicant's right to family life under Article 8.³⁵

3. Limits of Obligations

3.1 "Reasonable Steps"

The obligation to work towards reunification is not limitless or open-ended, and it is qualified by a number of factors. As a general point, the obligation is to take "reasonable" measures; in *R and H v United Kingdom*, it was held that "Article 8 does not require that domestic authorities make endless attempts at family reunification; it only requires that they take all the necessary steps that can reasonably be demanded to facilitate the reunion of the child and his or her parents."³⁶ Where it can be demonstrated that the authorities have taken reasonable measures, a violation will not be found. For example, in *V v Slovenia*, the Court found that there was no violation of Article 8 on the basis that "sustained efforts were made on the part of the authorities to facilitate contact and possible family reunification, and that the situation was regularly examined to see whether there had been any improvement in the family situation."³⁷

Similarly, in *Jovanovic v Sweden*,³⁸ the Court declined to find a violation due to the efforts made by the authorities to keep the case under review and to facilitate contact. In that case, following the

³³ *Ibid.*

³⁴ 16899/13, 29 March 2016.

³⁵ *Ibid* at [101] to [117].

³⁶ 35348/06, 31 May 2011 at [88].

³⁷ *V v Slovenia* (26971/07, 1 December 2011) at [84].

³⁸ 10592/12, 22 October 2015.

initial decision to take the infant into care when he suffered severe injuries, he was transferred to a treatment home along with the parents, the primary purpose of which was to evaluate the parent's ability to look after the infant. The staff in the home found that the mother had shown considerable flaws in her emotional interaction with the child. In a report, it was said that the mother objectified the baby instead of regarded the baby in his own right, and this was seen as worrying. The report was lacking detail on the father's interaction as he was absent from the home due to work commitments. The infant was then placed into a family home.

The applicant's contact rights were regularly examined by the social services. The parents were allowed to visit the child once every other month; this was appealed, and was then changed to one and half hours once every month, before later being reduced to one hour every month. The social services claimed that the visits were having an adverse effect on the infant's mental health and hence for the reduction in visiting hours. When the child was four, a company was assigned to film the mother and the child during one of their visiting sessions. The company found that the applicant had shown sensitivity to the child and that the applicant had the necessary abilities to support the child in his future development. The report concluded that it was of great importance for the mother to see the child more often. The contact rights were then increased to reflect the report, and there had been no appeal from the applicant to make any changes to the agreement.

The ECtHR noted that the social services reviewed the public care order every six months and that the applicant was heavily involved in the decision-making process and was able to protect her interests. The Court, therefore, found that there had been no violation of the applicant's right under Article 8 of the ECHR.

Most recently, in *Achim v Romania*,³⁹ the Court declined to find a violation in a case where the placement in care had been intended as a temporary means of providing for the children. It was found that the authorities had made real efforts to preserve the bonds between the children and their parents, on the basis that no ban had been placed on visits; the municipality had provided petrol to facilitate monthly visits; telephone contact had been maintained; and the children's return to their parents had been prepared in advance. The authorities had adopted a constructive attitude by advising the parents on the action they should take to improve their financial situation and their parenting skills in order to promote the children's development and education. Financial support had been granted to repair the roof of their house and install toilets, and on the first signs of improvement, the authorities had suggested returning the children to the family home. Consequently, the Court held that the temporary placement in care had been justified by relevant and sufficient reasons and had been intended as temporary. By closely monitoring the situation of the children and their parents, the authorities had consistently endeavoured to protect the children's interests, while seeking a fair balance between the rights of the parents and those of the children.

3.2 Best Interests of the Child

The best interests of the child may serve as a limitation on the duty of the public authorities to take measures designed to facilitate reunification. In *Johansen v Norway*, the Court observed that "the parent cannot be entitled under Article 8 of the Convention (art. 8) to have such measures taken as

³⁹ 45959/11, 24 October 2017 (judgment only available in French; see Court press release available at <https://t.co/2ilH05mFa6>).

would harm the child's health and development."⁴⁰ A violation was ultimately found in that case, but this principle has been followed through on in other judgments. In *YC v United Kingdom*,⁴¹ the parents were non-compliant with treatment programmes for alcohol and domestic abuse; the guardian *ad litem* referred to this as the crux of the issue regarding reunification and felt that a return into their care would cause serious harm to the child.⁴² The Court held that "where maintenance of family ties would harm the child's health and development, a parent is not entitled under Article 8 to insist that such ties be maintained."⁴³ Attempts had been made to facilitate reunification through the provision of support for alcohol abuse and opportunities for parenting assistance, and the child's mother had been involved in decision-making processes.⁴⁴ In these circumstances, no violation was found.

In the case of *Levin v Sweden*,⁴⁵ the public care order granted the applicant with visiting rights to the children and she visited them approximately once a month. However, this was reversed in the higher courts as it was found that the children were not happy to meet with the mother anymore and that they were suffering from the meetings. However, 16 months later, the Social Council decided to restrict the access afforded to the parents; each parent would meet with the child once every three months, so the mother would see them once every six months. All three children had suffered severe harm to their health and development because of the deficiencies in the applicant's ability to care for them. They were vulnerable and sensitive to change. They had become calmer and more balanced since entering care, but all three displayed signs of severe anxiety (including vomiting, bed wetting and sleeping badly) before and after contact with their mother. The Social Council concluded in its investigation report that the children had a right to contact with their mother but that their best interests required that the contact be limited in order to ensure their secure and positive development. After two years under this arrangement, contact was increased to four times a year.

The ECtHR noted that the social services had not set out to sever all links between the parties but continuously tried to find a balance and had attempted to maintain ties. The children were still allowed access to their father twice a year; during the meetings with the parents the children and the homes the children are living in show photos and films of their activities to include the parents in their lives. The parents are also still legal guardians of the children and have no intention of transferring the right to the new family of the children. All family members are free to send and receive letters and postcards from each other. The Court found no reason to question the goal of the Swedish authorities to improve relationships between the applicant and the children, and the intention of one day reuniting them or at least have a good and close relationship.⁴⁶

The Court agreed that the restrictions on access were severe, but continued:

However, when deciding whether or not the measure violated the applicant's rights under Article 8 of the Convention, the Court has to balance the interest of the applicant to have increased contact with her children against the interests of the children to have a secure and stable environment in which to develop. In doing so, the Court attaches particular importance to the best interests of the children which, depending on their nature and

⁴⁰ *Johansen v Norway* (17383/90, 7 August 1996) at [78].

⁴¹ 4547/10, 13 March 2012 at [134].

⁴² *Ibid* at [58].

⁴³ *Ibid* at [134].

⁴⁴ *Ibid* at [146].

⁴⁵ 35141/06, 15 March 2012.

⁴⁶ *Ibid* at [62].

seriousness, might override those of the applicant. In essence, it is the best interest of the children that is of crucial importance ...⁴⁷

In determining whether the granting of four visiting rights per year by the Courts in Sweden was fair, the Court drew attention to the fact that the children's own opinion about how often they wanted to see their mother was obtained upon request by the domestic court in the proceedings where contact was increased to four times per year. They expressly stated that they did not want to see their mother more than twice a year and they did not want to see her alone or stay with her. The ECtHR held that the voice of the children could not be ignored or trivialised in particular because it reflects the adverse reactions that the children displayed when the mother started to visit. The children had expressed that they wanted only to see their mother twice a year.⁴⁸

It was also noted that the social services continuously reconsider the applicants contact rights every three months and provide a written decision to her which includes an evaluation of each child and its reason for the decision. However there was a delay on the applicant appealing any of decisions made by the social services, and this affected her case, the court held that if she had appealed sooner, she might have been granted an increase in contact rights.⁴⁹ In light of all of the above, the Court held that the restrictions imposed were taken to protect the best interests of the children and that the restrictions were proportionate to the aim of the act and were in the margin of appreciation. Therefore the Court held that there had been no violation of Article 8 of the ECHR.

4. Placement for Adoption

The above cases all relate to efforts towards reunification where a child is in foster care. In the most extreme cases, the principle that the obligation to work towards reunification is not limitless has been found to permit the permanent adoption of children and the severing of family ties with the natural parents. However, a failure to adhere to any of the principles set out in the above case law will most likely lead to a determination that placing a child for adoption violates Article 8. (For example, in *Johansen v Norway*,⁵⁰ the mere decision to make the child available for adoption following inadequate contact and a failure to consider the mother's improved circumstances was found to violate Article 8, even though the final adoption order had not been made. The key point is that failures in the implementation of the care order that frustrate the goal of reunification may contribute to the creation of the very circumstances that culminate in the final outcome of adoption.)

In *K and T v Finland*, the Court observed that when a considerable amount of time has passed since the child was taken into care, the interests of the child not to have their *de facto* family changed again may override the interests of the parents to have the family reunified.⁵¹ As such, notwithstanding the general principle that care is to be regarded as a temporary situation to be discontinued as soon as possible, adoption of the child may be permissible in the most extreme cases where reunification is not a realistic prospect and provided that sufficient efforts towards reunification have been made initially.⁵² Nonetheless, the Court has stressed that "measures which

⁴⁷ *Ibid* at [64].

⁴⁸ *Ibid* at [67].

⁴⁹ *Ibid* at [68].

⁵⁰ *Johansen v Norway* (17383/90, 7 August 1996).

⁵¹ 25702/94, 12 July 2001 at [155].

⁵² *R and H v United Kingdom* (35348/06, 31 May 2011) at [82] to [89].

deprive biological parents of the parental responsibilities and authorise adoption should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests.⁵³ Since adoption orders are irreversible, "there is an even greater call than usual for protection against arbitrary interferences" and they "must be subject to the closest scrutiny".⁵⁴ Everything must be done to preserve personal relations and, where appropriate, to "rebuild" the family; it is not enough to show that a child could be placed in a more beneficial environment for his upbringing.⁵⁵

4.1 Cases in which adoption orders were found to be justified

In *Aune v Norway*,⁵⁶ the parents had a history of drug abuse, and their son was adopted from them without their authorisation. The child was removed from them initially under the equivalent of an interim care order which was subsequently made permanent. At the same time that the son was adopted permanently by his foster parents, the mother had rebuilt her life and had started her own business. While it was recognised the mother had made positive steps, it was still felt she was unable to care for her son long term. Noting that authorisation of adoption against the will of the parents should only be granted in exceptional circumstances, the ECtHR was happy this was the case here. While the child exhibited a normal standard of development for his age, he was identified by professionals as being vulnerable due to being 7 weeks premature and suffering neglect and trauma in his early life prior to being removed from his parents.⁵⁷ His crucial need for absolute emotional security (especially in the years to come) and the fact that he had no psychological child-parent bonds to the applicant were decisive in granting the adoption. The ECtHR confirmed the "correctness of the national assessment" in allowing the adoption to continue. It highlighted that the biological family had been allowed access to the child post adoption and that he was aware who they were; however, his welfare was best served in the permanent care of the parents he had bonded with and wished to remain with. The Court was satisfied that the decision to remove the child from the care of the parent and authorise adoption had been proportionate with regard to upholding the child's best interests.⁵⁸

In *SS v Slovenia*,⁵⁹ the child was taken into care three weeks after birth as the mother's mental health difficulties were such that she was unable to care for the child. The appropriateness of this measure was not in dispute (indeed, the mother did not even enquire about the child for the first five months). The application instead argued that the decision to place the child for adoption was too extreme, and that the authorities had failed to provide the mother with adequate support in light of her illness. The Court acknowledged that "[i]n the case of vulnerable persons, the authorities must show particular vigilance and afford increased protection";⁶⁰ however, it was satisfied that the response of the authorities in the case at hand had been appropriate.⁶¹ Moreover, contact had been facilitated; the failure of the mother and child to form a bond was not in any way attributable to the

⁵³ See, e.g., *Johansen v Norway* (17383/90, 7 August 1996) at [78]; *Aune v. Norway* (52502/07, 28 October 2010) at [66], and *R and H v United Kingdom* (35348/06, 31 May 2011) at [81].

⁵⁴ *YC v United Kingdom* (4547/10, 13 March 2012) at [136] to [137].

⁵⁵ *Ibid* at [134].

⁵⁶ 52502/07, 28 October 28, 2010.

⁵⁷ *Ibid* at [59].

⁵⁸ *Ibid* at [79].

⁵⁹ 40938/16, 30 October 2018.

⁶⁰ *Ibid* at [84]; see further at [90].

⁶¹ *Ibid* at [90] to [91].

actions of the authorities.⁶² Ultimately, the decision to place the child for adoption was based not on the applicant's psychiatric condition, but on her continuing inability to care for her child, as confirmed by expert reports.⁶³ Since reunification was not a realistic prospect, and noting that the law in Slovenia allowed for continued contact even following adoption, the Court found that the placement for adoption did not violate Article 8.⁶⁴

Similarly, in *Hasan v Norway*,⁶⁵ the court held that a placement for adoption was justified for a number of reasons. There was a significant history of domestic violence and the children had already experienced several broken relationships and lived in multiple homes, increasing their vulnerability. The evidence indicated that the applicant would not have been able to look after children with such a traumatic background even if her situation improved, and it was highly improbable that she would ever resume care of them. Moreover, as the evidence indicated that the children were at risk of abduction, access restrictions were necessary. As a result, the Court found that the children "had lost their attachment to the applicant and had developed such an attachment to their foster parents that it would be harmful to them to be removed when the adoption was authorised".⁶⁶ Thus, "the removal of parental authority and consent to adoption was motivated by overriding requirements pertaining to A and B's best interests and, hence, did not amount to a disproportionate interference in the applicant's right to respect for her family life".⁶⁷

4.2 Cases in which adoption orders were found to violate Article 8

In other cases, placements for adoption have been found to have violated Article 8 in circumstances where the respondent State had not taken all reasonable steps towards the possible reunification of the child with the natural parent(s). For example, in *EP v Italy*,⁶⁸ a mother with psychological difficulties had her child removed into care; but in spite of repeated requests to see her daughter, all contact was denied. The Court noted that "so severe a measure against a mother who had just arrived in Italy with her little daughter who spoke only Greek, and about whose past the authorities dealing with the case knew very little, raises serious questions".⁶⁹ No expert ever had the opportunity to see how the little girl behaved in her mother's presence (and *vice versa*), or to form an opinion as to whether there were real prospects of an improvement in the applicant's state of health, which led the Court to conclude that the subsequent deterioration in the mother's mental health should "be attributed at least in part to the shock of having been separated from her daughter so suddenly and irreversibly".⁷⁰ Despite the mother's willingness to be supervised by social workers during contact, the Court concluded that in reality, she was given no chance of re-establishing bonds with her daughter; accordingly, the Italian authorities had failed to take all steps that could reasonably be expected of them to facilitate reunification, and had violated Article 8.⁷¹

⁶² *Ibid* at [93].

⁶³ *Ibid* at [99].

⁶⁴ *Ibid* at [102] to [103].

⁶⁵ 27496/15, 26 April 2018.

⁶⁶ *Ibid* at [161].

⁶⁷ *Ibid* at [163].

⁶⁸ 31127/96, 16 November 1999.

⁶⁹ *Ibid* at [64].

⁷⁰ *Ibid* at [68].

⁷¹ *Ibid* at [68] to [69].

A violation was also found in *RMS v Spain*,⁷² in which the Court found that there had been “a serious lack of diligence in the procedure implemented by the authorities responsible for the child's guardianship, placement and possible adoption”.⁷³ The Court stressed the urgency of taking immediate measures following the taking of the child into care designed to facilitate reunification, stating that “[t]he 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”,⁷⁴ and that “the adequacy of a measure is to be judged by the swiftness of its implementation”.⁷⁵ The Court stressed that while it may sometimes be necessary to take children into care, such a decision “should have been followed swiftly by appropriate measures to examine in depth the child's situation and her relationship with her parents”.⁷⁶ However, “no consideration was given at any stage of the administrative procedure to the fact that the child had been very young when she was separated from her mother, to the existing emotional bond between mother and child or to the length of time that had elapsed since their separation and the attendant consequences for both of them.”⁷⁷ Crucially, the Court found that poverty had been the driving force behind the authorities’ actions:

The care order in respect of the applicant's child was made because of the applicant's difficult financial situation at the time, without any account being taken of subsequent changes in her circumstances. The Court considers that the applicant had simply been faced with a shortage of funds, a situation which the national authorities could have helped remedy by means other than the complete break-up of the family, a measure of last resort to be applied only in the most serious cases. In the Court's view, the Spanish administrative authorities should have considered other less drastic measures than taking the child into care.⁷⁸

Since the Court was not convinced of the necessity of the initial decision to take the child into care, it is no surprise that the Court found that the subsequent placement for adoption violated Article 8. It found that the applicant’s vulnerability, and subsequent changes in her financial circumstances, had not been taken into consideration;⁷⁹ and that that the passage of time made it very difficult to reverse the situation:

Hence, the length of time that elapsed – a consequence of the administrative authorities’ inaction – coupled with the inaction of the domestic courts, which did not consider to be unreasonable the grounds advanced by the authorities for depriving a mother of her daughter for financial reasons alone ... were decisive factors in precluding any possibility of the applicant and her daughter being reunited as a family.⁸⁰

A violation was also found in *SH v Italy*,⁸¹ again due to the failure by the authorities to provide assistance that could have facilitated reunification while also protecting the child’s best interests. The children had been taken into care following a number of incidents where they were hospitalised

⁷² 28775/12, 18 June 2013.

⁷³ *Ibid* at [80].

⁷⁴ *Ibid* at [71].

⁷⁵ *Ibid* at [81].

⁷⁶ *Ibid* at [83].

⁷⁷ *Ibid*.

⁷⁸ *Ibid* at [85] to [86].

⁷⁹ *Ibid* at [90].

⁸⁰ *Ibid* at [92].

⁸¹ 52557/14, 13 October 2015.

having accidentally ingested medication, and subcounty moved between their family home and public care on a number of occasions. Although an expert report set out a plan for reunification, noting “strong affective bonds between the parents and the children, as well as a generally positive assessment of the parents’ capacity for performing their role and their willingness to cooperate with the social services”, the national court disregarded this report and made the children available for adoption just two months later. The Court considered that “the decisive question in the instant case is whether, before cancelling the mother-child bond, the domestic authorities had taken all the necessary and adequate steps that could reasonably be expected of them to enable the children to lead a normal family life with their own family.”⁸² It noted that:

“The decision to break the maternal bond immediately and definitively was taken very quickly, without any detailed analysis of the impact of the adoption on the individuals concerned and despite the legal provisions laying down that a declaration of availability for adoption must remain the last resort. Accordingly, by refusing to consider any other less radical solutions which could have been implemented in the instant case, such as the family support programme envisaged by the expert, the court definitively ruled out any possibility that the programme might succeed and that the applicant might restore her relationship with her children.”⁸³

The Court stated that it did not “doubt the necessity, in the situation at issue, of intervention by the competent authorities in order to protect the children’s interests”, but that it “doubts the appropriateness of the chosen mode of intervention and considers that the domestic authorities expended insufficient efforts to safeguard the bond between the mother and the children.”⁸⁴ The fact that the children were placed for adoption contrary to expert recommendations, despite the availability of less radical solutions, led to the finding of a violation of Article 8, with the Court further criticising the fact that the three children had been split up upon adoption.⁸⁵

Most of the cases in which a placement for adoption was found to violate Article 8 involve a relatively clear-cut failure to pursue measures that might have made reunification possible. *Strand Lobben v Norway*⁸⁶ is an example of a less clear-cut case where the authorities could claim to have complied with the headline obligations laid down in the case law, but the quality of that compliance was at issue. The adoption was authorised when the child was three and a half years old, and had lived with the foster family since he was three weeks old. He had not bonded psychologically with his mother in spite of extensive contact. The Chamber found that his “fundamental attachment in the social and psychological sense was to his foster parents”,⁸⁷ and was found that the placement did not violate Article 8:

The best interests of the child dictate, on the one hand, that the child’s ties with its family must be maintained, except in cases where the family has proved particularly unfit. 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 of the Convention to have such measures taken as would harm the child’s health and development ... When a “considerable period of time” has passed since the child was first placed in care, the child’s

⁸² *Ibid* at [43].

⁸³ *Ibid* at [49].

⁸⁴ *Ibid* at [52].

⁸⁵ *Ibid* at [56].

⁸⁶ 37283/13, 30 November 2017 (Chamber).

⁸⁷ *Ibid* at [122].

interest in not undergoing further *de facto* changes to its family situation may prevail over the parents' interest in seeing the family reunited ...⁸⁸

Notably, Judges Grozev, O'Leary and Hüseynov wrote a joint dissenting opinion in which they accused the majority of only taking cognisance of the previous case law of the court in an abstract manner and only partly applying the established principles to the circumstances of the case at hand:

The general principles outlined in Section III reflect the case-law as it stands and clearly point to procedural and substantive requirements which must be met in a case like this. Once it comes to the concrete application of those principles to the circumstances of the individual case, it would appear that the focus becomes almost exclusively procedural. However, an excessive focus on procedures risks rendering banal what are far-reaching intrusions in family and private life. In addition, the Court's general principles when read in the abstract risk providing false hopes of reunification which, as this case demonstrates, are unlikely to be fulfilled once a child has been taken into care, access rights have been significantly limited, time has passed and domestic proceedings formally meet Article 8 procedural standards.⁸⁹

Upon referral to the Grand Chamber, these sentiments were reflected in the decision (by thirteen votes to four) to reverse the ruling of the Chamber.⁹⁰ The Grand Chamber re-emphasised the importance of urgency in taking measures to facilitate reunification,⁹¹ and stipulated that the mere passage of time is not a sufficient reason justifying a placement for adoption.⁹² The Court found that:

... the process leading to the withdrawal of parental responsibilities and consent to adoption shows that the domestic authorities did not attempt to perform a genuine balancing exercise between the interests of the child and his biological family ..., but focused on the child's interests instead of trying to combine both sets of interests, and moreover did not seriously contemplate any possibility of the child's reunification with his biological family.⁹³

A number of factors were highlighted as contributing to this flawed decision-making process. The authorities had decided at an early point that the child was likely to remain in foster care; consequently, contact sessions were arranged with a view to keeping the child in touch with his roots rather than facilitating reunification, and were not conducive to allowing the parties to bond freely. The Court was not satisfied that the limited contact provided clear evidence from which to draw conclusions about the applicant's caring abilities.⁹⁴ Moreover, the decision was based on psychological reports that were several years old; while accepting that "it would generally be for the domestic authorities to decide whether expert reports were needed", the Court considered that "the lack of a fresh expert examination substantially limited the factual assessment of the first applicant's new situation and her caring skills at the material time."⁹⁵ Finally, while the child's vulnerability had formed a central part of the reasoning for the initial decision to place him into care, there was little assessment of this issue in the final decision to place the child for adoption.⁹⁶ For

⁸⁸ *Ibid* at [109].

⁸⁹ *Ibid* at [28].

⁹⁰ 37283/13, 10 September 2019 (Grand Chamber).

⁹¹ *Ibid* at [208].

⁹² *Ibid* at [212].

⁹³ *Ibid* at [220].

⁹⁴ *Ibid* at [221].

⁹⁵ *Ibid* at [223].

⁹⁶ *Ibid* at [224].

these reasons, the Court held that it was “not satisfied that the said procedure was accompanied by safeguards that were commensurate with the gravity of the interference and the seriousness of the interests at stake”, and found a violation of Article 8.⁹⁷

| <i>Factors Leading to Finding Adoption Order Justified</i> | <i>Case</i> |
|---|---|
| Loss of attachment with parents – children particularly vulnerable – parents unable to care for them | <i>Aune v Norway, Hasan v Norway</i> |
| Parents still unable to care for children even after appropriate efforts made by the authorities to provide support | <i>SS v Slovenia</i> |
| Contact still possible after adoption | <i>R and H v United Kingdom, Aune v Norway, SS v Slovenia</i> |

| <i>Factors Leading to Finding of Violation</i> | <i>Case</i> |
|---|--|
| Initial care order seemingly unjustified | <i>RMS v Spain</i> |
| Failure to take all reasonable steps to facilitate reunification | <i>Johansen v Norway, EP v Italy, SH v Italy, Strand Lobben v Norway</i> |
| Failure to take account of changes in circumstances | <i>RMS v Spain, Strand Lobben v Norway</i> |
| Failure to commission expert reports, or to take adequate account of reports that were commissioned | <i>EP v Italy, SH v Italy, Strand Lobben v Norway</i> |
| Absence of violence, abuse or serious neglect | <i>RMS v Spain, SH v Italy</i> |

⁹⁷ *Ibid* at [225] to [226].

Table of Cases

| | |
|--|---|
| <i>Achim v Romania</i> (45959/11, 24 October 2017) | Judgment only available in French; see Court press release available at https://t.co/2ilH05mFa6 |
| <i>Andersson v Sweden</i> (12963/87, 25 February 1992) | http://www.bailii.org/eu/cases/ECHR/1992/1.html |
| <i>Aune v Norway</i> (52502/07, 28 October 2010) | http://www.bailii.org/eu/cases/ECHR/2010/1994.html |
| <i>EP v Italy</i> (31127/96, 16 November 1999) | https://www.bailii.org/eu/cases/ECHR/1999/129.html |
| <i>Eriksson v Sweden</i> (11373/85, 22 June 1989) | http://www.bailii.org/eu/cases/ECHR/1989/10.html |
| <i>Hasan v Norway</i> (27496/15, 26 April 2018) | https://www.bailii.org/eu/cases/ECHR/2018/375.html |
| <i>Johansen v Norway</i> (17383/90, 7 August 1996) | http://www.bailii.org/eu/cases/ECHR/1996/31.html |
| <i>Jovanovic v Sweden</i> (10592/12, 22 October 2015) | http://www.bailii.org/eu/cases/ECHR/2015/943.html |
| <i>K and T v Finland</i> (25702/94, 12 July 2001) | http://www.bailii.org/eu/cases/ECHR/2001/465.html |
| <i>Kocherov and Sergeyeva v Russia</i> (16899/13, 29 March 2016) | http://www.bailii.org/eu/cases/ECHR/2016/312.html |
| <i>Levin v Sweden</i> (35141/06, 15 March 2012) | http://www.bailii.org/eu/cases/ECHR/2012/447.html |
| <i>NP v Moldova</i> (58455/13, 6 October 2015) | http://www.bailii.org/eu/cases/ECHR/2015/846.html |
| <i>Olsson v Sweden (No. 1)</i> (10465/83, 24 March 1988) | http://www.bailii.org/eu/cases/ECHR/1988/2.html |
| <i>R v Finland</i> (34141/96, 30 May 2006) | http://www.bailii.org/eu/cases/ECHR/2006/559.html |
| <i>R and H v United Kingdom</i> (35348/06, 31 May 2011) | http://www.bailii.org/eu/cases/ECHR/2011/844.html |
| <i>Ribic v Croatia</i> (27148/12, 2 April 2015) | http://www.bailii.org/eu/cases/ECHR/2015/336.html |
| <i>RK and AK v United Kingdom</i> (38000(1)/05, 30 September 2008) | http://www.bailii.org/eu/cases/ECHR/2008/1889.html |
| <i>RMS v Spain</i> (28775/12, 18 June 2013) | http://hudoc.echr.coe.int/eng?i=001-121906 |
| <i>SH v Italy</i> (52557/14, 13 October 2015) | http://hudoc.echr.coe.int/eng?i=001-157766 |
| <i>SS v Slovenia</i> (40938/16, 30 October 2018) | http://hudoc.echr.coe.int/eng?i=001-187474 |
| <i>Stasik v Poland</i> (21823/12, 6 October 2015)) | http://www.bailii.org/eu/cases/ECHR/2015/844.html |
| <i>Strand Lobben v Norway</i> (37283/13, 30 November 2017 (Chamber); 10 September 2019 (Grand Chamber)). | http://hudoc.echr.coe.int/eng?i=001-195909 |
| <i>V v Slovenia</i> (26971/07, 1 December 2011) | http://www.bailii.org/eu/cases/ECHR/2011/1985.html |
| <i>YC v United Kingdom</i> (4547/10, 13 March 2012) | http://www.bailii.org/eu/cases/ECHR/2012/433.html |