Protection of children's human rights in the Council of Europe Member States

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JUDr. Marica Pirošíková's lecture at the NCHR/NKMRs symposium on the theme: "**Compulsory public care: Legal uncertainty and a danger to children's health and development**", held at Hotell Scandic Crown, Göteborg, September 5, 2015.

The lecture was followed by a very lively debate, which unfortunately can not be published here.

Dear ladies and gentlemen,

In my opinion there are many Convention issues rising from the cases of children being removed from their biological family and I would like to share with you our experience in the Slovak Republic.

Over the last three years I have been in touch with a certain number of cases as a result of Slovak parents contacting me and requesting help. On the 3rd of August 2012, after having studied the case files completely, I publicly expressed serious concerns over cases of removing children from their living biological parents without relevant reasons (with regards to the guarantees of Article 6 and 8 of the European Convention on Human Rights), occurring upon the decisions of the English courts and the subjects who were also Slovak citizens. I pointed out that the situation was also criticized by the British media, drawing attention in this regard to systemic shortcomings. I stressed that the respected British politician, MP John Hemming, who is also Chairman of the Justice for Families Campaign Group, has been attempting to effectuate a reform in this regard and help individuals facing unjustified adoption. Mr Hemming expressed his willingness to help Slovak citizens in analogical situation by providing adequate legal aid in the proceedings before the English courts. He also drew our attention to the opportunity to enter into proceedings as a third party and to ask for the remission in the case of Boor's children. Thanks to these efforts the Boor's children were successfully returned to the Slovak Republic where they currently live with their mother.

This case was unfortunately not the only one. Other cases followed and were published by both the British and Slovak press. The effectiveness of the active approach taken by the Slovak Republic intervening in the proceedings before English courts as a third party was proved by the important judgments of Sir

James Munby[1]. It is a challenge also for the other countries claiming not to be able to help their citizens facing separation of children from their parents without relevant reasons in the United Kingdom (or other countries), to intervene actively in such proceedings before the family courts[2]. At the same time, it is very important for the intervening country to assess the cases also with regard to European Court case law.

The removal of children from their biological families is strongly criticised not only in the United Kingdom. In December 2012 I was served with the report of The Nordic Committee for Human Rights. The authors of the report were all professionals working in the field of children and family care. Their report was elaborated with the aim to ask the Council of Europe to investigate into the matter of forced adoptions in Nordic countries. The report stated that an unusually high number of children were removed from the care of their parents and were placed in foster homes every year.

According to European Court taking a child into care is by far the most extreme measure and regularly requires domestic authorities to adopt additional measures of support if those are able to reach the pursued aim.

The fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the "necessity" for such an interference with the parents' right under Article 8 of the Convention to enjoy a family life with their child.

In the case ***Wallová and Walla v. the Czech Republic*** (judgment of 26 October 2006) the applicants had been separated from their children on the ground that they faced material difficulties making them unable to provide a suitable home for their five children. They also complained about the lack of assistance on the part of the Czech authorities. The Court held that there had been a violation of Article 8 of the Convention. It found that the care order in respect of the applicants' children had been made solely because the large family had been inadequately housed at the time. Separating the family completely on the sole grounds of their material difficulties had been an unduly drastic measure and other, less intrusive measures would have been available to ensure respect for the best interests of the children. The national social welfare authorities had powers to monitor the applicants' living conditions and hygiene arrangements and to advise them what steps they could take to improve the situation themselves and find a solution to their housing problem.

The case ***R.M.S. v. Spain*** (judgment of 18 June 2013) concerned the placement of a child with a foster family on account of her mother's financial situation and without taking into account subsequent change in circumstances. The applicant complained mainly of being deprived of all contact with her daughter and being separated from her without good reason. The Court held that there had been a

[1] http://www.familylawweek.co.uk/site.aspx?i=ed126781,http://www.jordanpublishing.co.uk/practice-areas/family/news_and_comment/re-a-and-b-children-brussels-ii-revised-article-15-2014-ewfc-40

[2] http://www.telegraph.co.uk/comment/11657472/A-rising-tide-of-anger-across-Europe-at-Nazi-social-workers.html

violation of Article 8 of the Convention, finding that the authorities had failed to make adequate and effective efforts to secure the applicant's right to live with her child.

In the case ***Kutzner v. Germany*** (judgment of 26 February 2002) the applicants, a married couple, complained that the withdrawal of their parental authority in respect of their daughters and the placement of the latter in foster families, mainly on the grounds that the parents did not have the intellectual capacity to bring up their children, had breached their right to respect for their family life. The Court held that there had been a violation of Article 8 of the Convention. It found that, whilst the reasons given by the national authorities and courts had been relevant, they had not been sufficient to justify such a serious interference with the applicants' family life.

In the case ***Zhou v. Italy*** (judgment of 21 January 2014) the European Court held that there had been a violation of Article 8 of the Convention, finding that the Italian authorities had not fulfilled their obligations before envisaging the severing of family ties, and had not made appropriate or sufficient efforts to ensure respect for the applicant's right to live with her child. In particular, the paramount need to preserve, in so far as possible, the family ties between the applicant, who was in a vulnerable situation, and her son, had not been duly considered. The judicial authorities had merely assessed the difficulties, which could have been overcome through targeted support from the social welfare services. The applicant had had no opportunity to re-establish a relationship with her son: in reality, the experts had not examined the real possibilities for an improvement in the applicant's ability to look after her son, bearing in mind also her health. Furthermore, the Italian Government had provided no convincing explanation which could justify the severing of the maternal affiliation between the applicant and her son.

Taking a child into care should normally be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and any measure of implementation should be consistent with the ultimate aim of reuniting the natural parent with his or her child.

In the case of ***A.D. and O.D. v. the United Kingdom*** *(*judgment of 16 March 2010) a 5 months old baby (O.D.) was admitted to hospital and a full skeletal survey confirmed four fractures. The County Court granted an interim care order by which the family had been relocated to the Family Resource Centre, some 150 miles away. The report noted that the couple presented as being very capable of caring for O.D. However, the local authority concluded that O.D. could not safely be placed with his parents and O.D. was placed with foster parents. The first applicant was allowed contact for a period of four hours a day for five days during the week. Tests indicated that O.D. had suffered from birth from *osteogenesis imperfecta*. The Court was not persuaded that less intrusive measures were not available, such as placing O.D. with relatives. It recalled that the local authorities could only exclude this option if it was not reasonably practicable or in the interests of O.D.'s welfare. The European Court found that it dismissed this option too quickly without giving it proper consideration. Finally, the European Court found that the period of time which elapsed between the final assessment and the return of O.D. to his parents' care (more than six weeks) was not reasonable in the circumstances. The foregoing considerations were sufficient to enable the European Court to conclude that there has been a violation of Article 8.

In the case ***M.A.K. and R.K. v. the United Kingdom*** (judgment of 23 March 2010) a nine years old child's illness was mistaken for signs of sexual abuse. After 10 days the second applicant was diagnosed with Schamberg's disease, a rare condition of the capillaries which is manifested by the eruption of purple patches on the skin. During this period, all visits of parents were supervised on account of the suspicion that she had been sexually abused. The applicants complained that their separation during the ten days that the second applicant was in hospital violated their right to respect for their private and family life under Article 8 of the Convention. The European Court held that if the dermatologist had been consulted immediately, the second applicant's condition could have been diagnosed some days earlier. The European Court held that while there were relevant and sufficient reasons for the authorities to suspect abuse at the time the second applicant was admitted to hospital, the delay in consulting a dermatologist extended the interference with the applicants' right to respect for their family life and was not proportionate to the legitimate aim of protecting the second applicant from harm. Consequently, the Court found that there has been a violation of the applicants' right to respect for their family life under Article 8 of the Convention.

According to European Court taking of a new-born baby into public care at the moment of its birth as "an extremely harsh measure" and held that a new-born can be removed from his or her mother only for "extraordinarily compelling reasons" (see *K. and T. v. Finland,* GC judgment of 12 July 2001).

In the case ***K. and T. v. Finland*** (GC judgment of 12 July 2001), the applicant mother had been diagnosed as suffering from schizophrenia. When she was expecting her third child J., the Social Welfare Board, considering that the applicant was unable to care for her second child M., placed him in a children's home as a short-term support measure consented to by the applicants. As soon as she was born, the third child J. was, by virtue of an emergency order, placed in public care given the applicant's unstable mental condition. In a further emergency order, issued a few days later, the second child M. was likewise placed in public care. The Court held, unanimously, that there had been a violation of Article 8 in respect of the decision to take into care of child at birth and failure of authorities to take proper steps to reunite parents and children in care. The taking of a new-born baby into public care at the moment of its birth was an extremely harsh measure. There needed to have been extraordinarily compelling reasons before a baby could be physically removed from the care of its mother, against her will, immediately after birth, as a consequence of a procedure in which neither she nor her partner had been involved. Such reasons had not been shown to exist. The authorities had known about the forthcoming birth of J. for months in advance and were well aware of the applicant's mental problems, so the situation was not an emergency in the sense of being unforeseen. The Finnish Government had not suggested that other possible ways of protecting J. from the risk of physical harm from mother had even been considered. Even having regard to the national authorities' margin of appreciation, the Court concluded that the emergency care order in respect of J. and the methods used in implementing that care were disproportionate. Different considerations came into play as far as the second child was concerned. He had already been physically separated from his family as a result of his voluntary placement in a children's home. The national authorities were therefore entitled to consider it necessary to take exceptional action, for a limited period.

Parents must be involved in any decision-making process concerning children to a degree sufficient to provide them with a requisite protection of their interests.

The case ***T.P. and K.M. v. United Kingdom*** (GC judgment of 10 May 2001) concerned the placement of a four-year-old girl in the care of the local authorities. She had complained that she had been sexually abused and her mother was considered incapable of protecting her. The mother and daughter alleged that they had had no access to a court or to an effective remedy to challenge the lack of justification for this placement, which had separated them. The European Court held that there had been a violation of Article 8 of the Convention, the mother having been deprived of an adequate involvement in the decision-making process concerning the care of her daughter. At the same time held that there had been a violation of Article 13 (right to an effective remedy) of the Convention, as the applicants had no appropriate means of obtaining a determination of their allegations that their right to respect for their family life had been breached, and no possibility of obtaining an enforceable award of compensation for the damage suffered as a result.

Having regard to the above mentioned I draw your attention also to the report of Committee on Legal Affairs and Human Rights of Parliamentary Assembly of Council of Europe "**Human rights and family courts**" and the PACE resolution 1908(2012) adopted on 30 November 2012[3]. The Committee took a look at the functioning of family courts in Europe. It was especially concerned about certain cases in which children have been withdrawn from their family against the wishes of their biological parents. 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 were 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 were 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.

Finally, I would like to draw your attention to the report of Committee on Social Affairs, Health and Sustainable Development **"Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States** and the PACE resolution 2049(2015) and recommendation 2068(2015) adopted on 22 April 2015[4]. According to this report children have the right not to be separated from their parents against their will, except when the competent authorities determine that such separation is necessary for the best interests of the child. In the absence of a child being judged to be at risk or imminent risk of suffering serious harm, in particular physical, sexual or psychological abuse, it is not enough to show that a child could be placed in a more beneficial environment for its upbringing to remove a child from his or her parents and even less to sever family ties completely. Member States should thus put into place laws, regulations and procedures which truly put the best

[3] see http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=19190&Language=EN
[4] see http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21567&lang=en

interest of the child first in removal, placement and reunification decisions. The competent Council of Europe body should develop policy guidelines for member States on how to avoid practices deemed abusive in this context, namely (except in exceptional circumstances) severing family ties completely, removing children from parental care at birth, basing placement decisions on the effluxion of time, and having recourse to adoptions without parental consent. In the explanatory memorandum to this report I discovered a lot of alarming information e. g.:

"…the percentage of children placed with relatives ranges from 3% (Finland) and 5% (Sweden, United Kingdom), to 63% in Latvia and 75% in Portugal. Foster families take in 0.5% of children in Portugal and 10% in Estonia, but more than half in France and Spain, 69% in Norway, and 75% in the United Kingdom. Institutions look after 10% of children in Norway, Portugal and the United Kingdom, and just over 50% in Hungary and Sweden…"

"There is a particular problem which I was made aware of in the United Kingdom, but which may pose a problem in several other countries, too: many mothers who are victims of domestic violence themselves seem to be re-victimised by the child protection system, as the child witnessing such violence (or threats of it) is considered to be subject to emotional abuse and thus significant harm. This means that if the mother has nowhere to turn to her child can be taken away from her. This is a problem which should not be underestimated, as the impact of the crisis and the effect of austerity cuts on social services means that more and more mothers are now trapped in abusive relationships (with shelters closing) and are afraid to signal domestic violence lest their children be taken away from them. Similarly, mothers with serious postnatal depression can also apparently have their children permanently taken away from them, despite the fact that they may well recover relatively quickly and be able to be a good parent if treated."

"*Taking children from extremely poor families into care is not the right solution: the right solution is to provide better support and services to these families, including financial and material support. In a country like Romania, which has been badly hit by the financial and economic crisis, this is, of course, easier said than done – though the cost of keeping a child in proper alternative care is certainly higher than the cost of providing more support to families. Further efforts must be made in this regard: As the judge I spoke to pointed out, love is a very strong bond, and many children would prefer to go hungry rather than be separated from their family. I think it should be the primary obligation of the State to ensure that no child goes hungry, for example by instituting a "food stamp" programme and free school meals rather than removing these children from their family because of poverty."*

"*…frequent recourse to removing children from parental care at birth should be a warning sign. Indeed, the European Court of Human Rights has qualified such a removal as "an extremely harsh measure" and "drastic", and has thus posited that a newborn can be removed from his or her mother only for "extraordinarily compelling reasons". My attention has been drawn to a number of cases in which a mother who had already had a child taken into care (for example, because she was considered an unfit parent because of her very young age, because she was in an abusive relationship with the father, because of substance abuse, because of mental illness), had another child removed from her care at birth many years later, despite a total change of circumstances.*"

"Similarly, the European Court of Human Rights abhors basing placement decisions on the effluxion of time. For example, placing a young child in a foster family while severely limiting contact with the birth family, and then, a few years later, allowing that foster family to adopt the child simply because the child is now "settled" in the foster family while, in the meantime, the birth family would be able to provide a perfectly secure and good environment for the child's upbringing, makes a mockery of both children's and parents' rights. Luckily, I have not come across too many such decisions in my research."

„My attention has been drawn to a handful of cases which are extremely tragic and concern miscarriages of justice. In several of these cases, an underlying medical condition of the child such as brittle bone disease or rickets was overlooked, and the children were placed for adoption (without parental consent). The tragedy is that even when the parents finally win in court, and can prove their innocence, they cannot get their children back, because a flaw in the English/Welsh legal system means that adoption orders cannot be reversed in any circumstances – in a misunderstanding of the "best interest of the child" who actually has a right to return to his/her birth family."

However, if it is useful to argue in the proceedings before the family courts by the European Court case-law then there are many cases in which human rights were violated at the national level. For a family who lost a case at the national level it is not an efficient solution to lodge an application to the European Court. This is because 1) the European Court refuses to apply in these cases the preliminary measure, and 2) in many countries, including the United Kingdom, there is no possibility to reopen the civil proceedings on the basis of the European Court judgement. In these cases the person concerned could obtain only satisfaction of justice but it is not a sufficient redress of the situation. On many occasions I pointed out this problem at the Council of Europe level[5] arguing that, in these cases, the reopening of the proceedings before family courts must be granted at the national level and requested as a necessary individual measure at the Committee of Ministers level during the execution of the European Court´s judgement.

With regards to the above mentioned and the fact that in the Brussels II *bis* Regulation only procedural rules are formulated, I support the adoption of new rules concerning the material part of the problem described at the European Union level. This solution will have an impact not only on the problem concerning the children of foreign citizens but also to the forced separation of children from their parents without relevant reasons in the European Union Member States. In this regard the constant case law of the European Court formulated in the field of Article 8 and Article 6 of the Convention and the PACE resolution 1908(2012) adopted on 30 November 2012[6] and the PACE resolution 2049(2015)[7] and recommendation 2068(2015) adopted on 22 April 2015[8] will be a useful source of inspiration. At the same time I fully support the idea of creating a new

[5] http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Tables_rondes/TR_Strasbourg_13-14%20octobre%202014/TR_Strasbourg_Programme_EN.pdf and http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DH_GDR/DH-GDR(2015)OJ008_EN.pdf

[6] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19220&lang=en

[7] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21737&lang=en

[8] http://assembly.coe.int//nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21738&lang=en

international supervising or judicial body able to properly react and sufficiently redress the violation of children's rights in the Europe.

For these reasons, as well as taking into consideration the sensitive nature of the problem and vulnerability of the victims, I highly appreciate this symposium grouping together many experts from different countries who are in their daily practise fighting for children's rights and I would like to say to all of you a big thank you for your efforts.

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