



**The case-law of the European Court of
Human Rights relevant to the protection the
rights of the child in relation to alternative
care settings**

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Alternative Care: General Principles

- ◆ **Protective measure** (ideally, temporary)
- ◆ **Family-based care** preferred (e.g. foster care)
- ◆ Child's right to a **guardian or representative**
- ◆ Decision-making in the **best interests of the child**
- ◆ **Children's broader rights** remain **applicable** to cases of alternative care
- ◆ All appropriate **legislative, administrative and other measures required** to implement the CRC





Role of the ECtHR and national authorities (K. & T. v. Finland, 2003; Pavel Shiskov v. Russia, 2021)

- ◆ **Subsidiary** role (review domestic decisions in light of the Convention)
- ◆ National authorities have **benefit of direct contact**
- ◆ Their task to strike fair balance between interests of the parent and the child
- ◆ **Wide margin of appreciation** accorded to national authorities varies:
 - ◆ **Nature** of the issue
 - ◆ **Importance** of the **interests** (protect the child; reunite the family)
 - ◆ WMA on custody matters
 - ◆ Stricter scrutiny in respect of any further limitations



Article 8: General Principles

- ◆ Mutual enjoyment by parent & child of each other's company constitutes **fundamental element of family life**
- ◆ **Negative** and **positive** obligations
- ◆ **Priority to keep the family together:**
 - ◆ explore effectiveness of **less drastic measures**
 - ◆ child's interest **to develop in a sound environment**
 - ◆ **obligation** not of results but **means employed**



Alternative Care: ECtHR Principles (A.K. v. Finland, 2003; Wallova & Walla, 2006)

- ◆ **Exceptions:** cases of particularly unfit family which may harm child's health/development
- ◆ The natural family relationship is **not terminated** by reason of taking a child in PC
- ◆ **Alternative care** intended as a **temporary** measure, aimed at family **reunification**
- ◆ **Positive obligation** to aim to **reunite** a natural parent with his/her child
- ◆ **Removal interferes** with respect for family life

◆ **Interference constitutes violation of Article 8 ECHR unless it is:**

1. **In accordance with the law**
2. **Pursues a legitimate aim(s)** (Art. 8/2)
3. **Necessary in a democratic society**



Alternative care must be necessary

- ◆ In determining whether such **necessity existed** the Ct. will have regard to:
 - ◆ **Appropriateness** of the intervention:
 - ◆ Traditions
 - ◆ Availability of resources
 - ◆ **Best interest of the child** - a primary consideration
 - ◆ **Relevant and sufficient reasons given** - justifying decision by authorities
- ◆ Possibility of placing in a more beneficial environment on its own does not justify removal; other circumstances must exist (*A.K.*);
- ◆ Parents' lack of financial means relevant, but not sufficient reasons (*Savigny*)



Placing Children in AC -Procedural Safeguards: Relevant Case Law

- ◆ *W. v. the UK*, 1987
- ◆ *McMichael v. the UK*, 1995
- ◆ *Olsson v. Sweden*, 1998
- ◆ *A.K. v. Finland*, 2003
- ◆ *Wallova and Walla v. Czech Republic*, 2006
- ◆ *Savigny v. Ukraine*, 2008
- ◆ *B. v. Romania*, 2013
- ◆ *B.B. and F.B. v. Germany*, 2013
- ◆ *T. v. the Czech Republic*, 2014
- ◆ *R.V. & Others v. Italy*, 2018
- ◆ *Hernehult v. Norway*, 2020
- ◆ *Suur v. Estonia*, 2020
- ◆ *Pavel Shishkov v. Russia*, 2021
- ◆ *Naltakyan v. Russia*, 2021
- ◆ *Jessica Marchi v. Italy*, 2021



Placing Children in AC – Procedural Safeguards: Taking children into AC

- ◆ Careful assessment of
 - ◆ the impact of the AC on the children & parents
 - ◆ less drastic alternatives to PC
- ◆ Adequate evidence should be provided
- ◆ Decision-making process as a whole must be fair + provide safeguards
- ◆ Domestic authorities must:
 - ◆ Conduct in depth examination of the relevant factors
 - ◆ Assess the respective interests (balanced & reasonable assessment)
 - ◆ Determine the best solution for the child
 - ◆ Provide relevant/sufficient reasons
- Economic instability, lack of suitable housing - less drastic measures should be used: monitor the family's living and hygiene conditions; advise them how to improve situation (*Wallova*)
- ◆ The Ct. questioned the evidence that personal qualities of parents endangered children's lives, health, moral (*Savigny*)
- ◆ District Ct, relied only on the testimony of children who lied (*B.B. & F.B. v. Germany*)
- ◆ Hearing psychologist, psychiatrist children (*T. v. the Czech Republic*)



Taking children into AC

- ◆ Decision making process should be fair as a whole:
 - ◆ Sufficient involvement of parents in the decision making process
 - ◆ inform about developments,
 - ◆ Procedural rights guaranteed
 - ◆ Hearing of children
 - ◆ Views & interests should be taken into account
- ◆ Difference between emergency and ordinary care orders (*A.K., Pavel Shiskov*)



10

Taking children into AC

- ◆ Administrative difficulties (lack of appropriate families/placements) could play only a secondary role in decisions
- ◆ Children should not be placed in a separate foster homes, at a significant distance from each other/parents (*Olsson*)



Placing Children in AC – Procedural Safeguards: Implementation of AC

- ◆ Everything possible must be done to preserve personal relations and if and when appropriate to rebuild the family (presented to children as an option)
- ◆ Sustained effort to facilitate family reunification (support regular contact; steps to reunite; examine & monitor situation)
- ◆ Measures taken must be supported by sufficient reasons to be proportionate
- ◆ Regular review of the restrictions of contact (*T. v. the Czech Republik*)
- ◆ Child's interest to maintain ties with family except in particularly extreme cases when not in child's BI
- ◆ The likelihood of reunification will be progressively diminished and eventually destroyed if not allowed to see each other at all, or only so rarely that no natural bonding is likely to occur
- ◆ Key consideration is whether the authorities have taken all necessary steps to facilitate contact as can reasonably be demanded in a special circumstances of each case



Placing Children in AC – Procedural Safeguards: Termination of AC

- ◆ **Temporary measure:** should be discontinued as soon as circumstances permit
- ◆ **Reunification** should be planned - positive duty to facilitate family reunification as soon as **reasonably feasible**
- ◆ In the proceedings should be considered whether it would be viable to reunite child with natural parents under circumstances that would **minimize any potential negative effects** (*Nalatakyan*)



Placing Children in Alternative Care – Case Law

Olsson v. Sweden (No. 1), 1988

- ◆ Children placed in separate foster homes, at a significant distance from each other and the parents
- ◆ Authorities acted in good faith, arguing their choice was driven by lack of appropriate foster families
- ◆ **ECtHR: Violation of Article 8:** insufficient reasoning to render measures proportionate to the legitimate aim pursued

Savinj v. Ukraine, 2008

- ◆ Children placed in care due to parents' lack of financial means
- ◆ Authorities argued that parents' personal qualities endanger children's lives, health and moral upbringing
- ◆ **ECtHR: Violation of Article 8:** insufficient evidence of social assistance involved
- ◆ Although relevant reasoning, insufficient to justify the interference



Placing Children in Alternative Care - Case Law

Under Article 8 ECHR:

- ◆ **Parents must be sufficiently included in decision-making (*W. v. the United Kingdom*)**
- ◆ **Parents must be informed about the developments, ensuring they can participate in decisions (*McMichael v. the United Kingdom*)**
- ◆ **In certain cases, important to hear from the children concerned (*B. v. Romania*)**

B. v. Romania (no. 2), 2013

- ◆ Mother diagnosed with schizophrenia, taken by police to psychiatric institutions for treatment
- ◆ Children placed in care home
- ◆ Mother not assigned a lawyer or guardian during proceedings
- ◆ Situation examined by courts only 2x in 12 years
- ◆ No evidence of regular contact by social workers
- ◆ **ECtHR: Violation of Article 8:** mother's interests inadequately protected



Placing Children in Alternative Care – Case Law

R.V. and Others v. Italy, 2019

- ◆ Mother has psychological issues; deemed unfit to take care of children; family was lacking financial means
- ◆ Relying on expert opinion, authorities placed children in care
- ◆ **ECtHR: Violation of Article 8:** foster care is a temporary measure. Herein, it went on for 10+ years. Lack of speed, diligence and review do not meet Article 8 requirements

Naltakyan v. Russia, 2021

- ◆ Mother gave up her son day after birth at the hospital. The father thought he died at birth, and learned of his survival a year and a half later
- ◆ Son placed in foster home. Father's contact rights restricted
- ◆ **ECtHR: Violation of Article 8:** Courts failed to thoroughly examine and fairly balance rights. Decision-making deficient and arbitrary, making family reunion impossible



Placing Children in Alternative Care – Case Law

Hernehult v. Norway, 2020

- ◆ Children's health deemed at risk: living in isolation and suffering from pathologizing
- ◆ Children placed in foster homes. **B** and **C** in the same home. **A** in another. **A** eventually returned to parents (because he expressed strong wish to move back in)
- ◆ **ECtHR: Violation of Article 8:** Insufficient efforts to keep B and C together with applicant. Failure to consider reunification





Child Protection in Institutions

X and Others v. Bulgaria [GC], 2021

- ◆ The applicants were placed in an orphanage, having been abandoned by their mother
- ◆ In 2012, having been adopted by Italian parents, they disclosed that they were sexually abused at the orphanage
- ◆ In 2013, Bulgarian authorities began to investigate
- ◆ The case was discontinued, as the public prosecutor considered evidence was insufficient to establish an offence
- ◆ **No violation of substantive limb** of Article 3: appropriate legislative and regulatory framework in place
- ◆ **Violation of procedural limb of Article 3:** the investigation was not thorough enough
- ◆ **Lanzarote Convention** standard not met
 - ◆ children not interviewed in a way adapted to their age and maturity;
 - ◆ interviews not video-recorded;
 - ◆ other children not interviewed;
 - ◆ no medical examination;
 - ◆ no assistance; etc.



*“There can be no keener revelation of a society’s soul
than the way in which it treats its children.”
Nelson Mandela*

Thank you for your attention.