Adolescents in Parental separation and care proceedings

summary outline of

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Evaluation and determination of the best interests of the child in parental separation and care proceedings
Exchange of views and knowledge among specialists and professionals

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The UNCRC recognises that all children have rights from birth to 18 - that is from neonates through infants, young children, to adolescents and young persons., those rights are not homogenous and the UNCRC refers to "evolving capacities" and "age and maturity." The CRC Committee has referenced the principle of "evolving capacities" more than **eighty times in nineteen of its General Comments (GC's).**

The UNCRC committee has adopted two particularly relevant GC's focussing on the extremities of the range of childhood: GC 7 on early childhood and GC 20 on adolescents.

In the context of family environment and alternative care GC 20 (at paragraph 50) specifically links the rights of adolescents to states obligations under the CRC Articles 18 (parental responsibilities and state assistance) and 27 (the right to a standards of living adequate for the child's development.)

Perhaps additional mention might have been made of Article 5 – the right to parental direction and guidance consistent with a child's evolving capacities. This provision affirms the role of the family in a child's life but also makes clear that this is a right of the child - not of the parents - and relates primarily to direction and guidance in exercising and enjoying.

This right assumes an enhanced role when parents separate and the child may be – and often is - receiving different "direction and guidance" from each parent, and perhaps additionally from step-parents or a new social parent. Article 5 anticipates that when a child reaches a sufficient level of maturity and capacity to exercise his or her rights independently there will no longer be a need or a justification for parental direction and guidance.

Important too for adolescents are Articles 8 (the preservation of identity), Article 9 (the right not to be separated from parents), and Articles 13 (freedom of expression), 14 (freedom of thought conscience and religion), and 15 (freedom of association and peaceful assembly). Article 9(1) and (2) are particularly important both for situations of parental separation and for the taking of children into care. (See also UN guidelines specifically paragraphs 47 and 57.)

At this point the importance of **Article 12 (hearing the child's views)** increases exponentially. The older a child is, the more weight is to be given to the child's own views when making both the best interests assessment and the best interests determination (see GC 14), which are the necessary prior steps to their best interests being made a primary consideration in all administrative and judicial decision making.

The adolescent child's growing autonomy may have an impact on whole range of situations: relocation and choice of residence, schooling (and the choice to continue education or not), personal

identity and relationships, employment, consent to medical treatment – all of which can be subject to disputes between separated parents and between those parents and the children.

Council of Europe Member States recognise the autonomy of adolescents at different ages in different situations.

Irrespective of the legal frameworks regulating each of these issues, and of the age at which the adolescent's autonomy in these matters is recognised, even without legal autonomy, hearing the views of the adolescent and giving them due weight becomes increasingly important.

Some thoughtful judgments have been delivered after the views of the affected children have been heard. See e.g the Peter Jackson letter (http://www.bailii.org/ew/cases/EWFC/HCJ/2017/48.html) where the judge - having heard the 14-year-old child separately from his parents and step-parents - gave his judgment in the form of a letter directly to the child saying expressly why he did so, "as this case is about you and your future."

Abductions are more common for younger children and The Hague Convention on Child Abduction (1980) only applies to children up to the age of 16. It cannot be applied to order the return of an older child.

Adolescents can apply for passports without parental consent from the age of 15 or 16 in some states, but not until 18 in others. Even for children under that age, the Hague Convention expressly provides for a child's objection to being returned as a ground for refusing a return under Article 13 (if the child is old enough.)

The 1996 Hague Convention on Parental Responsibility and Child Protection applies to children up to the age of 18. The new BiiB Regulation coming into force on 1st August 2022 will require the child to have been heard before recognition is given to a national decision.

<u>The ECTHR and adolescents in situations of parental separation:</u>

The separation of a child's parents can occur by (relationship breakdown) by choice or by administrative action such as imprisonment or deportation and the consequences for the child can be dictated by judicial authorities or their endorsement of administrative action.

Concepts such as custody contact and access for their parents are increasingly inappropriate as adolescents get older.

I now want to turn to runaway children, who are mostly adolescents. Children run away from both family homes and from state care. They frequently run from their "family homes" when they live with one parent who has been given custody and with that parent's new partner, with whom they may not have good relations. The presence of a new partner may dramatically alter the best interest assessment and determination previously taken that was associated with custody and residence and access orders. In how many European jurisdictions can an adolescent child - in practice - seek to have the "child arrangements" including residence changed when their circumstances have changed? But they also often run away from the alternative care in which they have been placed by the state.

GC 20 notes that adolescents leaving care need special support and preparation for transition. What is equally important is that children between the ages of 15 and 18 who are in "alternative care" are actually receiving the "care" to which their placement entitles them. (already discussed in other sessions.)

The approach of the ECTHR

MD v. Malta (Application no. 64791/10)

The Court found a violation in MD v Malta as there was no possibility to go to court to contest a care order after it had been made even up to the age of 18. In that case the mother, although deprived of parental responsibility, was found to have standing to represent her children as well as herself before the ECtHR. By the time the court's judgment found violations the children were 12 and 14, but THEIR complaints were not addressed in the operative part of the judgment – and they were even referred to as "the children" rather than the 2nd and 3rd applicants - they were effectively sidelined in proceedings which were about their rights to have contact with their mother. This is not unusual.

Iglesias Casarrubios et Cantalapiedra Iglesias v. Spain (Application no. 23298/12)

In Iglesias Casarrubios et Cantalapiedra Iglesias v. Spain, a case on divorce proceedings, the applicant asked that her 2 daughters (aged 13 and 11 and also applicants) be heard. The court ordered a psychosocial team to hear them rather than hearing them directly. The youngest requested "categorically and imperatively" that it be recorded, but the team refused, so she did not proceed with the interview. During an appeal, the two daughters (then aged 15 and 12) wrote letters to the judge stating they wanted to be heard, but no response appears in the record.

The ECHR found a violation of their Article 6 § 1 rights. The ECHR stated that section 770 of the Spanish Code of Civil Procedure and Article 9 of Organic Law 1/1996 both gave minors the right to be heard (Section 770 stated minors over aged 12), as did prior case law, however, Organic Law 15/2005 changed the wording to say courts "will hear minors capable of discernment when it is deemed necessary." (§§ 18, 19, 20) Additionally, the trial judge only reviewed the statement given by the older daughter to the psychosocial team and relied on previous expert reports from a different legal procedure to ascertain the youngest daughter's opinion, rather than actually hearing from her. (§ 40) The ECHR Court "s[aw] no reason why the opinion of the applicant's eldest daughter, a minor then aged over 12, was not directly sought by the court of first instance… Nor does the Court see any reason justifying the trial judge not giving a reasoned decision… on the request of the applicant's youngest daughter to be heard by him." (§ 42)

Mustafa and Armağan Akin v. Turkey (Application no. 4694/03)

In Mustafa and Armağan Akin v. Turkey, in divorce and custody proceedings, the court awarded custody of their 12-year-old son to the husband/father and custody of their 7-year-old daughter to the wife/mother, with instructions to switch the children from 1-15 February each year. The husband asked to allow both children to stay with him every other weekend and then allow both

children to stay with his ex-wife on the opposing weekends, so that the children could maintain a relationship with each other. However, the court refused. When the son was 13, the father and son brought a case together, requesting a way for the siblings to maintain contact with each other, but the domestic courts refused and all appeals were rejected.

The ECHR found a violation of the father and son's Article 8 rights. The domestic courts, on their own, came up with this custody arrangement – neither parent had requested it. The ECHR Court was "struck by the absence of reasoning justifying the separation of the children." (§ 23) The domestic courts gave no explanation as to how going to her father's every other weekend would harm the daughter. (§ 26) The domestic court "did not only fail to seek the opinion of the children but also failed to base its decision on any evidence." (§ 27)

Plaza v. Poland (Application no. 18830/07)

In Plaza v. Poland, the parents split up when their daughter was a baby. She lived with her mother and the father had visitation rights 1 day/month. There were ongoing disputes between the parents; when the girl was around 10 she started refusing to see father. When she was 11, he filed application to deny paternity, but he refused to have a DNA test done, so his application went nowhere. When she was 13, she spoke to experts from the court, expressing her negative feelings about her father. When she was 15, the regional court remanded an appeal stating that her feelings had to be considered; she spoke to the court without either of her parents present and stated that she did not want to continue meeting with her father. When she was 17, she spoke to a custody officer and "requested recognition and understanding of her feelings and views" and also "stated that she was almost an adult and able to make a sensible judgment for herself." The father continuously (and apparently intentionally) did things to upset daughter from when she was a toddler up.

The ECHR found there had been no violation of the father's Article 6 § 1 or Article 8 rights. All domestic courts found that mother had never prevented child from seeing father. (§§ 77, 84) Prior to child turning 11, father missed multiple meetings, brought strangers to meeting that child was afraid of; after she turned 11 and started to refuse to see him, he would randomly show up at her school or other public places. (§§ 26, 60, 77, 78) A court officer was assigned by the domestic courts when the child was 10; she tried to mediate between the parents and encourage the child, but the child still refused to see her father. (§ 80) The courts "repeatedly appointed experts with a view to establishing what was in the best interest of the child under the circumstances." (§ 82) The ECHR stated that "as time went by, [the child] matured and was able to take her own decisions in respect of her contact with her father." It was the child, not the mother, who refused contact starting from when she was 11. The domestic courts took her situation and wishes into consideration, and that approach "cannot be open to criticism." (§ 86)

N.Ts and others v. Georgia (Application no. 71776/12)

The Father of 3 boys struggled with drug addiction; their mother died (the case doesn't give cause, only saying it's unrelated to the father's drug addiction) when the oldest boy was 7 and the youngest (twins) were 3. The boys lived with their maternal grandparents and aunts; a year later and in recovery, their father tried to get them back. The lower court said the boys should live with their father, the appeals court reversed, the Supreme Court of Georgia remanded for review saying that while the opinion of a child is important, "it may be disregarded if it does not correspond to his or her interests." When the oldest boy was 9 or 10, he hysterically insisted to social workers that he

didn't want to live with his father, saying his father killed his mother and that he was embarrassed at school because his father had gone on TV to talk about his drug addiction and the custody issues. The appeals court then flipped their decision to say that the boys should live with their father, due to the negative influence of their maternal family; the Supreme Court confirmed. However, at each scheduled handover the boys refused to go with their father, so they remained with maternal family. Their maternal aunt brought case on behalf of the three boys.

The ECHR found a violation of the boys' Article 8 rights. They stated that Article 8 doesn't have "explicit procedural requirements", however in order to protect an applicant's right, he/they must be "involved in the decision-making process." Here, that would mean the children would need to be heard. (§ 72) The government claimed that the boys had been involved and heard by the involvement of the SSA, however, the SSA only met with them a handful of times and only with the purpose of writing reports. They also did not have status within the court proceedings; therefore, the ECHR did not believe they were adequate representation. (§§ 74, 75, 77) The boys were never heard by the domestic courts in person. The applicants claimed that Article 81 of the Georgian Civil Code obliged the courts to hear the older boy at least, but the government disputed that interpretation. Neither side submitted any supporting case law. The ECHR did "not understand why the domestic courts failed both to give any consideration to the possibility of directly involving the older boy in the proceedings and to give reasons for not hearing him." (§§ 37, 79, 80) The government claimed that it was in the best interest of children to reunite with their father and that the "maternal family was having a negative influence." The Court accepted those reasons, but stated that the government "failed to give adequate consideration to one important fact: the boys did not want to be reunited with their father." (§ 81) The ECHR "attache[d] particular weight to the reports of" several psychologists involved in the legal proceedings, who had recommended a period of transition to prepare the boys for leaving their maternal family rather than forcing them to immediately leave and return to their father. (§ 83)

VP v France (Application no. 21825/20)

Child applicant brought her case under Art. 8, but Court found it to be manifestly ill-founded. Daughter claimed her mother abused her; doctors found no evidence, but the court temporarily assigned residence with father with visiting rights for mother. However, the relationship between mother-daughter continued to degrade; a year later, the domestic court removed her from home and placed her in an ASE home, with visits allowed/scheduled for both parents. Mother-daughter relationship did not improve, so the courts continuously extended her stay, trying several different measures, including cancelling her father's visit if she refused to see her mother. Per the ECHR decision, she was heard by the Court of Appeal when she was 8 and again when she was 11/12, both times saying that she wished to live with her father; she was assigned a lawyer when she was 8 plus an ad hoc administrator when she was approximately 11. Two and a half years after she was first placed in the ASE home, the domestic courts allowed her to return to live with her father.

As their reasoning, the ECHR stated that the domestic courts' actions were taken with the goal of protecting the child's health and to restore "balanced family relations." (§ 53) They also stated that per experts involved, the applicant was in psychological danger because of the conflict between her parents and the strong influence of her father. (§ 54) Relying on regular reports written by experts and the fact that she had "adapted well" to living in the ASE home, the domestic courts extended her stay at regular intervals. If the domestic courts did not respond to the child's wishes, it was because the experts maintained that it was in her long-term best interest to remain in the ASE home. When it was clear that there was no improvement in the girl's relationship with her mother,

the domestic courts began reversing their prior decisions and finally allowed her to live with her father again. (§§ 55, 58, 59) The ECHR believed that the placement did not appear to have negatively affected the applicant's relationship with her father. (§ 60) The ECHR court also found that her "placement was based on 'relevant and sufficient' reasons" and that the government struck a "fair balance" between the best interests of the child and the other interests at play. The government also "took the measures that could reasonably be required of them." (§§ 56, 61) As part of the decision-making process, the domestic courts received multiple reports by social services and experts, the applicant had a lawyer and an ad hoc administrator to represent her interests, and the courts themselves heard from her. There were therefore "sufficient safeguards to respect the interests of the applicant and enable her to assert her rights." (§§ 62, 63)

The DGD recently held by UNCRC Committee examined alternative care in detail.