EXTENT OF STATE’S DUTY TO REUNITE PARENT AND CHILD – AN EUROPEAN HUMAN RIGHTS PERSPECTIVE

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INTRODUCTION

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms1 protects the right to respect for family life.2 A comprehensive investigation into this right reveals the increasing importance attached to the extent of a state’s duty in respecting a person’s family life. Harris3 states: “[T]he reach of this right cannot be considered separately from the specific duty on a State under Article 8, ie its duty to respect family life.”

Claims with regard to the extent of a member state’s duty to respect family life, is mainly based on the judgment of the European Court on Human Rights4 in *Marchak v Belgium*,5 namely that article 8(1)

“does not merely compel the state to abstain from such interferences: in addition to this primary negative undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life” (my italics).

The identification of circumstances where this right demands that states take positive steps is not without difficulties. In this regard the ECtHR in *Abdulaziz, Cabales and Balkandali v United Kingdom*6 remarked:

“[E]specially as far as those positive obligations are concerned, the notion of ‘respect’ is not clear-cut: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case accordingly, this is an area in which Contracting Parties enjoy a wide margin of appreciation.”7

In determining whether a positive obligation exists, the ECtHR has on many occasions held that “regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole Convention”.7

This contribution examines the guidelines8 with regard to the extent of a state’s duty to secure reunion of parent and child in terms of article 8 ECHR,9 as laid down by the ECtHR. Two issues in this regard will be addressed, namely, the

1 4 Nov 1950 ETS no 5 (hereinafter referred to as ECHR). A 8 provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence (my italics).
2. There shall be no interference by a public authority with the exercise of the right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic, well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

2 For a discussion on the meaning of the concepts “family” and “family life” see Van der Linde “Die (moontlike) uitdruklike erkenning en beskerming van fundamentele regte ten aansien van die gesin” 2000 De Jure 1.


4 Hereinafter referred to as ECtHR.


6 (1985) 7 EHRR 471 497 para 67.


8 These guidelines or standards are based on the principle that family life survives the removal of children from the family home and their replacement with alternative carers. See discussion in 1 1–1 4.

9 A number of other international legal instruments concerning children refer to the right of the child to maintain contact with his or her parents. A 9(3) of the United Nations Convention on the Rights of the Child (CRC) expressly provides for the right of

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placement of children in public or alternative care, and the enforcement of return orders under the Hague Convention. Lastly, a brief overview of the provisions of the recently enacted Convention on Contact concerning Children,10 is provided. This Convention can be seen as a manifestation of these guidelines and principles in one document in an attempt to improve and alleviate problems pertaining to contact between parent and child, especially in the two mentioned areas of law.

2 CHILDREN IN ALTERNATIVE CARE

2 1 Mutual enjoyment by parent and child of each other’s company – fundamental element of family life

Respect for family life implies an obligation on states to maintain and develop family ties and to act in a manner calculated to allow these ties to develop normally.11 In a number of cases dealing with the removal of children from the care of parents by local authorities, an infringement on the (parent’s) right to respect for their family life, was accepted in principle. In Rieme v Sweden12 the ECtHR states:

“The mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, and the natural family relationship is not terminated by reason of the fact that the child is taken into public care. The implementation of the public care order, the subsequent prohibition on removal and its maintenance in force clearly constituted an interference with the applicant’s right to respect for family life.”13

With regard to the role the local authority has to play the court in Rieme v Sweden14 went on to say:

“Furthermore, it must be recalled that in cases like the present a father’s right to respect for family life under Article 8 includes a right to the taking of measures with a view to his being reunited with the child.”

In Johansen v Norway15 the court considered a case where a child had been placed in public care from the age of two weeks. The court did not criticise the removal as such but concluded that infringement of article 8 lied in the authority’s further actions to terminate parental rights in an attempt to have the child adopted. The court held:16

“In the present case the applicant has been deprived of her parental rights and access in the context of a permanent placement of her daughter in a foster home with a view to adoption by the foster parents. These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child’s best interests.”

2 2 Right of parent to be involved in the decision-making process: Procedural safeguards

A procedural dimension is given to article 8 by the judgments in H and W v United Kingdom.17 Both cases dealt with the procedure followed by local authorities towards the natural parents of children taken from the care of such parents in

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10 Para 4 below.
14 Para 69.
16 72 para 78.
17 (1988) 10 EHRR 39 and 29. See also the recent judgment in Venema v Netherlands appl no 35731/97 of 17 Dec 2002.

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view of a possible adoption. The children were removed for lengthy periods of time and the chances for reuniting them with their families were initially slim. After some time family H’s circumstances improved. The local authority, however, delayed attempts to reconcile parents and child. The ECtHR is of opinion that

“[c]oncerning as they did the question of the applicant’s future relations with her child, the proceedings related to a fundamental element of family life”.

The court concluded as follows:19

“Irrespective of their final outcome, an effective respect for the applicant’s family life required that the question be determined solely in the light of all relevant considerations and not by the mere effluxion of time. Since it was not, there has been a violation of Article 8.”

In the case of W, in addition to a delay in proceedings, the court had to consider whether the parents were sufficiently informed about the different steps in the decision-making process that lead to the children’s adoption. With reference to a state’s positive obligation the court concluded:20

“[T]he relevant considerations to be weighed by a local authority in reaching decisions on children in its care must perforce include the views and interests of the natural parents. The decision-making process must therefore, in the Court’s view, be such as to secure that their views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them.”

Feldman21 declares in this regard:

“Thus procedures for making child-care decisions must be adequate to ensure that these various (family) interests are taken fairly into account, introducing due-process values to a range of decision-making functions.”

Kilkelly22 confirms that the consequence of the W case was to establish the right of parents to be consulted and heard about important decisions regarding their children, unless there are convincing reasons to exclude them from such consultation or information. In McMichael v United Kingdom23 the court confirmed that although article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded in article 8.24 In the recent judgment of Venema v Netherlands25 the essence of the applicants’ case is that they were at no stage prior to the making of the order (to remove the children) consulted about the concerns being expressed about them by health professionals or offered an opportunity to contest the reliability, relevance or sufficiency of the information being compiled on them.26 What has to be determined, in the court’s view, is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they were not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as “necessary” within the meaning of article 8.27

18 112 para 90.
19 112 para 80.
20 49 para 63.
24 Para 87. In para 91 it was furthermore decided: “The Court would like to point to the difference in the nature of the interests protected by Article 6(1) and 8. Thus, Article 6(1) affords a procedural safeguard, namely the right to a court” in the determination of one’s civil rights and obligations . . whereas not only does the procedural requirement inherent in Article 8 cover administrative procedures as well as judicial proceedings, but it is ancillary to the wider purpose of ensuring proper respect for . . family life. The difference between the purpose pursued by the respective safeguards afforded by Article 6(1) and 8 may, in the light of the particular circumstances, justify the examination of the same facts under both Articles.”
26 Para 89.
27 Para 91.
It is essential that a parent be placed in a position where he or she may obtain access to information which is relied on by the authorities in taking measures of protective care or in taking decisions relevant to the care and custody of a child. Otherwise, the parent will be unable to participate effectively in the decision-making process or put forward in a fair or adequate manner those matters militating in favour of his or her ability to provide the child with proper care and protection. The court accepts that when action has to be taken to protect a child in an emergency, it may not always be possible, because of the urgency of the situation, to involve in the decision-making process those having custody of the child. Nor, as the government pointed out, may it even be desirable, even if possible, to do so if those having custody of the child are seen as the source of an immediate threat to the child, since giving them prior warning would be liable to deprive the measure of its effectiveness. However, the court must be satisfied that the authorities were entitled to consider that there were circumstances justifying the abrupt removal of the child from the care of its parents without any prior contact or consultation. It is for the state to establish that a careful assessment of the impact of the proposed care measure on the parents and child, as well as of the possible alternatives to the removal of the child from its family, was carried out prior to the implementation of a care measure.

Kilkelly points out that the right of other family members, such as grandparents, to participate in the decision-making process, appears to depend on the nature of their relationship with the child in care. If family life within the context of article 8 exists, it appears that some degree of participation by the grandparents will be required. In Boyle v United Kingdom the applicant (an uncle of the child) lived near his sister (M) and her son (C) and enjoyed a close relationship with (C). On suspicion of sexual abuse by (M), (C) was placed in care. The applicant’s requests for access to (C) were rejected save for one supervised visit, and prior to the Children Act 1989 he had no right to apply to a court for access. He claimed that his right to respect for family life under article 8 of the Convention had been infringed. The European Commission on Human Rights decided under the circumstances and having regard to the absence of (C’s) father, that there was a significant bond between the applicant and (C), and that this relationship fell within the scope of the concept of “family life”. On the question whether the rejection of the uncle’s requests constitutes an infringement of his right to respect for family life the Commission laid down the following principles:

“Where a parent is denied access to a minor child taken into care, there is in general an interference with the parent’s right to respect for family life as protected by Article 8(1) of the Convention. This however is not necessarily the case where other close relatives are concerned. Access by relatives to a child is normally at the discretion of the child’s parents and, where a care order has been made in respect of the child, this control of access passes to the local authority. A restriction of access which does not deny a recoverable opportunity to maintain the relationship will not of itself show a lack of respect for family life. The Commission recalls however with regard to the present applicant that apart from one visit in September 1989, all contact with C was prohibited thereby preventing any continuance of the applicant’s relationship with him. It finds that this amounts to an interference with the applicant’s right to respect for his ‘family life’ as guaranteed by Article 8(1) of the Convention.”

The decision to terminate access by the applicant, was made at a case conference to which he was not invited and without prior invitation of his views. The Commission concluded that the absence of a sufficient forum or mechanism for obtaining an objective and meaningful review of the applicant’s requests as to access disclosed a fundamental shortcoming, since the applicant as a result was not involved in the decision-making process to the degree sufficient to provide him with the requisite protection of his interest.

28  Para 92.
29  Para 93.
30  287.
32  (1994) 19 EHRR 179.
33  182 para 45.
34  Paras 46 47.
35  Para 57.
36  Para 58.
In addition, the ECtHR recognises that the wishes and feelings of children should duly be taken into account in applications concerning them.\(^\text{37}\)

### 2.3 Access by parent to child in public care and state’s duty to facilitate child’s return

In its judgments the ECtHR has consistently drawn a distinction between (a) decisions to take a child into public care or to maintain that care, and (b) decisions to restrict parental access or to limit parental rights while the child is in public care.\(^\text{38}\) Those in the former category, being in principle temporary and aimed at ultimate reunification, are accorded a wide margin of appreciation. The latter kind of decisions, however, carry the risk that “family relations between the parents and a young child [will be] effectively curtailed”.\(^\text{39}\) Such cases are examined more carefully.\(^\text{40}\) In *Margareta and Roger Andersson v Sweden*\(^\text{41}\) the applicants were mother and son. The son was taken into public care and then into a foster home. For a period of almost one-and-a-half years, the social welfare authorities, applying domestic legislation, prohibited almost all contact between the applicants, including meetings, correspondence and telephone conversations, to avoid harm to the child. The question as to infringement of their right to respect for family life was answered in the affirmative. The ECtHR held:\(^\text{42}\)

“The mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, and the natural family relationship is not terminated by reason of the fact that the child is taken into public care. Moreover, telephone conversations between family members are covered by the notions of ‘family life’ and ‘correspondence’ within the meaning of Article 8. It follows – and this was not contested by the Government – that the measures at issue amounted to interferences with the applicant’s right to respect for their family life and correspondence.”

The fundamental nature of family life between parent and child under the ECHR means that where a child is placed with alternative carers, contact between them must continue, not least in order to facilitate the ultimate aim of reuniting the family.\(^\text{43}\) Practical impediments can often frustrate contact under the circumstances mentioned. In *Olsson v Sweden*\(^\text{44}\) access was not prohibited but the foster families with whom the children were placed, lived a significant distance from their parents and from each other. This made it difficult to maintain meaningful contact. Kilkelly remarks\(^\text{45}\) that this principle places a heavy burden on authorities to ensure that a care order is implemented appropriately and in a manner that guarantees the right to respect for family life of both children and parents, particularly in view of the courts judgment that practical difficulties caused by the lack of suitable foster parents are not relevant. A similar conclusion (of infringement) was reached where, for a period of six years, a mother’s access to her daughter was restricted and she had

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\(^\text{37}\) Hokkanen v Finland (1995) 19 EHRR 139. In an earlier judgment (Nielsen v Denmark (1988) 11 EHRR 175) the court, however, determined that the ECHR applies to children as it does to adults. The applicant, a minor born out of wedlock, complained under a 5(1) about his committal to a child psychiatric ward of a state hospital at the request of his mother, who was also his sole legal custodian at the time. He claimed that he had been deprived of his liberty for reasons other than the need for medical treatment and that the mother’s sole intention was to prevent him from joining his father, who had repeatedly attempted to obtain custody of him. He also complained under a 5(4) of the fact that he had not had any opportunity to challenge the lawfulness of his detention before a court. The ECHR does not make express provision for the rights of children who are removed from their home environment in this way. A 20 CRC, however, ensures that a state is obliged to provide special protection to a child deprived of the family environment and to ensure that appropriate alternative family care or institutional placement is available. Efforts to meet this obligation shall pay due regard to the child’s cultural background. See, however, a 2 of the First Protocol to the ECHR to which a state is obliged to respect the religious and philosophical convictions of parents in the education and teaching of children. Consequently, when a state removes children into public care, it must be implemented in a manner that respects the religious and philosophical convictions of the child’s parents.


\(^\text{39}\) Johansen v Norway (1997) 23 EHRR 33 68 para 64; Janis et al 270.

\(^\text{40}\) See K & T v Finland appl no 25702/94, judgment of 12 July 2001 discussed in para 2 4 below.

\(^\text{41}\) (1992) 14 EHRR 615.

\(^\text{42}\) 643 para 72.


\(^\text{44}\) (1989) 11 EHRR 259.

\(^\text{45}\) 178.
no enforceable visiting rights under a system designed ultimately to reunite the family. There may also be a violation of article 8 if no adequate steps are taken to enable a non-custodial parent to have access to a child. In Rieme v Sweden and Olsson v Sweden, however, the ECtHR held that the delay in return of custody was justifiable in light of such factors as the genuineness of the state’s efforts at restoring the parent-child relationship, the seriousness of the risk to the child and the degree of cooperation of the biological parents.

2.4 Grounds for removal and justification under article 8(2)

The removal of children from the family will be compatible with the ECHR only if it is necessary in a democratic society in order to protect the interests of the child, and has, what the court describes as, a relevant and sufficient basis. In K & T v Finland the ECtHR recapitulated its case law on the impact of article 8(1) and 8(2). The court outlined the following principles with regard to article 8(2) and more specifically the question as to whether the interference is necessary in a democratic society:

"(1) In determining whether the impugned measures were ‘necessary in a democratic society’, the Court will consider whether in the light of the case as a whole, the reasons adduced to justify these measures were relevant and sufficient for the purpose of Article 8(2).

(2) In so doing, the Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area.

(3) Consideration of what is in the best interests of the child is in every case of crucial importance. It must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned . . . often at the very stage when care measures are being envisaged or immediately after their implementation. It follows from these considerations that the Court’s task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the public care of children and the rights of parents whose children have been taken into care, but rather to review under the Convention the decisions taken by those authorities in the exercise of their power of appreciation." The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake, such as, on the one hand, the importance of protecting a child in a situation which is assessed to seriously threaten his or her health or development and, on the other hand, the aim to reunite the family as soon as circumstances permit. After a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited. The court thus recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.

In Kroon v Netherlands the ECtHR confirmed that article 8(2) is also applicable where states have a positive obligation to act:

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46 Eriksson v Sweden (1990) 12 EHRR 183. See also Margareta and Roger Andersson v Sweden (1992) 14 EHRR 615.
47 Nuutinen v Finland (2003) 34 EHRR 358.
49 (No 2) 1992 17 EHRR 134.
50 See fn 1.
51 A 8(2).
52 Appl no 25702/94, judgment of 12 July 2001. For a discussion of this judgment see Jacobs and White 229.
53 Paras 154 and 155.
54 Para 155. See also TP and KM v UK (2002) 34 EHRR 42.
“[T]he essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective ‘respect’ for family life. However, the boundaries between the State’s positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both contexts the State enjoys a certain margin of appreciation.”

With regard to specific grounds for removal, the European Commission on Human Rights has on occasion declared “that only the most pressing grounds can justify the disruption of existing family ties, even where the material conditions of a family are poor”.

Similarly, the Commission and the ECtHR decided in *Olsson v Sweden* that the removal of children from the care of their parents “must be supported by sufficiently sound and weighty considerations in the interests of the child; it is not enough that the child would be better off if placed in care.”

### 2.5 Positive duty on the state to protect a child in need of care through placement procedures

Conversely, a child may have the right to hold the state liable if the state neglected to act, or did not act in time in an effort to alleviate the poor circumstances in which the child lived. In a number of cases against the United Kingdom, the applicants (minors between the ages of two and ten) contended that the British authorities failed to protect them against abuse and neglect by their parents, notwithstanding the fact that the local welfare authorities were well aware of the circumstances. The ECtHR concluded that the British government failed to comply with its positive duty under the ECHR.

### 2.6 Financial assistance

It appears as if the state’s positive obligation to maintain family life does not necessarily include financial assistance. The Commission in *Andersson and Kullman v Sweden* has found that article 8 does not guarantee the right to state assistance for the family, either in the form of financial support or day care facilities for children. The Commission found, in particular, that respect for family life cannot be interpreted so as to oblige states to provide financial assistance to enable a parent to take care of children at home. In *Marckx v Belgium* the ECtHR, however, explicitly states the

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56 See also Van Dijk and Van Hoof Theory and Practice of the European Convention on Human Rights (1998) 536 who state: “The upshot of the Court’s most recent case-law seems to be that for the weighing of the interests involved it is becoming less relevant whether the alleged violation of Article 8 is a violation of a positive obligation on the part of the State or rather an interference.”

57 Hereinafter referred to as “the Commission”.

58 X and Y v Germany appl no 8059/77 (1978) DR 15 208.


60 For a detailed discussion of grounds for removal as apparent from a survey of the case law see Kilkelly 264–271.


64 App no 11776/85 (1986) DR 46 251.

65 Kilkelly 210 points out, however, that it is unclear whether an obligation in this regard should be ruled out where the parent’s decision to stay home is an enforced one, such as to provide for a child with special needs.

66 (1979) 2 EHR 330 351 para 52.
following: “Family life does not include only social, moral or cultural relations . . ; it also comprises interests of a material kind” (my italics).

Duffey\textsuperscript{67} is of the opinion that it is “very probable” that welfare provisions can be brought within the scope of article 8. Cohen-Jonathan\textsuperscript{68} asks:

“Does the State not have the positive obligation to intervene with a view to restoring family life conditions which have been truly deteriorated by a situation of ‘great poverty’?”

Kilkelly\textsuperscript{69} reiterates by asking:

“For example, where children are found to be suffering from neglect as a result of poverty or inadequate family support, can the permanent removal of the child from the family home be supported by relevant and sufficient reasons, where it is arguable the State which is at fault in failing to provide such assistance earlier?”

She argues\textsuperscript{70} that a positive obligation to respect family life under article 8 could, in certain circumstances, require the adoption of appropriate measures in order to prevent the separation of family members.

3 ENFORCEMENT OF RETURN ORDERS UNDER THE HAGUE CONVENTION

3.1 Introduction

Family life between parent and child does not cease to exist upon divorce. Any infringement on this right must be justified under article 8(2).\textsuperscript{71} Once again the best interests of the child is the criterion. Conversely, however, the infringement of a parent’s right to respect for his/her family life (in view of the allocation of custody or access) solely on grounds pertaining to such a parent’s religious\textsuperscript{72} or sexual orientation\textsuperscript{73} was found to be in violation of that parent’s right under article 8.\textsuperscript{74}

Problems pertaining to the issue at hand are two-fold. A parent with whom the child usually lives, may be reluctant to allow some or even any national or transfrontier contact to take place, as he or she may fear, in some cases not without reason, that the child will not be returned by the other parent (or by another person having family ties with the child). On the other hand a parent (or any other person having family ties with the child) who has no or very limited contact with a child, may disregard the custody right of the other parent including the right to determine the place where the child is supposed to live, and take the child in order to ensure regular contact with him or her.\textsuperscript{75}

The preamble of the Hague Convention on the Civil Aspects of International Child Abduction\textsuperscript{76} includes the following statement regarding its purpose:

\textsuperscript{67} “The protection of privacy, family life and other rights under article 8 of the European Convention on Human Rights” 1993 YEL 191 199.

\textsuperscript{68} “Respect for private and family life” in MacDonald et al The European system for the protection of human rights (1993) 405 443. See in this regard also a 27 of the CRC which refers to the duty on states to assist parents who are unable to ensure that a child has an adequate standard of living. Institutionalisation should thus be considered only as a last resort as Sloth-Nielsen and Van Heerden “New child care and protection legislation for South-Africa: Lessons from Africa” 1997 Stell LR 261 272 point out, not only because of the child’s right to be cared for by his parents (a 7 CRC), but also because it is far more expensive to institutionalise a child than to support a child within the family.

\textsuperscript{69} 173.

\textsuperscript{70} Ibid. In Petrovic v Austria (1998) 6 EHRR 67 the applicant father complained about the refusal to grant him parental leave allowance as a full time carer, when it was awarded to mothers. Although article 8 does not contain a right to parental leave, the complaint fell within the scope of that provision because the payment was designed to promote family life.

\textsuperscript{71} Hendricks v Netherlands appl no 8427/78 DR 295.

\textsuperscript{72} Hoffmann v Austria (1994) 17 EHRR 293.

\textsuperscript{73} Salgueiro da Silva Mouta v Portugal 21 Dec 1999 unreported.

\textsuperscript{74} See also a 9 CRC.

\textsuperscript{75} Commentary on the provisions of the recent Convention on Contact concerning Children para 7.

\textsuperscript{76} 25 Oct 1980. Hereinafter referred to as “the Hague Convention”.

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“[T]o protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedure to ensure their prompt return to the State of their habitual residence.”

The object of such a return is that, following the restoration of the *status quo*, the conflict between the custodian and the person who has removed or retained the child can be resolved in the state where the child is habitually resident. This principle is based on the consideration that the courts of the state of habitual residence are usually best placed to take custody decisions. Article 3 of the Hague Convention provides as follows:

“The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or the retention; and

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.”

### 3.2 Sylvester v Austria

This recent decision of the ECtHR concerned the non-enforcement of a final return order under the Hague Convention. The applicant complained that the non-enforcement of the final order had violated his right under article 8 ECHR. The following issues were assessed by the ECtHR: How the positive obligations that article 8 imposes on states in the matter of reuniting a parent with his or her child must be interpreted and determined; whether the duty to take the necessary measures and even apply coercion is absolute; whether a change in circumstances may justify the non-enforcement of a final return order, and, if so whether the ECtHR must take cognisance of the fact that the change in circumstances was brought about by a state’s failure to take all measures that could reasonably be expected to facilitate execution of the return order.

#### 3.2.1 Facts

The applicant, Mr Sylvester, an United States national, married an Austrian citizen in 1994. On 11 September 1994 their daughter was born. The family’s common residence was in Michigan. Under the law of the State of Michigan the parents had joint custody over the child. On 30 October 1995 the wife and mother went to Austria, taking their daughter with her without obtaining her husband’s consent. Mr Sylvester applied to the Austrian courts to order the child’s return under the Hague Convention. His application was granted in December 1995 by the Graz district court. Appeals by the mother failed. In April 1996 Mr Sylvester was granted a divorce and sole custody in the United States courts. Late in February 1996 the applicant filed an application for enforcement of the return order of December 1995. (Only) on 7 May 1996 did the file again arrive at the Graz district court. On 8 May 1996 the court ordered the enforcement of the return order and noted that it was necessary to order coercive measures as the mother was obstructing the child’s return. Attempts to enforce the order failed. The child’s mother appealed against the enforcement order and in August 1996 the Graz regional court set it aside, referring it back to the district court, and ordering it to examine whether the situation had changed since the order had been made. The Austrian courts found that the circumstances had changed and that the child’s well-being was paramount. It could not be excluded that the child, who was now more than two years old and had been living solely with her mother for more than a year, would suffer grave psychological harm in the event of a return to her father. The mother was eventually granted sole custody. Mr Sylvester contended that the courts had failed to take all reasonable measures to enforce the return order resulting in an infringement of his right to respect for family life under article 8. The delays caused by the courts had eventually made enforcement impossible.

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77 Para 45.
79 Paras 10–11.
80 Para 12.
81 Para 13.
82 Paras 17–20.
83 Paras 22–30.
84 Para 34.
85 Para 43.
In particular, two-and-a-half months had passed between the supreme court’s decision of 27 February 1996 and the return of the file to the Graz district court. In the interference (by the Austrian courts) with the right to respect for family life was thus not justified under article 8(2).

3 2 2 Judgment

The court concluded that the positive obligations that article 8 imposes on states in matters concerning the reuniting of parent and child must be determined according to the Hague Convention. In general, a state’s positive obligations under Article 8 include the parent’s right to the taking of measures with a view to the child being reunited with the parent. But the obligation is not absolute. The reunion of a parent and child who has lived for some time with the other parent may not be able to take place immediately and may require preparatory measures. Any obligation to apply coercion must be limited especially in view of the best interests of the child. Where contact with the parent threatens to interfere with those rights, it is for the states to strike a fair balance between them. What is, however, decisive, is whether all the necessary steps to facilitate execution of the return order were taken. The adequacy of measures is to be judged by the swiftness of its implementation. The passage of time can have detrimental consequences for relations between the child and the parent who does not live with him. Although a change in circumstances may justify non-enforcement, positive obligations inherent to article 8 require that it must not have been brought about by the state’s failure to take all reasonable measures.

The delay of more than two months for the return of the file to the Graz district court and the fact that no further steps were taken towards enforcement after the first unsuccessful attempt, were material. The courts were further under a duty to give an expeditious decision on the appeal in question. However, it took three-and-a-half months. It took a further five months to obtain an expert report although he was already familiar with the case. Despite the difficulties created by the mother, the lapse of time was to a large extent caused by the authorities’ own handling of the case. With reference to the earlier mentioned W v United Kingdom, the court confirmed that effective respect for family life requires that future relations between parent and child should not be determined by the mere effluxion of time. Accordingly there has been a violation of article 8.

In Hokkanen v Finland the court decided that the positive obligation on states to take action with a view to have a parent reunited with a child, also applies to cases where the origin of the provisional transfer of care is a private agreement. The applicant agreed that his daughter should be looked after by her maternal grandparents following his wife’s death. The grandparents subsequently refused to return her and did not comply with court orders granting him access and custody, and a police chief refused to execute the custody order. The appeal court eventually transferred custody to the grandparents and declined to enforce access against the child’s wishes.

However, the obligation of the national authorities to facilitate reunion is not absolute, since the reunion of a parent with a child who has lived for some time with other persons may not be able to take place immediately and may require preparatory measures being taken to this effect. The nature and extent of such preparation will depend on the circum-

86 Para 49.
87 Para 57. See s 7 which contains a list of measures to be taken to secure the prompt return of children.
88 Para 58.
89 Para 58.
90 Para 58. The court refers to the earlier judgment in Ignaccolo-Zenide v Romania (2001) 31 EHRR 7 in this regard. For a discussion of this case see Van der Linde and Labuschagne “Strafregtelike aanspreeklikheid weens die skending van ‘n omgangsreg van ‘n ouer met sy/haar kind deur die ander ouer” 2001 Obiter 153. What was important for the court in this case was not whether national law provided for sufficient measures and whether they had been properly applied, but whether they were successful in bringing about the re-unification of the applicant and her children.
91 Para 60.
92 Para 63.
93 See in this regard s 11 of the Hague Convention.
95 (1995) 19 EHRR 139.
stances of each case, but the understanding and co-operation of all concerned will always be an important ingredient. Whilst national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion 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 and his or her rights under article 8. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them. What is decisive is whether the national authorities have taken all necessary steps to facilitate reunion as can reasonably be demanded in the special circumstances of each case.96

An important aspect of this judgment is that the wishes and feelings of children should duly be taken into account in applications concerning them.97 With regard to the positive obligation on states to facilitate reunification in casu, the court declared that the difficulties in arranging access were admittedly in large measure due to the animosity between the grandparents and the applicant. Nonetheless the Court does not accept that responsibility for the failure of the relevant decisions or measures in actually bringing about contacts can be attributed to the applicant. Both the district court’s and the Court of Appeal’s decisions regarding access had recognised the need to arrange meetings at a neutral place outside the grandparents’ home. Whilst the grandparents consistently refused to comply with these decisions, the applicant actively sought their enforcement. The suggestion by the Government that the situation would have been any different had he requested the imposition of the administrative fines or not neglected to renew his enforcement request for some time, is highly improbable. From the foregoing it could not be said that, bearing in mind the interests involved, the competent authorities, prior to the Court of Appeal’s judgment of 21 October 1993, made reasonable efforts to facilitate reunion. On the contrary, the inaction of the authorities place the burden on the applicant to have constant recourse to a succession of time-consuming and ultimately ineffectual remedies to enforce his rights.98

4 CONVENTION ON CONTACT CONCERNING CHILDREN99

41 Introduction

This Convention can, to a large extent, be seen as an embodiment of the principles regarding the content and scope of the right to respect for family life, on aspects of contact concerning children (especially the two areas under discussion), as determined by the ECtHR.100 The aim of the Convention is to improve certain aspects of the right of national and transfrontier contact and, in particular, to specify and reinforce the basic right of children and their parents to maintain contact on a regular basis. This right may be extended, if necessary, to include contact between a child and persons other than his or her parents, in particular when the child has family ties with such a person.101

The objects of the Convention are, inter alia, to determine general principles to be applied to contact orders, and to fix appropriate safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children

96 168 paras 55–58.
97 See in this regard also the recently decided case of Hansen v Turkey (appl no 36141/97 of 23 Dec 2003) where authorities, similarly, failed to take steps to locate the children with a view to facilitating contact with their mother. Even though the children had expressed their reluctance to see their mother the failure to enforce access rights of the mother was first and foremost the result of the father’s refusal to co-operate. The court stated (para 106) that although measures against children obliging them to re-unite with one or other parent are not desirable in this sensitive area, such action must not be ruled out in the event of non-compliance or unlawful behaviour by the parent with whom the children live.
98 173 paras 60 and 61.
99 The convention was opened for signature by the member states of the Council of Europe, the non-member States which have participated in its elaboration and the European Community, in Strasbourg on 15 May 2003. This convention shall enter into force when three states (including at least two member states of the Council of Europe) have expressed their consent to be bound (ratification, acceptance or approval) – see a 22. For a general discussion on the background to this Convention see Jansen “Europees verdrag inzake de omgang van en met kinderen” 2003 FJR 138.
100 States parties need to adopt such legislative and other measures as may be necessary to ensure that these principles are applied by judicial authorities when making, amending, suspending or revoking contact orders (A 3)).
101 Summary of treaty ETC no 192. See a 4 and 5 discussed below.
at the end of the period of contact.\textsuperscript{102} It establishes co-operation between all the bodies and authorities concerned with contact orders and reinforces the implementation of relevant existing international legal instruments in this field.

The notion “contact concerning children” rather than “access to children” strengthens the fact that children are holders of certain rights. “Contact” is, furthermore, more in line with modern concepts such as “parental responsibility”.\textsuperscript{103}

\section*{4.2 General principles regarding contact}

Some of the general principles to be applied to contact orders include the following: A child\textsuperscript{104} and his or her parents shall have the right to obtain and maintain regular contact\textsuperscript{105} with each other.\textsuperscript{106} Such contact may be restricted or excluded only where necessary in the best interests of the child.\textsuperscript{107} Where it is not in the best interests of a child to maintain unsupervised contact with one of his or her parents, the possibility of supervised personal contact or other forms of contact with this parent shall be considered.\textsuperscript{108}

Subject to his or her best interests, contact may be established between the child and persons other than his or her parents having family ties\textsuperscript{109} with the child.\textsuperscript{110} States are free to extend this provision to persons other than those having family ties, and where so extended, states may freely decide what aspects of contact, as defined in article 2, shall apply.\textsuperscript{111} A child considered by internal law as having sufficient understanding shall have the right to be consulted and to express his or her views, unless it would be manifestly contrary to his or her best interests to receive all relevant information.\textsuperscript{112} Due weight shall be given to those views and to the ascertainable wishes and feelings of the child.\textsuperscript{113}

Taking the considerations in article 4 and 5 into account, persons, other than parents, having family ties with a child may have a right to apply for contact. However, this right is not on an equal footing with the right of a child and his or her parents to contact because there is a presumption of contact for legally recognised parents and their children, and only where it is necessary in the best interests of the child, the parents and the child can be deprived of their right of

\textsuperscript{102} A 1.
\textsuperscript{103} Commentary on the provisions of the Convention para 10. According to para 6 of the general comments on the convention, it therefore, seems more appropriate to refer to contact concerning children with different persons rather than just to the rights of certain persons to access to children. This is also in line with abovementioned case law on a 8 ECHR which frequently refer to the “right of both parents and children to maintain contact”. See also Jansen 2003 FJR 138 140.
\textsuperscript{104} A person under the age of 18 years – see a 2.
\textsuperscript{105} “Contact” means: (i) the child staying for a limited period of time with or meeting a person mentioned in a 4 or 5 with whom he or she is not usually living; (ii) any form of communication between the child and such person; (iii) the provision of information to such a person about the child or to the child about such a person - see a 2. There are, therefore, three levels of contact, namely: (i) direct (personal; face-to-face) contact between persons mentioned in a 4 and 5; (ii) other forms of contact than direct contact, eg by telephone, letters, faxes, e-mail, SMS, etc; (iii) provision of information about the child, eg photographs, school reports, medical reports - see Commentary para 45.
\textsuperscript{106} A 4(1). This applies to contact between a child and his/her parents ie those recognised as parents. This right is described in the Commentary (para 40) as a “fundamental right”. Jansen 2003 FJR 138 140 remarks: “Niet onbelangrijk is dat de toelichting dit recht als een ‘fundamental right’ bestempelt . . . Contact is dus evenals gezag, een mensenrecht.”
\textsuperscript{107} A 4(2). These restrictions of contact can take different form, for instance, non-regular contact (eg only during child’s birthday) or supervised contact.
\textsuperscript{108} A 4(3).
\textsuperscript{109} “Family ties” ito a 2(d) means a close relationship such as between a child and his or her grandparents or siblings, based on law or on a de facto family relationship.
\textsuperscript{110} A 5(1).
\textsuperscript{111} A 5(2). This category covers persons other than those having family ties with the child, for instance, persons having close personal links with the child, eg teachers.
\textsuperscript{112} A 6. Procedural rights of the child are, therefore, specifically mentioned.
\textsuperscript{113} A 6(2). See also a 12 CRC. A 6(2), however, does not grant the child an absolute right to consent or to veto a planned decision concerning contact, because it is not always in the best interests of the child to grant him/her such a right. It is for the judicial authority to make the final decision taking into account the wishes and feelings of the child as well as all other circumstances – para 56 Commentary.
contact. A child and persons, other than parents, having family ties with the child do not have a right to obtain and maintain contact but may only have a right to apply for contact subject to the best interests of the child. As regards the rights of persons having family ties with the child to apply for contact, such contact should normally take account of the views of the child’s parents.

When resolving disputes concerning contact, the judicial authorities shall take all appropriate measures to ensure that both parents are informed of the importance for their child and for both of them of establishing and maintaining regular contact with their child. They have to encourage parents and other persons having family ties with the child to reach amicable agreements with respect to contact, in particular through the use of family mediation and other processes for resolving disputes.

Before taking a decision, they must ensure that they have sufficient information at their disposal, in particular from the holders of parental responsibilities, in order to take a decision in the best interests of the child and, where necessary, obtain further information from other relevant bodies or persons.

The Convention, furthermore, makes provision that states shall provide for and promote the use of safeguards and guarantees for the purpose of ensuring contact orders to be carried out.

In a separate chapter the Convention contains measures to promote and improve transfrontier contact. Each state will have to appoint a central authority to carry out the functions provided for by the Convention. Central authorities of state parties must co-operate with each other to achieve the purposes of the Convention, inter alia, the provision of information concerning their laws relating to parental responsibilities, the taking of all appropriate steps in order to discover the whereabouts of the child, securing the transmission of requests for information coming from the competent authorities and relating to legal or factual matters concerning pending proceedings. In transfrontier cases, the central authorities shall assist children, parents and other persons having family ties with the child, in particular, to institute proceedings regarding transfrontier contact. Where a child at the end of a period of transfrontier contact based on a contact order is not returned, the competent authorities shall, upon request, ensure the child’s immediate return, where applicable, by applying the relevant provisions of international instruments, of internal law and by implementing, where appropriate, such safeguards and guarantees as may be provided in the contact order. A decision on the return of the child shall be made, whenever possible, within six weeks of the date of an application for the return.

5 CONCLUSION

According to the case-law of the ECtHR, respect for family life implies an obligation for a state to act in a manner calculated to allow those ties to develop normally. The mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, and the natural family relationship is not terminated by reason of the fact that the child is taken into public care. Family life under article 8 includes a right to the taking of measures with a view to child and parent being reunited. This includes sufficient involvement by parent and child in the decision-making process. With regard to transfrontier contact and the enforcement of return orders, the ECtHR concluded that the positive obligations that article 8 imposes on states in these matters, must be determined according to the Hague Convention. A state’s positive obligations include the parent’s right (and that of the child) to the taking of measures with a view to parent and child being reunited. Although a change in circumstances may justify non-enforcement, positive obligations inherent to article 8 requires that it must not have been brought about by the state’s failure to take all reasonable measures.

114 See para 1 and 2 of a 4 of this convention.
115 Para 49 Commentary on a 4 and 5.
116 Ibid.
117 A 7.
118 A 9.
119 Ch 3.
120 A 11(1).
121 A 13.
measures. The importance of these basic principles have now find application in the Convention on Contact concerning Children.

6 SOUTH AFRICA

6.1 The Constitution

The Constitution of the Republic of South Africa\(^1\), came into operation without the explicit inclusion of fundamental rights with regard to the family and family life. In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA*\(^2\), the Constitutional Court held, *inter alia*, that various sections of the Constitution either directly or indirectly support the institution of marriage and family life.

Criticism towards this argument is that attempts to deal with aspects of family life under sections of the Constitution which presumably afford indirect protection is often forcing the issue while such issues are internationally with great ease dealt with under an explicit right to respect for family life.\(^3\)

Section 28 of the Constitution, is however very important for children. Amongst the rights included in section 28 is the right of every child to family care or parental care or to appropriate alternative care, when removed from the family environment. In the case of *Grootboom v Oostenberg Municipality*\(^4\) the court characterized section 28 as a particularly significant provision because it is not qualified by other parts of the Constitution and aims to facilitate family life for children.

6.2 The Child Care Act 74 of 1983

The Child Care Act\(^5\) (as amended) contains most of the legal rules which govern the protection, assessment and placement of children potentially or actually in need of alternative care in South Africa. To a large degree one can argue that this Act, to an extent, also indirectly protects the family life of children. The advantage, in my view of article 8, however, is that it (also) emphasises the right of the parent to respect for his/her family life and does not exclusively focus on the child. Article 8 of the ECHR sufficiently covers a parent’s right to the enjoyment of the child, the right to be involved in the decision making process and access to the child in alternative care. An interpretation of this right of a parent also reveals the increasing importance attached to the extent of the state’s positive duty in this regard.

6.3 Children’s Court and early intervention services

Because placement of children into alternative care may significantly affect a parent-child relationship and the fundamental right of the child to remain in his or her present family or parental environment, specifically designed children courts conduct inquiries to establish whether a child is in need of alternative care and if so, what form that alternative care should take.

Removal of a child from his/her present family or parental environment, should always be treated as a measure of last resort. A preferable first step before a children’s court inquiry is, therefore, to apply so-called “early intervention services” or “preventative services”. In this regard social workers engage in therapeutic counselling (individual, joint or familial), parental guidance, referral for accommodation, financial and/or legal assistance, drug and alcohol services, community work programmes, etcetera. A study by Matthias shows, however, that the problem of insufficient resources

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\(^1\) Act 108 of 1996.

\(^2\) 1996 4 SA 744 (CC).

\(^3\) See in this regard Dawood, Shalabi and Thomas v Minister of Home Affairs where family life in an immigration-context was dealt with under s 10, namely the right to human dignity.

\(^4\) 2000 3 BCLR 277 (C) 290-1.

\(^5\) Act 74 of 1983.
for preventative work is widespread. In order to keep more children with their families, Matthias points out that the area of preventative services will have to become a far greater priority.

6.4 Grounds for removal

The grounds for a children’s court decision on whether a child is in need of alternative care are set out in section 14(4) of the Act. They include, inter alia, where the child has no parent or guardian; or the child has been abandoned or without visible means of support; or is behaviourally beyond the control of the caregiver; or is in danger of sexual exploitation or abduction; or lives in circumstances which may be seriously harmful to him or her, etcetera. Zaal and Matthias convincingly argue that whilst most of these grounds can be seen as providing appropriate criteria, allowing the removal purely because he/she is “without visible means of support” is surely controversial. They argue in favour of the Act to be amended to allow the courts to make special temporary maintenance grants where poverty emerges as the sole or primary factor mandating a removal of a child into alternative care. Such recommendation would bring the Act in line with section 28(1)(b) of our Constitution which correctly places “family care or parental care” as a first right for children in preference to alternative care. It should also be noted that it tends usually to be less expensive for the state to maintain a child with his/her family than to take over the care of a child in a care facility. This will also be in line with article 8 of the ECHR.

6.5 Post-court-order phase: Facilitation of reunification

Although the Act puts an emphasis on reunification of parent and child, the study by Matthias shows that effective reconstruction or reunification services are not being provided in practice. This is a serious problem because parent-child relationships are not being rebuilt to allow children to rejoin their biological family units. The child’s right to family life as asserted by the Constitution is thus not being promoted in practice.

6.6 Conclusion

It is my submission that explicit rights with regard to the family and family life in the Constitution, will place a positive duty on the state to give effect to a child and parent’s right to maintain family ties by way of property formulated policy considerations, especially in the area of preventative services, grounds for removal and reunification of parent and child. In this regard article 8 as interpreted by the ECHR provides sufficient guidelines and measures.

129 Reg 15.
130 Matthias 58.