Noot bij EHRM 29 maart 2016

Bruning, M.R.

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Europees Hof voor de Rechten van de Mens
29 maart 2016, 16899/13.
(López Guerra (President)
Nicolaou
Keller
Dedov
Lubarda
Pastor Vilanova
Polácková)

Kocherov en Sergeyeva
tegen
Rusland

Gezinsleven, Licht verstandelijk beperkte ouder, Beperking gezag, Uithuisplaatsing kind

[EVRM - 8 ; EVRM - 14]

» Samenvatting

Eerste klager heeft een licht verstandelijke beperking en heeft als jong-volwassene gedurende 29 jaar in een zorginstelling verbleven. In de instelling had hij veel vrijheid; hij kon zelf beslissen wanneer hij de zorginstelling wilde verlaten. Hij woonde daar zelfstandig in een eigen kamer die hij opgeruimd hield en zorgde voor zijn eigen eten en medicatie. Tevens verrichtte hij betaald werk. In 2007 trouwde hij met L.S., die in dezelfde zorginstelling verbleef, maar dit huwelijk werd later nietig verklaard omdat L.S. handelingsonbekwaam was vanwege haar geestelijke handicap; zij stond onder curatele. L.S. kreeg in mei 2007 een kind van eerste klager (tweede klager), dat echter meteen in een kindertehuis werd geplaatst omdat L.S. niet voor haar kon zorgen. Eerste klager, die als juridisch vader werd aangemerkt na erkenning van het kind, bezocht zijn dochter regelmatig en gaf aan dat zodra hij dat zou kunnen, hij zelf voor zijn dochter wilde zorgen. Dat werd mogelijk toen hij begin 2012, toen zijn dochter vier jaar oud was, werd ontslagen uit de zorginstelling en in een eigen flat ging wonen. Het kindertehuis had ernstig bezwaar tegen de plaatsing van het meisje bij eerste klager, omdat hij met zijn partner L.S. niet voor een gezond leefklimaat voor het meisje zou kunnen zorgen en een overplaatsing het meisje op dat moment ernstige schade en stress zou opleveren. Een overplaatsing was te voorbarig volgens het tehuis. Het kindertehuis verzocht de rechter derhalve om eerste klagers ouderlijk gezag te beperken en werd in het gelijk gesteld door de rechter in eerste aanleg en het hof. De rechters overwogen dat een plaatsing van het meisje bij haar vader (eerste klager) niet in haar belang was; het meisje voelde zich nerveus in de nabijheid van haar ouders en had moeite om met hen te communiceren, terwijl eerste klager geen enkele ervaring had met het opvoeden van een kind en pas net, na 29 jaar verblijf in een zorginstelling, zelfstandig woonde. Ook benoemde de rechtbank dat er in verband met de licht verstandelijke beperking van eerste klager onvoldoende bewijs was dat de situatie bij hem thuis veilig zou zijn, te meer omdat de moeder L.S. vrije toegang tot zijn woning had en handelingsonbekwaam was. Ten slotte noemde de rechtbank dat er onvoldoende financiële draagkracht was bij eerste klager. Het Hof bekrachtigde de beslissing en de motivering daarbij. In 2013 diende eerste klager een verzoek in om te worden hersteld in het ouderlijk gezag; dit verzoek werd op 8 april 2013 toegewezen. De tweede klager, de dochter, had inmiddels een nauwe persoonlijke band ontwikkeld met haar ouders en voelde zich veilig bij hen; ook had eerste klager een stabiel en voldoende inkomen. Sinds mei 2013 woont het meisje bij eerste klager.

De vader dient een klacht in bij het EHRM, ook namens zijn dochter; de beperking van zijn ouderlijk gezag zou in strijd zijn met art. 8 en 14 EVRM. Vier derde-partijen

voegen zich en benadrukken het recht van gehandicapte ouders op gezinsleven. Zij concluderen dat het scheiden van kinderen en hun gehandicapte ouders met strikte waarborgen moet zijn omkleed en in beginsel niet alleen een schending van art. 8, maar ook van 14 EVRM behelst, te weten discriminatie op grond van hun handicaps.

Het EHRM beoordeelt de zaak onder art. 8 EVRM en geeft daarbij aan dat de nationale rechter relevante redenen heeft aangevoerd om het ouderlijk gezag van eerste klager te beperken. Het constateert echter ook dat de nationale rechters veel bewijsmateriaal hebben laten liggen, zoals de verklaring van het kindertehuis dat de dochter niet meer bang was voor haar ouders en dat eerste klager haar regelmatig had bezocht. Het EHRM concludeert dat de nationale rechters een formalistische aanpak voorstonden door stilzwijgend al het bewijs dat tegen het standpunt van de verzoeker tot gezagsbeperking in ging, te negeren. De nationale rechters hadden volgens het EHRM een onafhankelijk deskundigenonderzoek moeten gelasten. Daarbij mag het afwezig zijn van vaardigheid en ervaring met het opvoeden van kinderen volgens het EHRM geen reden zijn om ouderlijk gezag te beperken of een kind uit huis te plaatsen. Het lijkt er volgens het EHRM op alsof de nationale rechters hun oordeel over de opvoedkwaliteiten van eerste klager enkel baseerden op zijn jarenlange verblijf in een zorginstelling, zonder enige informatie waaruit bleek dat eerste klager in staat was om zijn dochter op te voeden, mee te nemen. Eerste klagers langdurige verblijf in een zorginstelling kan volgens het EHRM niet worden gezien als voldoende grond voor een beperking van zijn ouderlijk gezag en daarmee een langduriger verblijf voor zijn dochter, tweede klager, in alternatieve zorg. Ten aanzien van de verwijzing van de nationale rechters naar de handelingsonbekwaamheid (ondercuratelestelling) van eerste klagers partner, L.S., geeft het EHRM aan dat handelingsonbekwaamheid niet per definitie betekent dat iemand een gevaar voor zijn of haar omgeving is. Derhalve was dit onvoldoende reden voor de beperking van eerste klagers ouderlijk gezag. Evenmin konden eerste klagers financiële problemen als zodanig voldoende grond opleveren voor een beperking van het ouderlijk gezag. Het EHRM beslist tot een schending van art. 8 EVRM en overweegt ten slotte dat het niet noodzakelijk is om te oordelen over een vermeende schending van art. 14 EVRM, dit in het licht van de beoordeling van het EHRM ten aanzien van art. 8 EVRM en de geconstateerde schending.

beslissing/besluit

» Uitspraak

THE LAW

59. The Court will deal with the preliminary matters in the case before considering the applicants' complaints concerning the allegedly unjustified and discriminatory restriction of the first applicant's parental authority over the second applicant.

A. Compliance with the six-month rule

60. The Government argued that the present application had been lodged outside the six-month period set forth in Article 35 § 1 of the Convention. They submitted that the final decision in the applicants' case had been taken by the St Petersburg City Court on 17 July 2012, and it was from that date that time had started running. By lodging their application on 17 January 2013, the applicants had missed the time-limit by one day.

61. The applicants disagreed with the Government. They argued that under the

Court's well-established case-law, the six-month period ran from the day following the date on which the final decision was pronounced in public or on which the applicant or his representative were informed thereof. In view of the fact that the final decision had been pronounced by the St Petersburg City Court on 17 July 2012, the period for lodging the application had started to run on 18 July 2012 and had expired on 17 January 2013, the date on which the present application had been sent. The applicants therefore insisted that they had complied with the six-month rule.

62. The Court observes that for the purposes of calculating the six month period, both parties relied on the decision of the St Petersburg City Court of 17 July 2012 as being "final", within the meaning of Article 35 § 1 of the Convention. They disagreed, however, as to the exact date on which that period started running. The Court reiterates in this connection that the date on which the final domestic decision is pronounced is not counted in the six-month period referred to in Article 35 § 1 of the Convention. Time starts to run the day following the date on which the final decision has been pronounced orally in public, or on which the applicant or his representative were informed thereof, and expires six calendar months later, regardless of the actual duration of those calendar months (see, among other authorities, *Nelson v. the United Kingdom*, no. 74961/01, §§ 12-13, 1 April 2008; *Otto v. Germany* (dec.), no. 21425/06, 10 November 2009; and *Bajsultanov v. Austria*, no. 54131/10, §§ 53-54, 12 June 2012). The Court thus accepts the applicants' argument that the six-month period in the present case started running on 18 July 2012 and expired on 17 January 2013, the date on which the present application was sent.

63. The Court is satisfied that the application was lodged with the Court within the six-month period. The Government's relevant objection should therefore be dismissed.

B. Exhaustion of domestic remedies

64. In an additional memorandum, the Government pointed out that a federal law of 9 December 2010 had amended the Russian Code of Civil Procedure to establish three levels of jurisdiction for examining a civil case. In particular, a new appeal procedure had been introduced in respect of judgments by first-instance courts that had not become binding. Moreover, a procedure for reviewing judgments that had become final had been split into a cassation appeal procedure and a supervisory-review procedure. The Government insisted that the two procedures were effective within the meaning of Article 35 § 1 of the Convention, so the applicants should have availed themselves of them before applying to the Court. They further pointed out that the first applicant's cassation appeal against the judgment of 20 March 2012, upheld on appeal on 17 July 2012, had been returned without examination on 31 January 2013 as it had not met certain formal requirements. They argued that by failing to pursue the cassation proceedings any further, the first applicant had failed to exhaust the effective domestic remedies available to him.

65. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against a State to use first the remedies provided by the national legal system, thus allowing States the opportunity to put matters right through their own legal systems before being required to answer for their acts before an international body. In order to comply with the rule, applicants should normally use remedies which are available and sufficient to afford redress in respect of the breaches alleged (see, among

other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999 V).

66. In the context of Russia, the Court has consistently held that the ultimate judicial remedy to be exhausted prior to lodging an application with the Court was an appeal to a regional court, and that the applicants were not required to submit their cases for re-examination by higher courts by way of a supervisory review procedure, which constituted an extraordinary remedy (see *Tumilovich v. Russia* (dec.), no. 47033/99, 22 June 1999; *Denisov v. Russia* (dec.), no. 33408/03, 6 May 2004; and *Martynets v. Russia* (dec.), no. 29612/09, 5 November 2009). It was not until very recently that, following the legislative amendments reforming the Russian civil procedure with effect from 1 January 2012, the Court held that the new cassation procedure was no longer fraught with the previously existing uncertainty, and that any individual who intended to lodge an application in respect of a violation of his or her Convention rights should first use the remedies offered by the new cassation procedure, including a second cassation appeal to the Supreme Court of Russia (see *Abramyan and Others v. Russia* (dec.), nos. 38951/13 and 59611/13, §§ 76-96, 12 May 2015). By contrast, the Court affirmed its consistent approach to the supervisory-review procedure, which it does not consider an effective remedy to be exhausted (ibid., § 102).

67. It is however observed that the issue of whether domestic remedies have been exhausted is normally determined by reference to the date on which the application was lodged with the Court (see *Shalya v. Russia*, no. 27335/13, § 16, 13 November 2014, and *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). In cases where the effectiveness of a given remedy was recognised in the Court's case-law after the introduction of an application, the Court deemed it disproportionate to require the applicants to turn to that remedy for redress a long time after they had lodged their applications with the Court, especially after the time limit for using that remedy had expired (see *Ridic and Others v. Serbia*, nos. 53736/08, 53737/08, 14271/11, 17124/11, 24452/11 and 36515/11, § 72, 1 July 2014, and *Pikic v. Croatia*, no. 16552/02, §§ 29-33, 18 January 2005; contrast with *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002 VIII, in which the applicant could still avail himself of a new remedy).

68. In the present case, the applicants lodged their application with the Court on 17 January 2013, that is, before the Court recognised the reformed two-tier cassation appeal procedure as an effective remedy. Moreover, the Government never alleged that at the time of the events under consideration any relevant domestic case-law had existed to enable the applicants to realise that the new remedy met the requirements of Article 35 § 1 of the Convention, and to anticipate the new exhaustion requirement rather than following the approach that had been applied by the Court until very recently (see paragraph 66 above). In such circumstances, the Court considers that the applicants were not required to pursue that procedure prior to lodging their application to the Court. Moreover, it notes that the applicants can no longer avail themselves of the remedy in question, as the time-limit for using it expired (see paragraph 55 above).

69. Accordingly, the Court rejects the Government's objection as to the alleged non-exhaustion of domestic remedies.

C. Conclusion

70. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

II. Alleged violation of Article 8 of the Convention

71. The applicants complained that the restriction of the first applicant's parental authority over the second applicant had made it impossible for them to live together as a family and had thus breached their right to respect for their family life. They relied on Article 8, which reads as follows:

Article 8

"1. Everyone has the right to respect for his private and family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is 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."

A. The parties' arguments

1. The applicants

72. The applicants maintained their complaint. They argued that the restriction imposed on the first applicant's parental authority over the second applicant had resulted in their continued separation and inability to live as a family at their home and the second applicant's continued time in public care, and constituted an unjustified interference with their right to respect for their family life.

73. The applicants argued, in particular, that the interference in question had not been lawful, as the domestic courts had failed to establish that the first applicant had posed any danger to the second applicant, that being a prerequisite for restricting parental authority under Article 73 § 2 of the Russian Family Code. The applicants submitted that the domestic courts had held instead that it would be "undesirable" to give custody of the girl to her father, which was not a legitimate ground for restriction under that Article.

74. The applicants also argued that the interference in question had not been proportionate as the domestic courts had failed to adduce "relevant and sufficient reasons" for their decisions. They contended, more specifically, that the domestic courts had not been justified in relying on the first applicant's mental disability and Ms N.S.'s legal incapacity as the reason for restricting the first applicant's parental authority. In particular, the mental disability and legal incapacity as such did not imply any danger and could not be a ground for restricting parental authority. Moreover, the legal incapacity of a child's mother could not be regarded as a legitimate ground for restricting the father's parental authority.

75. The applicants went on to argue that the domestic courts had failed to establish convincingly the first applicant's inability to provide the necessary care to the second applicant. In so far as the domestic courts and the Government had relied on the second applicant's anxiety and fear of her parents, the applicants argued that at the time the application to restrict the first applicant's parental authority was being examined in 2012, that consideration had no longer been relevant. They relied in that connection on a statement by a representative of the children's home made at the trial to the effect that at the time "the girl's fear of her parents had passed" (see paragraph 26 above). The applicants argued that, in any event, it would have inevitably been stressful for the second applicant, who at the time had only been five years old, to start living somewhere new, be it in an adoptive family or with her father. As the first applicant had suggested during the proceedings before the first-instance court, that stress could have been mitigated by

arranging for a "gradual transfer" of the child, with certain measures of psychological support for the parents and the child. Yet the authorities had never considered any such alternative measures and had preferred to leave the second applicant in public care.

76. Lastly, the applicants acknowledged that the restriction imposed on the first applicant's parental authority would not have entailed the second applicant's removal from her family, as at the time she had been in public care in any event. They nevertheless argued that because of that restriction, the second applicant had had to spend one more year in care, which, given her young age at the time had been a significant period for her. The applicants relied on the State's obligation under Article 8 of the Convention to aim at reuniting children in care with their parents in situations where the reasons for placing a child in public care no longer existed. The applicants argued that the authorities had failed to take any such measures in their case.

2. The Government

77. The Government acknowledged that there had been an interference with the applicants' right to respect for their family life within the meaning of Article 8 § 1 of the Convention, as a result of the first applicant's parental authority over the second applicant being restricted. At the same time, they insisted that the interference in question had been lawful, pursued the legitimate aim of protecting the health and rights of a minor, the second applicant, and that it had been necessary in a democratic society, within the meaning of Article 8 § 2 of the Convention.

78. The Government argued, in particular, that in the proceedings to restrict the first applicant's parental authority, the parties, including the first applicant and his representative, had been fully able to present all evidence and arguments they had considered necessary. The domestic courts had had due regard to all relevant factors and had carefully balanced the interests of the first applicant and those of the second applicant. The decision to restrict the first applicant's parental authority had been well-reasoned and taken in the second applicant's best interests.

79. The Government stressed that the domestic courts had established with reference to oral evidence of the staff of the children's home that at the time, the girl had felt anxious in her parents' presence, had had difficulties in communicating with them, and had been afraid of the idea of having to live with her father. They disputed the applicants' argument that the representatives of the children's home had confirmed at a hearing before the first-instance court that the second applicant was no longer afraid of her parents (see paragraph 75 above), saying that it was untrue, incorrect and did not correspond to reality.

80. The Government also argued that the domestic courts had had reasonable doubts that the first applicant, who had never lived independently and had just been discharged from a specialist institution where he had spent almost twenty-nine years and had always relied on its staff's assistance, would be able to provide all the necessary security and care to the second applicant. Indeed, during the proceedings in question, the first applicant's representative had put forward somewhat conflicting arguments, from the Government's point of view, insisting on the one hand that the first applicant was fully able to live independently and take care of the second applicant, and stating on the other that he would need assistance from the competent social care agencies (see paragraph 25 above). The courts had also taken into account the first applicant's financial situation at the time, which would hardly

have enabled him to ensure adequate support for himself and his daughter.

81. The Government also argued that the domestic courts had been justified in relying on the fact that the second applicant's mother, Ms N.S., who had had free access to the first applicant's flat, had been deprived of her legal capacity. The absence of legal capacity meant that she could not understand the meaning of or control her actions or bear responsibility for them, which could have put the second applicant at risk. The Government relied on a psychiatric examination report which had been carried out in the context of civil proceedings in 2008, when Ms N.S.'s application to restore her legal capacity had been rejected, and which had stated that there were aggressive, conflicting, emotionally inadequate tendencies in her behaviour (see paragraph 12 above).

82. The Government went on to argue that any less restrictive alternatives, such as for instance transferring the second applicant into the first applicant's care under the close supervision and monitoring of the State social care agencies, would not have objectively guaranteed the girl's safety and adequate living conditions. Furthermore, they stressed that the restriction of the first applicant's parental authority had been of a temporary nature, which the domestic courts had clearly stated in the decisions of 20 March and 17 July 2012, and could have been lifted as soon as it became clear that the first applicant had fully adapted himself to an independent life and had maintained a relationship with his daughter. In fact, the first applicant had successfully availed himself of the right to seek to have his parental authority fully restored, and his application to that end had been allowed by the domestic courts in 2013, when they had established that the relevant circumstances had changed and the restriction in question had no longer been needed, and had returned the second applicant to her father. Moreover, during the period when the restriction complained of had remained in place, the first applicant had had unlimited access to the second applicant (see paragraph 48 above), which had allowed him to develop close emotional ties with her.

83. Overall, the Government argued that the impugned measure had been proportionate to the aim pursued, and therefore complied with Article 8 § 2 of the Convention.

3. The third-party interveners

84. The third-party interveners – the International Disability Alliance, the European Disability Forum, Inclusion International and Inclusion Europe – made a number of general observations concerning the latest international standards on the human rights of persons with disabilities and the right of children to grow up in a family environment.

85. They stressed, in particular, that the United Nations Convention on the Rights of Persons with Disabilities and Council of Europe instruments, such as a recommendation of the Committee of Ministers and an action plan, encouraged States to address carefully the needs of parents and children with disabilities and provide measures of support for them to enable the former to acquire the necessary competence to fulfil their responsibilities towards their children, and the latter to grow up with their families, to be included in the community and local children's life and activities. The third-party interveners also pointed out that in the cases of *Kutzner v. Germany* (no. 46544/99, ECHR 2002 I) and *Saviny v. Ukraine* (no. 39948/06, 18 December 2008) the Court had confirmed the States' positive obligation to uphold family ties between parents and children as a component of the right to respect for family life secured by Article 8 of the Convention, and to provide increased protection to vulnerable persons.

86. The third-party interveners also submitted that national laws, policies and practices concerning the right to family life of people with disabilities were developing across the world with growing recognition of the enjoyment and exercise of parental authority by those people on an equal basis with others, as well as of the obligation on States to ensure the provision of measures of support for parents where needed. According to the third parties, an increasing number of States were addressing that important issue and reaching out to people with disabilities in order to consult and involve them in legal reform processes and identify and improve shortfalls in both law and practice.

87. They concluded by arguing that decisions to remove children from parents with disabilities, or to deny their reunion, represented a serious interference with the right to respect for family life of such children and their parents. The States' margin of appreciation in that area was narrow and, unless valid and compelling reasons were provided for such an interference, it would constitute a violation of the rights of the parents and children to respect for their family life under Article 8 of the Convention, and discrimination on the grounds of disability, contrary to Article 14 of the Convention. Moreover, separating children from their parents with disabilities and placing them in care also constituted discrimination through their association with their disabled parents.

B. The Court's assessment

88. The Court observes at the outset that the existence of ties between the applicants forming "family life" within the meaning of Article 8 § 1 of the Convention has never been denied either by the domestic courts or by the Government before the Court. It also reiterates that the mutual enjoyment by a parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see, among other authorities, *Johansen v. Norway*, 7 August 1996, § 52, *Reports of Judgments and Decisions* 1996-III). Any such interference constitutes a violation of this Article unless it is "in accordance with the law", pursues an aim or aims that are legitimate under Article 8 § 2 and can be regarded as "necessary in a democratic society".

89. In the present case, the parties agreed that the restriction of the first applicant's parental authority over the second applicant constituted an interference with their right to respect for their family life. The Court takes the same view.

1. "In accordance with law"

90. The court observes that the measure in question was based on Article 73 of the Russian Family Code and thus "in accordance with law". In so far as the applicants disputed the lawfulness of the interference, arguing that the domestic courts had failed to show convincingly that the first applicant had posed any danger to the second applicant while under the same Code this was a prerequisite for restricting parental authority, the Court considers that these arguments instead relate to the proportionality of the restriction under examination. It will therefore address these arguments in the relevant part of its analysis.

2. "Legitimate aim"

91. The Court also finds that the interference was aimed at protecting the "health or morals" and the "rights and freedoms" of a minor – the second applicant – and thus pursued aims that are legitimate under Article 8 § 2. It remains to be examined whether the restriction in question can be considered "necessary in a democratic society".

3. "Necessary in a democratic society"

(a) General principles

92. The Court has to consider whether, in the light of the case as a whole, the reasons given to justify the impugned measure were relevant and sufficient for the purposes of Article 8 § 2 of the Convention. It will also have regard to the obligation which the State has in principle to enable the ties between parents and their children to be preserved (see *Kutzner*, cited above, § 65).

93. Undoubtedly, consideration of what is in the best interests of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. 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 regarding custody and contact issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their discretionary powers (see *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299 A, and *Kutzner*, cited above, § 66).

94. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. The Court has thus recognised that the authorities enjoy a margin of appreciation when deciding on custody matters. However, stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of contact, and as regards any legal safeguards designed to secure the 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 a young child and one or both parents would be effectively curtailed (see *Sahin v. Germany* [GC], no. 30943/96, § 65, ECHR 2003 VIII; *Elsholz v. Germany* [GC], no. 25735/94, § 49, ECHR 2000 VIII; and *Kutzner*, cited above, § 67).

95. Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see *Elsholz*, cited above, § 50; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V; *Ignaccolo Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I; and *Nuutinen v. Finland*, no. 32842/96, § 128, ECHR 2000-VIII).

(b) Application of these principles

96. In the present case, the Court observes that, in view of his diagnosis, the first applicant lived at the care home from 1983 until 2012, that is, for twenty-nine years. During that period, in 2007 he and Ms N.S., another resident of the care home, had a daughter, the second applicant, who was placed in public care a week after her birth, where she remained for several years, with the first applicant's consent (see paragraphs 7-11 above). It is therefore clear that the restriction of the first applicant's parental authority over the second applicant imposed by the domestic courts in the proceedings that took place in 2012 did not result in the applicants' separation one from another, as by that time they had never lived together as a family.

97. Moreover, the restriction of the first applicant's parental authority over the second applicant had no impact on his

visiting rights; it is clear from the case file that, either before or after the court decisions restricting his parental authority, the first applicant had unlimited access to the second applicant at the children's home (see paragraphs 11 and 48 above). Also, as was stressed by the domestic courts, the impugned restriction was of a temporary nature and could be lifted as soon as practicable. In fact, it remained in place for slightly more than a year, from 20 March 2012 when the Frunzenskiy District Court imposed it, until 8 April 2013 when the same court withdrew it (see paragraph 53 above).

98. At the same time, the first applicant made it clear that he intended to take the second applicant home as soon as he was discharged from the care home, that is, in February 2012 (see paragraphs 11 and 16 above), and by restricting his parental authority over the second applicant, the authorities prevented their immediate reunion. The Court reiterates in this respect that where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed (see *Keegan v. Ireland*, 26 May 1994, § 50, Series A no. 290, and *Kroon and Others v. the Netherlands*, 27 October 1994, § 32, Series A no. 297 C). Article 8 of the Convention thus imposes on every State the obligation to aim at reuniting a natural parent with his or her child (see *K. and T. v. Finland* [GC], no. 25702/94, § 178, ECHR 2001–VII; *Johansen*, cited above, § 78; and *Olsson v. Sweden (no. 1)*, 24 March 1988, § 81, Series A no. 130), and any measures of implementing temporary public care should be consistent with that ultimate aim (see *E.P. v. Italy*, no. 31127/96, § 64, 16 November 1999, and *Jovanovic v. Sweden*, no. 10592/12, § 77, 22 October 2015). Moreover, as was pointed out by the third-party interveners in paragraph 85 above, the same principles are established in the relevant international instruments (see paragraphs 57 and 58 above).

99. The Court observes that in their decisions of 20 March and 17 July 2012 the domestic courts found that at the time the first applicant was not in a position to care for the second applicant, and that she should therefore remain in public care for the time being. Those decisions were based on a number of considerations. In particular, the domestic authorities noted that the second applicant showed signs of anxiety in her parents' presence and had difficulties communicating with them. They concluded that "it would be stressful for the child to be placed with the family of her parents, who she had never lived with and had so far had no chance to get used to" (see paragraph 30 above). They also referred to the fact that by that time it had only been a month since the first applicant had left a specialist institution, where he had lived for all his life with the result that, in the District Court's opinion, he had "no skills or experience in bringing children up and taking care of them" (see paragraph 31 above). The remaining reasons given by the domestic courts included the first applicant's psychiatric diagnosis; the fact that the second applicant's mother, Ms N.S., was legally incapacitated and could freely visit the first applicant's flat; and the first applicant's financial means being insufficient to support the second applicant (see paragraphs 32-34 above).

100. The Court is prepared to accept that the aforementioned considerations were relevant for striking a balance between the conflicting interests in the present case. On the other hand, it doubts that they were based on sufficient evidence (see *Saviny*, cited above, § 56). It will examine below each of the reasons given by the domestic courts.

(i) Communication difficulties between the applicants

101. Thus, in so far as the domestic courts established the existence of communication difficulties between the applicants, they

relied on reports by the staff of the children's home and statements of its representatives and made at a hearing before the District Court (see paragraphs 18 and 26 above). The Court observes, however, that, in its judgment the first-instance court did not indicate the dates the reports had been issued, or mention the period of time they had described. Yet in his appeal submissions, the first applicant's representative disputed the reports as being out of date and thus irrelevant for the assessment of the current relationship between the applicants (see paragraph 37 above), but the appellate court left that argument unanswered.

102. Furthermore, as pointed out by the applicants in the proceedings before the District Court, the representatives of the children's home stated, in fact, that at the time, the second applicant's fear of her parents had passed, and that she had ceased fearing having to live with her family (see paragraph 26 above). It appears that this statement remained unnoticed and unassessed by either the first-instance or appellate court, although the first applicant had expressly raised an argument to that end in his appeal submissions (see paragraph 37 above). In so far as the Government argued that the interpretation given to that statement by the applicants was inaccurate (see paragraph 79 above), the Court cannot accept that argument, as it was for the national courts to resolve all possible ambiguity by addressing this issue during the proceedings, which they failed to do.

103. It also observes that the first applicant produced a number of certificates confirming that he had regularly visited the second applicant in the children's home in 2009 to 2012 and had communicated with her (see paragraphs 20- 22 and 24 above). It does not however transpire from the court decisions of 20 March or 17 July 2012 that those pieces of evidence were ever assessed by the domestic courts, which made their conclusion that the second applicant "[had] so far had no chance to get used" to the first applicant questionable. In this connection, the Court notes that, faced with an obviously conflicting body of evidence, the domestic courts could have ordered an independent comprehensive psychological expert examination of the second applicant with a view to establishing her psychological and emotional state and attitude towards the first applicant, but they failed to do so.

104. In the light of the foregoing, the Court is not persuaded that the domestic courts convincingly demonstrated that the second applicant's transfer into the first applicant's care would be stressful for her to the extent that it made it necessary for her to remain in public care for another year. In the Court's view, they chose a formalistic approach, simply endorsing the position of the representative of the children's home, supported by the municipal custody and guardianship agency and public prosecutor (see paragraphs 26-27 above), and silently ignoring all evidence and arguments to the contrary advanced by the first applicant.

(ii) The first applicant's lack of skills in child rearing

105. Furthermore, the District Court found that "in view of his diagnosis" the first applicant had spent all his life in a specialist institution with the result that he "had no experience in bringing up and taking care of children". The court also added that it was only in February 2012 that the first applicant had been discharged from the specialist institution and that "in such circumstances, his intention to raise his daughter [was] premature".

106. Firstly, the Court agrees with the applicants that the absence of skills and experience in rearing children, whatever reasons they might be, in itself can hardly be regarded as a legitimate ground for restricting parental authority, or keeping a

child in public care. Furthermore, in so far as the Government suggested that the domestic courts actually referred to the fact that, having just been discharged from a specialist institution where he had spent nearly twenty-nine years the first applicant had not adapted to an independent life and therefore the immediate transfer of the second applicant into his care could have been dangerous for her, the Court notes that this line of reasoning did not transpire from the decisions of the domestic authorities, whose relevant findings were limited to those summarised in the previous paragraph.

107. Even if the Court were prepared to accept the Government's interpretation of the domestic courts' decisions, it observes that the first applicant submitted a number of documents to them, including a psychiatric examination report dated 10 October 2011 and certificates from the care home. Those documents, as well as a representative of the care home and Ms O. in the proceedings before the District Court, confirmed that during his years at the home, the first applicant had lived in a separate room which he had kept in order. He had cooked for himself, maintained a household, and overall had been quite independent and fully able to care for himself (see paragraphs 22, 24 and 28 above). Moreover, he had not been confined to the care home, and had been authorised to leave the premises. He had actually worked part-time at the home, and had very positive references. He had also worked part-time outside in the city. The evidence adduced by the first applicant to the domestic courts also showed that as soon as he had been allocated a flat, he had carried out the necessary repair works, registered the second applicant there, obtained compulsory medical insurance for her and collected all the necessary documents to put her on a waiting list for a place at a kindergarten (see paragraph 24 above).

108. The accuracy of any of the aforementioned pieces of evidence or Ms O.'s statements was never challenged before the domestic courts or called into question by them. Yet it does not appear that they made any meaningful attempt to analyse the first applicant's emotional and mental maturity and ability to care for his daughter in the light of the adduced evidence and with due regard to all of the elements it revealed. As noted above, the domestic courts limited their finding in that regard to a mere reference to the first applicant's very prolonged residence in a specialist institution. In the Court's view, that fact alone cannot be regarded as a sufficient ground to justify the domestic courts' decision to restrict his parental authority over the second applicant and to prolong her time in care.

(iii) The first applicant's mental disability

109. The Court further turns to the domestic courts' finding that "there [was] no reliable evidence that the girl living with [the first applicant] would be safe for her in view of his diagnosis".

110. The Court observes in this connection that the first applicant produced to the domestic courts a report of 10 October 2011 on the results of a psychiatric examination by a panel of experts, which described in detail his psychiatric condition, his ability to take care of himself and rear a child, and so forth (see paragraph 22 above). The report unequivocally concluded that the first applicant's state of health allowed him fully to exercise his parental authority. The authenticity or accuracy of the report or the expert conclusions therein were never called into doubt by the opposing party or the courts. The latter, in fact, remained silent regarding this piece of evidence and did not indicate in their relevant decisions whether they considered it to be reliable or not. The opposing party did not provide

any evidence disputing the conclusions of the report, or proving that the first applicant's diagnosis would put the second applicant at risk, if she were transferred into his care.

111. In such circumstances, the Court fails to see the basis for the domestic courts' aforementioned finding, and more importantly what evidence, in the domestic courts' view, the first applicant was required to adduce to prove that his mental condition posed no danger to the second applicant's safety.

112. The Court therefore finds that the domestic courts' reference to the first applicant's diagnosis was not a "sufficient" reason to justify a restriction of his parental authority.

(iv) Ms N.S.'s legal incapacity

113. The domestic courts also referred to the fact that the second applicant's mother had been deprived of her legal capacity in view of her mental illness, and to the fact that she would have free access to the second applicant if she were transferred into the first applicant's care, which, in their opinion, could put the second applicant at risk.

114. The Court observes, as was established by the domestic courts, that Ms N.S. had had free access to the first applicant's flat, and as a result could have unrestricted access to the second applicant if the latter were to live there. The Court accepts that in such circumstances the question of whether Ms N.S. posed a danger to the second applicant was directly relevant for striking a balance between her interests and those of her father.

115. The Court notes, however, that the domestic courts based their fears for the second applicant's safety on a mere reference to the fact that Ms N.S. had no legal capacity. The Court is not convinced that a person's lack of legal capacity in itself makes him or her dangerous to others. In its view, the domestic courts should have convincingly demonstrated that Ms N.S.'s behaviour had or may have put the second applicant at risk to the extent that made a transfer into her father's care impossible. Yet the domestic courts did not rely on medical reports or any other written or oral evidence to prove that any such danger emanated from Ms N.S.

116. The Court notes the Government's argument that the fact that Ms N.S. could pose a danger to the second applicant was confirmed by a medical report drawn up in 2008 in the proceedings regarding Ms N.S.'s legal capacity, which stated that there were aggressive, conflicting and emotionally inadequate tendencies in her behaviour (see paragraphs 12 and 81 above). Even if the Court were prepared to accept that a report on a medical psychiatric examination carried out four years before the proceedings under examination may be regarded as a sufficient ground for the domestic courts' finding that Ms N.S. posed a danger to the second applicant, it notes that, in any event, the domestic courts never relied on that report to substantiate their finding. The Court thus rejects the Government's argument as irrelevant.

117. In such circumstances, the Court is not convinced that the domestic courts' reference to Ms N.S.'s legal status was a sufficient ground for restricting the first applicant's parental authority.

(v) The first applicant's financial situation

118. Lastly, the domestic courts assessed the first applicant's financial means as insufficient to maintain an adequate standard of living for the second applicant (see paragraph 34 above).

119. The Court will not speculate whether the first applicant's monthly income was higher than the minimum subsistence level and therefore sufficient to ensure an adequate standard of living for the second applicant. It finds that, in any event, the first applicant's financial difficulties cannot in themselves be regarded as sufficient grounds for refusing him custody over the second applicant, in the absence of any other valid reasons.

(vi) Conclusion

120. In the light of the foregoing, the Court considers that the reasons relied on by the domestic courts to restrict the first applicant's parental authority over the second applicant in order to prevent her transfer into his care were insufficient to justify that interference. Notwithstanding the domestic authorities' margin of appreciation, the interference was therefore not proportionate to the legitimate aim pursued.

121. Accordingly, there has been a violation of Article 8 of the Convention on that account.

III. Alleged violation of Article 14 in conjunction with Article 8 of the Convention

122. The first applicant complained that the restriction on his parental authority had been discriminatory as it had been imposed because of his mental disability and had only been motivated by the authorities' prejudice against people with mental disabilities. The first applicant argued that in a comparable situation, where a biological father without a mental disability sought to exercise his parental authority over his child, the arguments advanced by the domestic authorities would be irrelevant. The first applicant relied on Article 14 in conjunction with Article 8 of the Convention. Article 14 reads as follows:

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

123. The Government insisted that the first applicant had not been discriminated against, as the decision to temporarily restrict his parental authority had not only been based on the state of his health; the domestic courts had taken into account and carefully assessed a number of relevant factors, and had taken their decision in the second applicant's best interests.

124. The Court reiterates that where a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14 unless a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 67, Series A no. 45). In the present case, it observes that the first applicant complained, in essence, that the restriction on his parental authority over the second applicant had been imposed because of his mental disability. It observes in this respect that in paragraphs 101-119 above it has analysed in detail the reasons, including the first applicant's mental health, advanced by the domestic courts to restrict his parental authority. It found those reasons to be insufficient to justify that restriction, with the result that the interference with the applicants' right to respect for their family life was disproportionate in breach of Article 8 of the Convention. In view of the Court's analysis under that Article and the violation found, the Court does not consider it

necessary to determine whether the domestic courts' decisions thereby discriminated against the first applicant in breach of Article 14, read in conjunction with Article 8 of the Convention (see, for a similar conclusion, *Schneider v. Germany*, no. 17080/07, § 108, 15 September 2011, or *A.K. and L. v. Croatia*, no. 37956/11, § 94, 8 January 2013).

IV. Application of Article 41 of the Convention

125. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

126. The applicants claimed 12,000 euros (EUR), with EUR 8,000 to be awarded to the first applicant and EUR 4,000 to be awarded to the second applicant, in respect of the non-pecuniary damage they incurred in connection with the alleged violations of their rights under the Convention.

127. The Government contested that claim as excessive and unsubstantiated.

128. The Court observes that it has found a violation of Article 8 of the Convention. It considers that the applicants must have suffered stress and frustration as a result, which cannot be compensated by a mere finding of a violation. Making its assessment on an equitable basis, the Court awards the first applicant EUR 5,000 and the second applicant EUR 2,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

129. The applicants also claimed EUR 8,043 for the costs and expenses incurred in the domestic proceedings and before the Court.

130. The Government argued that the number of lawyers and their fees had been excessive, and that in any event it had not been demonstrated that the applicants had any prior agreement with the counsel in question, or that all of the fees had actually been paid.

131. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants jointly the sum of EUR 8,000 covering costs and expenses under all heads, plus any tax that may be chargeable to the applicants on that amount.

C. Default interest

132. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention;

3. *Holds*, by six votes to one, that there is no need to examine separately the complaint under Article 14, taken together with Article 8 of the Convention;

4. *Holds*, unanimously,

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 5,000 (five thousand euros) to the first applicant, and EUR 2,500 (two thousand five hundred euros) to the second applicant, plus any tax that may be chargeable on both amounts, in respect of non-pecuniary damage;

(ii) EUR 8,000 (eight thousand euros) jointly to the two applicants, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Dissenting opinion of Judge Keller

1. In addition to his claims under Article 8 of the Convention, the first applicant alleged a breach of Article 14 of the Convention, read in conjunction with Article 8, on account of the fact that the restriction on his parental authority had been discriminatory. This restriction was imposed because of his mental disability and, he argued, was mainly motivated by the authorities' prejudice against people with mental disabilities (see paragraph 122 of the judgment). While I agree with the majority's finding of a violation of Article 8 in respect of both applicants, I regret that am unable to share the majority's view that it is not necessary to examine separately whether there has been a violation of Article 14 in conjunction with Article 8 in respect of the first applicant. Unlike the majority, I consider that the threshold required for a separate evaluation of whether the first applicant suffered discrimination in his enjoyment of the rights and freedoms set forth in the Convention has been reached, for the reasons set out below.

2. In paragraph 124 of the judgment, the majority reiterates the Court's pre-existing case-law that where a substantive Article of the Convention has been invoked both on its own and together with Article 14, and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to also examine the case under Article 14 unless a fundamental aspect of the case is a clear inequality of treatment in the enjoyment of the right in question (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 67, Series A no. 45; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 89, ECHR 1999-III; *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 53, ECHR 2005-XII; and *A.K. and L. v. Croatia*, no. 37956/11, § 92, 8 January 2013). In the present case, in view of its detailed analysis of Article 8 and the violation of that provision found, the majority applied this case-law to find that it was not necessary to determine whether the domestic courts' decisions were also discriminatory.

3. In my opinion, and contrary to the majority's view, the first applicant has an arguable claim that the restriction on his parental authority over the second applicant was imposed and maintained *because of his mental disability*, which therefore seems indeed to be *a fundamental aspect of the case*. The reasons for this are various, but they largely concern the stereotyped view of the first applicant as a mentally disabled parent expressed by the domestic instances.

The domestic reliance on the first applicant's mental disability to justify the restriction on his parental rights is a crucial factor in the present case, and represents a recurring theme in the reasoning provided by the State authorities.

I. Stereotyped Line of Reasoning as a Fundamental Aspect

4. The reliance on Mr Kocherov's disability as a justification for restricting his parental authority stems from the submissions made by the children's home, which argued that he was incapable of exercising his parental responsibilities due to his mental disability, while providing the District Court only with undated reports by its own staff to support this statement (see paragraphs 17 and 18 of the judgment). The representatives of the children's home maintained these claims and further stated, in particular, that the first applicant would be unable to provide the second applicant with proper hygienic care, owing to his mental disability and his lifelong stay in a closed specialist institution (see paragraph 26). Moreover, a representative of the municipal custody and guardianship authority and a public prosecutor both corroborated the children's home's claims and explicitly identified the first applicant's diagnosis, along with his wife's condition, as the main ground for refusing to transfer the second applicant into her father's care, as two parents with mental disabilities would be unable to ensure the second applicant's harmonious development (see paragraph 27).

5. The District Court based its judgment on the aforementioned statements. It ruled that placing the second applicant into the care of a mentally challenged person would not be in the child's best interest (see paragraph 30) and attributed to the first applicant a lack of skills and experience in raising a child that was, in its estimation, due to the fact that he had lived in a specialist State institution for people with mental disabilities since childhood (see paragraph 31). In addition, the District Court again explicitly referred to the first applicant's mental disability in stating – while seemingly disregarding all the written evidence to the contrary (see paragraphs 20-24) – that he had failed to provide reliable evidence that it would be safe for the second applicant to live with him (see paragraph 33). The District Court also noted that, given his diagnosis and category of disability, the first applicant was not eligible to apply to adopt a child (ibid.). In doing so, the District Court based its judgment on outdated reports provided by the staff members of the children's home, while disregarding the later evidence provided by the same representatives, which confirmed that the second applicant was no longer afraid of her father (see paragraph 37).

6. Similar argumentation was employed by the second domestic instance. The appellate court upheld the judgment of the District Court and repeated the same reasoning and conclusions, stating that the first applicant had failed to adduce convincing evidence to prove the absence of a real risk to the second applicant's life, health and adequate upbringing (see paragraph 43).

7. Taken as a whole, the domestic argumentation demonstrates that the authorities based their conclusions on generalised ideas about disabled parents, rather than on the first applicant's actual ability to care for his child or the concrete facts of the case. The domestic authorities' reasoning thus clearly indicates the presence of a stereotyped assumption about the parenting inabilities of mentally disabled persons, as well as a tendency to ignore the evidence in the first applicant's favour.

8. The argument that the first applicant was subjected to obvious discrimination due to his mental disability is further substantiated by two points. First, the Russian Family

Code does not provide that a prolonged stay in a specialist institution for people with mental disabilities constitutes a ground for restricting parental authority. Secondly, Russian law does not normally require biological parents to provide proof of their ability to raise children or their housekeeping skills (see paragraph 38).

9. Based on the aforementioned circumstances, I cannot but regard the rulings of the domestic courts as biased. To my mind, it is evident that the stereotyped line of reasoning employed by the domestic authorities was based on the underlying assumption that a handicapped person is, by definition, less or not at all capable of properly caring for a child. Such an essentialist view of the parenting inabilities of persons with disabilities flattens and homogenises the experiences and capabilities of this group's members. The inadequacy of such a stereotyped approach is particularly acute given the vulnerability of persons with mental disabilities as a group that has suffered considerable discrimination in the past (see *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010, § 42).

II. Disproportionate Reactions of the National Authorities

10. Furthermore, my disagreement relates to the disproportionality of the restrictive measures applied by the domestic authorities in the present case. As regards the United Nations Convention on the Rights of Persons with Disabilities, the Court has recognised this instrument of international law, which enjoys almost universal ratification, as setting the standard concerning the need to protect people with disabilities from discriminatory treatment (see *Glor v. Switzerland*, no. 13444/04, § 53, 30 April 2009). Concerning parental rights, the CRPD states in its Article 23 (see paragraph 57) that State Parties are to render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities. Furthermore, Article 23 (4) explicitly confirms that no child is to be separated from his or her parents on the basis of a disability either of the child or of one or both of the parents. The written and oral evidence adduced by the first applicant (see paragraphs 20-24 and 25) convincingly showed that there was no objective indication of neglect, abuse or immediate danger for the child. On the contrary, the first applicant showed his concern for the child's welfare and his willingness to cooperate with the domestic authorities by even proposing *a gradual transfer* of the second applicant into his care in order to avoid causing her any unnecessary stress (see paragraph 25). Yet the domestic authorities did not attempt to impose any less invasive measures regarding the restriction on the first applicant's parental authority anywhere in their reasoning, and did not seem to make any efforts to provide the first applicant with the "appropriate assistance" required by the CRPD.

III. General Meaning of Article 14 of the Convention

11. It is well-established in the Court's case-law that Article 14 has no autonomous meaning, but can be invoked only in conjunction with another Convention guarantee. However, the fact that the substantive provision invoked in the present case, Article 8 of the Convention, has been analysed in detail and a violation has been found does not mean that the *discriminatory nature* of the State action has been sufficiently examined by the Court. In other words, the scope and substance of Article 14 is by no means automatically absorbed by the scope of the substantive right with which it must be invoked. Such automatic absorption would deprive Article 14 of all scope of application and render it the 'Cinderella provision' of the Convention. [noot:1]

12. The Court's traditional line of reasoning concerning the accessory nature of Article 14, as interpreted in the present case, has a significant impact on the meaning of Article 14 of the Convention [noot:2] and could considerably limit its scope in practical terms. Thus, an applicant seeking a definitive finding by the Court on a discrimination issue would have to make a difficult decision prior to submitting his or her application. In order to achieve a separate examination of Article 14, an applicant would necessarily have to invoke only Article 14 in conjunction with Article 8 of the Convention, instead of also invoking Article 8 on its own. In my opinion, such a restrictive practice does not correspond to the *ratione Conventionis*. Apart from the doubts expressed above, one has to bear in mind that it is also of practical significance whether the Court finds one or two Convention rights to have been violated: the amount granted under Article 41 is normally higher in the latter case.

IV. Conclusion

13. I conclude that the Court should have examined the violation of Article 14 alleged by the first applicant. There is much evidence suggesting a violation of Article 14 read in conjunction with Article 8 in respect of the first applicant's claim that the restriction on his parental authority over the second applicant was imposed and maintained *because of his mental disability*. It follows that the inequality of treatment in question constitutes a *fundamental aspect of the case* (compare *supra*, § 3) and warrants examination by the Court under Article 14 in conjunction with Article 8.

» Noot

1. Het EHRM maakt in deze uitspraak korte metten met de veronderstelling dat ouders met een licht verstandelijke beperking een onvoldoende veilig opvoedklimaat voor hun kinderen kunnen bieden, waarmee een beperking van het ouderlijk gezag zou zijn gelegitimeerd. De vader in kwestie, die tevens namens zijn minderjarige dochter een klacht bij het EHRM indiende, had de schijn bepaald tegen. Hij woonde vanaf zijn zeventiende tot zijn zesenveertigste levensjaar, dat wil zeggen ruim 29 jaar, in een zorginstelling. Hij krijgt daar een relatie met een medebewoonster, een vrouw die onder curatele staat, en samen krijgen zij een dochter. Uit de EHRM-beslissing valt af te leiden dat de partner van klager zelf niet in staat was haar kind op te voeden. Het huwelijk dat zij sluiten wordt vernietigd aangezien zij onder curatele staat en derhalve handelingsonbekwaam is. Verder wordt er gesproken over een psychiatrische rapportage van de vrouw waarin is aangegeven dat haar gedrag conflictueuze, agressieve en emotioneel inadequate tendensen vertoont. De zaak draait dan ook om de wens van vader om zijn kind op te voeden; de moeder heeft daar geen belangrijke rol in, zo lijkt het althans.

De pasgeboren dochter wordt direct na haar geboorte in een kindertehuis geplaatst. Het lijkt er op dat de vader (alleen) met het ouderlijk gezag over het meisje is belast, maar instemt met de plaatsing van zijn dochter in het kindertehuis. Het gaat derhalve om een vrijwillige plaatsing. Klager bezoekt haar daar regelmatig, neemt haar mee om te wandelen en koopt kleding en kadootjes voor haar. Hij geeft in het vierde levensjaar van zijn dochter aan dat zodra hij zelfstandig zou wonen, hij het meisje zelf wilde opvoeden. Dit bericht doet het kindertehuis schrikken, aangezien de professionals die daar werken vinden dat een plaatsing van het meisje bij haar vader niet in haar belang zou zijn. Daarom verzoekt het kindertehuis pas op dat moment om een beperking van het ouderlijk gezag van vader, en dit verzoek wordt door de rechter toegewezen; in hoger beroep wordt de beslissing bekrachtigd. De klacht bij het EHRM draait om deze beslissing tot een beperking van het gezag.

2. De onderbouwing van de gronden die de nationale rechters aandragen voor de gezagsbeperking, heeft in belangrijke mate te maken met de achtergrond van de vader. Hij zou nooit zelfstandig hebben gewoond en daarom zou een directe overplaatsing van zijn dochter naar hem in zijn eerste maanden van zelfstandig wonen prematuur zijn; hij zou te weinig financiële middelen hebben om zijn dochter te onderhouden; vanwege zijn licht verstandelijke beperking zou hij volgens de Russische wet geen kind mogen adopteren en dit zou er op wijzen dat hij geen veilige leefsituatie voor zijn dochter kon bieden; zijn partner, de moeder van het meisje, had vrije toegang tot zijn woonruimte en haar handelingsonbekwaamheid vanwege de ondercuratelestelling zou ook in de richting van een onveilige leefsituatie voor het meisje leiden. Maar het belangrijkste argument leek toch te liggen in de belangen van de jonge dochter: toen ze voor het eerst hoorde dat ze bij haar vader zou gaan wonen, zou ze angstig en gespannen zijn geweest. Het argument van de professionals dat een plaatsing van het meisje prematuur zou zijn geweest, is wat mij betreft legitiem. Maar waarom dan niet bijvoorbeeld een langzamer overplaatsing door eerst een contactuitbreiding, met weekendbezoek, en een meer geleidelijke plaatsing van het meisje naar haar vader met intensieve begeleiding? Deze geleidelijke overgang werd zelfs door vader voorgesteld. Tegelijk raakt dit argument de kern van de zaak niet; ook bij een herstel van het ouderlijk gezag van vader zou dit nog niet per definitie hoeven te betekenen dat het meisje automatisch direct bij vader zou gaan wonen.

De beweegredenen van de nationale rechters lijken toch vooral te zijn gericht op het gebrek aan vertrouwen in de opvoedkwaliteiten van de vader. Hoewel hij verschillende verklaringen kon overleggen die erop wezen dat hij wel degelijk in staat was om een veilig opvoedklimaat te bieden, werden die door de nationale rechters niet meegenomen in hun beslissing. Het was alsof er op vader een enorme bewijslast rustte vanuit de veronderstelling dat ouders met een licht verstandelijke beperking doorgaans geen veilig opvoedklimaat kunnen bieden, maar dat hij tegelijk geen eerlijke kans kreeg aangezien het bewijs dat hij daarvoor aanvoerde, niet, althans in elk geval niet zichtbaar, werd meegewogen. Het Gerechtshof geeft opnieuw aan dat klager onvoldoende overtuigend bewijs had aangevoerd dat er geen risico's voor zijn dochter waren om bij hem te wonen en hij een veilig opvoedklimaat kon bieden. Dit wordt door het EHRM afgestraft, waarover later meer.

3. Het is niet voor het eerst dat het EHRM zich buigt over ouders met licht verstandelijke beperkingen en hun recht op gezinsleven met hun kinderen. In *Kutzner* t. *Duitsland* (EHRM 26 februari 2002, nr. 46544/99) werden twee kinderen gescheiden van hun ouders met een licht verstandelijke beperking en geplaatst in pleeggezinnen. Het EHRM onderstreepte dat de uithuisplaatsing van kinderen in een gunstiger omgeving geen legitieme reden kan zijn om een scheiding tussen ouders en kinderen te rechtvaardigen en daarmee te voldoen aan art. 8 lid 2 EVRM. De kinderen hadden op vrijwillige basis hulp ontvangen, maar bleken in hun ontwikkeling achter te lopen. Het EHRM wierp in deze uitspraak de vraag op of de bevoegde autoriteiten zich wel genoeg hadden ingespannen om andere hulp op vrijwillige basis aan te bieden ter ondersteuning van de ouders bij de opvoeding in plaats van de extreme en vergaande beslissing om kinderen en ouders te scheiden, en concludeerde dat sprake was van een schending van art. 8 EVRM. Art. 14 EVRM werd in deze zaak overigens in het geheel niet genoemd. In *Saviny* t. *Oekraïne* (EHRM 18 december 2008, nr. 39948/06, «EHRC» 2009/18) werden kinderen van blinde ouders met financiële problemen uit huis geplaatst.

Opnieuw bevestigde het EHRM dat er onvoldoende grond was voor deze ingrijpende maatregel, die een drastische inbreuk, namelijk een scheiding tussen kinderen en hun ouders, teweeg brengt. De uithuisplaatsing was dan wel relevant, maar niet voldoende om te voldoen aan de vereiste 'noodzakelijkheid in een democratische samenleving' en derhalve werd ook in deze zaak een schending van art. 8 EVRM geconstateerd. In *B.* t. *Roemenië* (19 februari 2013, nr. 1285/03) en *A.K. en L.* t. *Kroatië* (8 januari 2013, nr. 37956/11, «EHRC» 2013/162 m.nt. De Graaf) ging het om de scheiding tussen kinderen en moeders met resp. een psychische stoornis en een licht verstandelijke beperking en werd door het EHRM benadrukt dat procedurele verplichtingen die voortvloeien uit art. 8 EVRM met zich meebrengen dat deze ouders voldoende worden ondersteund in de procedure. In beide zaken werd vanwege een gebrek aan juridische ondersteuning tot een schending van art. 8 EVRM geconcludeerd.

In de onderhavige zaak valt op dat door klagers (bijgestaan door een advocaat) en derde-partijen sterk de nadruk wordt gelegd op rechten van ouders met beperkingen om voor hun kinderen te zorgen, waarbij elke vorm van discriminatie moet worden tegengegaan. Ook het EHRM gaat, bij de beoordeling onder art. 8 EVRM, in op de door de nationale autoriteiten vermeende veronderstelling dat vader vanwege zijn langdurige verblijf in een zorginstelling als licht verstandelijk beperkte ouder niet in staat zou zijn om een veilig opvoedklimaat te bieden. De recente mondiale en regionale aandacht voor rechten van gehandicapten, waaronder gehandicapte ouders (denk aan het VN-Verdrag inzake de rechten van personen met een handicap (A/RES/61/106) en de Aanbeveling Rec(2006)5 van het Comité van Ministers van de lidstaten inzake het Actieplan van de Raad van Europa ter bevordering van de rechten en de volledige participatie van personen met een beperking in de maatschappij: naar een betere kwaliteit van leven voor personen met een beperking in Europa 2006-2015), met daarbij een groeiende erkenning van het uitoefenen van ouderlijk gezag door hen, kunnen hier een verklaring voor zijn.

4. Het EHRM oordeelt in deze zaak dat de gronden voor het beperken van het ouderlijk gezag van de eerste klager wel relevant, maar niet voldoende zijn. Ten aanzien van de relevantie weegt het EHRM mee dat vader onbeperkt contact met zijn dochter kon hebben en dat de beperking van het gezag niet definitief was, maar er een mogelijkheid bestond om te verzoeken om herstel in het gezag. Daarbij had het kindertehuis aangegeven dat het niet in het belang van het meisje zou zijn om al zo snel na het ontslag van haar vader uit de zorginstelling bij hem te gaan wonen. Om te beslissen over de vraag of de beperking van vaders gezag ook 'sufficient' was, oordeelt het EHRM over de verschillende argumenten die de nationale rechters benoemden om het gezag van vader te beperken. Het EHRM beslist dat de nationale rechters te kort door de bocht zijn gegaan door de informatie die vader aandroeg om aan te tonen dat hij gekwalificeerd was als opvoeder en zijn dochter een veilig opvoedklimaat kon bieden, te laten liggen en, zo lijkt het althans, niet mee te wegen. Zoals het EHRM in familiezaken recent vaker bepleit, wordt ook in deze uitspraak benadrukt dat de nationale rechters een onafhankelijk deskundigenonderzoek hadden moeten gelasten. Door een '*formalistic approach*' waarbij slechts de opvatting van het kindertehuis werd omarmd door de nationale rechters en de informatie van vader stilzwijgend opzij werd geschoven, hebben de nationale rechters niet overtuigend aangetoond dat de plaatsing van het meisje bij haar vader niet in haar belang zou zijn, aldus het EHRM. Ook met de andere argumenten van de nationale rechters maakt het EHRM korte

metten: het ontbreken van ervaring in het opvoeden van kinderen mag nooit een reden zijn om ouderlijke rechten in te perken of kinderen uit huis te plaatsen. Het enkele feit dat eerste klager gedurende bijna dertig jaar in een zorginstelling verbleef, kan nooit voldoende reden zijn om het meisje in een instelling te laten wonen en het gezag van vader te beperken. De verwijzing naar de licht verstandelijke beperking zonder in te gaan op bewijs dat aantoonde dat eerste klager prima in staat was om zijn dochter op te voeden, was onvoldoende reden voor de inbreuk op het gezinsleven. De verwijzing naar de handelingsonbekwaamheid van de moeder was ook onvoldoende reden; dit wil volgens het EHRM namelijk nog niet zeggen dat zij ook per definitie een gevaar voor anderen was. Tenslotte herhaalt het EHRM dat financiële problemen nooit op zichzelf voldoende reden kunnen zijn voor een inbreuk in het gezinsleven door kind en ouders te scheiden (zie ook o.m. *Moser* t. *Oostenrijk*, 21 september 2006, nr. 12643/02, «EHRC» 2006/129). Het EHRM oordeelt derhalve inhoudelijk en kritisch en laat daarmee slechts een kleine beoordelingsruimte over aan de nationale autoriteiten. Het EHRM noemt daarbij niet, zoals in de hierboven genoemde zaak *Kutzner* t. *Duitsland*, dat inspanningen hadden moeten worden verricht om met minder ingrijpende maatregelen de vader en zijn dochter te begeleiden en te ondersteunen bij de opvoeding, al had dat in deze zaak zeker ook ingezet kunnen worden. Daarmee zouden ook de eerder genoemde internationale documenten waarin rechten van gehandicapten zijn vastgelegd, kunnen zijn gebruikt als interpretatiemiddel bij art. 8 EVRM. Overigens valt tevens op dat, in tegenstelling tot veel andere familierechtuitspraken van het EHRM waarbij kinderen betrokken zijn, geen verwijzing wordt gemaakt naar het VN-Kinderrechtenverdrag. Juist ten aanzien van de klachten van tweede klager had dat voor de hand gelegen.

5. Klagers doen niet alleen een beroep op art. 8, maar ook op art. 14 EVRM: de beperking van het gezag van eerste klager was gebaseerd op het vooroordeel van de verantwoordelijke autoriteiten dat ouders met verstandelijke beperkingen niet in staat zijn tot het bieden van een veilig opvoedklimaat voor hun kind. Het EHRM beslist dat, nu de argumenten die een gezagsbeperking onderbouwden, al inhoudelijk en gedetailleerd zijn geanalyseerd en tot een schending van art. 8 EVRM hebben geleid, er geen noodzaak meer bestaat om de zaak ook onder art. 14 EVRM te beoordelen. Slechts als een duidelijke ongelijke behandeling bij de uitoefening van EVRM-rechten een kernelement van de zaak betreft, zal het EHRM op een substantiële bepaling uit het EVRM èn op art. 14 EVRM ingaan (*Dudgeon* t. *Verenigd Koninkrijk*, 22 oktober 1981, nr. 7525/76, Series A, nr. 45). De *dissenting opinion* van rechter Keller betreurt juist dit onderdeel van de uitspraak. Volgens hem was de ongelijke behandeling van eerste klager vanwege zijn verstandelijke beperkingen nu juist wel een kernelement van deze zaak. Hij benadrukt de stereotype benadering van de nationale rechters, die leidt tot een stereotype motivering van de beslissing. Zonder inhoudelijk te beoordelen of deze vader voldoende opvoedkwaliteiten in huis had, hebben de nationale rechters aangenomen dat deze vader vanwege zijn verstandelijke beperking geen veilig opvoedklimaat kon bieden, gebaseerd op de veralgemenisering dat ouders met verstandelijke beperking hiertoe niet in staat zijn. Keller verwijst hierbij naar het VN-Gehandicaptenverdrag, waarin is opgetekend dat verdragsstaten passende bijstand moeten bieden aan gehandicapte ouders bij de opvoeding van hun kinderen en dat kinderen niet op grond van de handicap van het kind of de ouder van hun ouders mogen worden gescheiden (art. 23). Ik kan me vinden in deze *dissenting opinion*; in deze zaak ging het niet alleen om een inbreuk op art. 8 EVRM, maar speelden uitdrukkelijk ook vragen

van discriminatoire aard. De beslissing van het EHRM en de lijn in de EHRM-jurisprudentie waarmee een beroep op art. 14 EVRM in combinatie met een substantieel EVRM-recht maar in weinig gevallen tot een inhoudelijke beoordeling van art. 14 EVRM leidt, maakt dat art. 14 EVRM tot een 'Cinderella-provision' wordt (aldus Keller in par. 11 van haar dissent, met verwijzing naar een publicatie van O'Connell uit 2009 (R. O'Connell, 'Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009) pp. 211-229; zie dissenting opinion par. 11). Daarmee wordt het bereik van art. 14 EVRM ernstig en onnodig beperkt.

6. De discussie over opvoedkwaliteiten van ouders met licht verstandelijke beperkingen speelt ook in Nederland, en leidt van tijd tot tijd tot media-aandacht en verontwaardiging, bijvoorbeeld als een jonge baby direct na de geboorte van ouders wordt gescheiden zonder dat de ouders zich hebben kunnen bewijzen als opvoeders (zie bijv. de nieuwsberichten over het zoontje van Moniek en Arjan dat direct na zijn geboorte uit huis werd geplaatst; RTL nieuws 20 januari 2016; over hun eerste kind, dat ook direct uit huis werd geplaatst, kwamen zij enkele jaren eerder ook in het nieuws). Ook de vraag of bepaalde volwassenen met een kinderwens verplicht zouden moeten worden gesteriliseerd, bijvoorbeeld als zij psychische stoornissen, verstandelijke beperkingen of verslavingsproblemen hebben, komt al jaren herhaaldelijk weer op. Juist vanwege de redenering van het EHRM in deze zaak, kort gezegd dat de veronderstelling 'het enkele feit dat ouders licht verstandelijke beperkingen hebben maakt ze ongeschikte opvoeders', niet legitiem is, ben ik bepaald geen voorstander van verplichte sterilisatie voor ouders met handicaps. Ik denk dat je er op grond van het EVRM en andere mensenrechtenverdragen nooit vanuit kunt gaan dat een bepaalde groep ouders per definitie niet in staat zal zijn om een kind op te voeden. Wat mij betreft moet deze discussie dan ook veel genuanceerder worden gevoerd dan vaak het geval is.

prof. mr. drs. M. Bruning, Hoogleraar Jeugdrecht Universiteit Leiden

» Voetnoten

[1]

O'Connell Rory, 'Cinderella Comes to the Ball: Article 14 and the Right to Non Discrimination in the ECHR', (2009) 29 (2) *Legal Studies: The Journal of the Society of Legal Scholars*, 211-229, 212.

[2]

This approach is one reason for the Court's rather limited case-law on discrimination issues; see Gerards Janneke, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights', (2013) 13 (1) *Human Rights Law Review*, 99-124, 100; Harris David John, O'Boyle Michael, Bates Edward and Buckley Carla, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (Oxford: Oxford University Press 2014), p. 784.