Norwegian National
Human Rights Institution

The Committee on the Rights of the Child
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Day of General Discussion: "Children's Rights and Alternative Care" – written submission from the Norwegian National Human Rights Institution

1. Introduction

We refer to the information posted on the webpage of the Committee, calling for written submissions prior to the Day of General Discussion ("DGD") 2021 devoted to the issue of children in alternative care.

The Norwegian National Human Rights Institution (hereinafter: NIM) hereby submits its contribution to the discussion of this important issue. We are grateful for the possibility to share our insights, concerns and questions with the Committee and look forward to the deliberations to come.

NIM is Norway's NHRI and was granted A-status in 2017. We welcome the Committee's initiative to discuss this challenging issue. We are particularly appreciative since alternative care touches on various human rights challenges in Norway. As the Committee is well aware, the European Court of Human Rights (ECtHR) has considered numerous cases against Norway on the issue of alternative care in recent years, which has given rise to much debate both within and outside of Norway. The issue of alternative care is also relevant to unaccompanied asylum-seeking children and to the use of force against children in the welfare system.

In this submission, we will address three topics:

- The interpretation of the CRC in light of the recent case law from the ECtHR
- The situation of unaccompanied and separated children
- The use of force by the police against children in the child welfare system

We raise these issues because they have given rise to debate about the interpretation of the CRC in Norway, and we assume that some clarification or guidance from the Committee will be of value both for Norway and other states where these issues arise.

2. The CRC and recent case law from the European Court of Human Rights (ECtHR) on the right to respect for family life

2.1. Introduction

We refer to the Concept Note describing the overall purpose of the DGD, including to "identify and discuss particular areas of concern with regard to the unnecessary separation of children from their families and appropriate ways to respond to family and child separation in cases where it is unavoidable."

In respect of the principle of systemic integration and article 31 (3) (c) of the Vienna Convention on the Law of Treaties, NIM would like to shed light on recent case law against Norway from the ECtHR concerning the right to respect for family life under Article 8 of the European Convention on Human Rights (ECHR), with a view to identifying areas which may benefit from clarification by the Committee.

In recent years, the ECtHR has accepted 39 cases involving the Norwegian Child Welfare Services for hearing. The Court has ruled in ten cases, of which the Court in eight cases has found a violation of the right to family life.[1]

The cases that have been considered by the ECtHR involve the use of coercive measures by the Norwegian Child Welfare Services. In most of these cases, it is not the care order itself that is subject to review, nor is it, for the most part, the care order that is being criticised by the ECtHR. The cases mostly concern restrictions on contact between parents and children, as well as adoption.

As to the law, the Court, when considering the alleged violations of Article 8 of the ECHR, emphasises that the mutual enjoyment by 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 this provision.[2] The Court further states, referring to CRC Article 9, para. 1, that an important international consensus exists to the effect that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In considering if the interference constitutes a violation of Article 8, the Court considers the requirements of Article 8, para. 2, and in particular the condition that the interference is "necessary in a democratic society". This includes the question of whether or not the interference "is

[1] NIM has published a report analysing the case law in the cases against Norway, including also, to some extent, cases against other States. A brief English summary of the report can be found on NIMs webpage: Why Does the ECtHR Find Human Rights Violations in Cases Concerning the Norwegian Child Welfare Services - NIM (nhri.no)

[2] Case of Strand Lobben and others v. Norway, app. no. 37283/13, para. 202.

proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests."[3]

2.2. The best interests of the child and the child's lack of independent representation before the ECtHR

In its practice, the ECtHR applies the central principle of the UN Convention on the Rights of the Child, enshrined in Article 3 of the Convention, that the best interests of the child should be a primary consideration in all actions concerning children. The Court has repeatedly stated that there is "a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance" and further, that in cases concerning the care of children and contact restrictions, "the child's interests must come before all other considerations."[4]

The ECtHR assumes that the content of a best interests assessment consists of two elements. On the one hand, it is generally in a child's best interests to maintain their family ties. On the other hand, it is clearly also in a child's interests to ensure their development in a sound environment, and a parent cannot be entitled under Article 8 to take measures that could harm a child's health and development.[5]

A topic of debate is whether there are differences in how the ECtHR and the Committee on the Rights of the Child have interpreted the principle of the child's best interests, and whether ECtHR practice has evolved as a result of the Norwegian cases. NIM is concerned that the child's lack of independent representation before the ECtHR could influence the ECtHR's assessments, in the sense that the child's interests are not as visible in the Court's decisions as they should be. In two of the Norwegian child welfare cases before the ECtHR, the child is made a party to an appeal before the ECtHR by a parent who no longer has parental responsibility for the child.[6] In these cases, the Court states, without further discussions, that there is no conflict of interests between the parent(s) and the child which would require the Court to dismiss the application on behalf of the child.[7] Also, the right of the child to be heard in cases concerning themselves is not discussed in relation to the judgements. Children, as independent rights-holders under the ECHR, thereby have a restricted role in the cases before the

[3] Case of Strand Lobben and others v. Norway, app. no. 37283/13, para. 203.

[4] Case of Strand Lobben and others v. Norway, app. no. 37283/13, para. 204.

[5] Case of Neulinger and Shuruk v. Switzerland, app. no. 41615/07, para. 136.

[6] Case of Strand Lobben and others v. Norway, app. no. 37283/13, and case of Pedersen and others v. Norway, app. no. 39710/15.

[7] Case of Strand Lobben and others v. Norway, app. no. 37283/13, para. 154-159 and case of Pedersen and others v. Norway, app. no. 39710/15, para. 43-64.

ECtHR where they themselves are a party to the appeal, which in turn often makes them less visible in the ECtHR's own processes and decisions.[8]

2.3. The reunification objective and the issue of stipulation of contact

A guiding principle of the ECtHR is that a care order should be regarded as temporary, and that any measures taken should be consistent with the ultimate aim of reuniting the parents and the child. A lack of emphasis on the ultimate aim of reunification of the child with his or her family has been the main reason why the ECtHR concluded that the Norwegian Government has violated the right to family life in several of the Norwegian child welfare cases.

Of particular relevance under the aim of reunification is the issue of stipulating contact between the child and their family. A common theme raised by the Court in its rulings against Norway in this area is that the regime of contact must be based on concrete assessments and effectively support the goal of reunification. However, some debate has arisen in Norwegian legal theory as to some of the Courts' statements regarding the contact between the child and its natural parents, and the consideration of the rights of the child in this regard.

The Court has emphasised that it is "crucial that the contact regime, without exposing the child to any undue hardship, effectively supports the goal of reunification until – after careful consideration, and taking account of the authorities' positive duty to take measures to facilitate family reunification – the authorities are justified in concluding that the ultimate aim of reunification is no longer compatible with the best interests of the child."[9] Further, the Court has emphasized that "[f]amily reunification cannot normally be expected to be sufficiently supported if there are intervals of weeks, or even months, between each contact session."[10] The last quote may be interpreted as if the ECtHR imposes a minimum level of contact. In NIMs view, the principle of the best interests of the child requires a thorough assessment based on the individual circumstances in each case when determining the extent and frequency of the contact regime.

2.4. Recommendation

NIM encourages the Committee to take into consideration the recent case law from the ECtHR, and to consider addressing issues of particular relevance for the interpretation of the CRC, as outlined above.

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[8] Katre Luhamaa and Jenny Krutzinna: Pedersen et al v. Norway: Progress towards child-centrism at the European Court of Human Rights? Strasbourg Observers, 28th of May 2020.

[9] Case of M.L. v. Norway, app. no. 64639/16, para. 79,

[10] Case of M.L. v. Norway, app. no. 64639/16, para. 79, and case of K.O. and V.M. v. Norway, app. no. 64808/16, para. 69.

3. Alternative care for unaccompanied and separated children

We refer to the Concept Note, para. 29, calling on input on areas of interest including suitable alternative care for unaccompanied and separated children.

The Committee has emphasised States' obligations regarding the care and protection of unaccompanied or separated children, including in its General Comment no. 6.[11] Moreover, the Committee has expressed concern regarding the care and protection of unaccompanied and separated children in its Concluding Observations to Norway in 2005, 2010 and 2018.

In 2008, the Norwegian Child Welfare Act was amended so as to clarify the responsibility of the Child Welfare Services for unaccompanied minors. However, the relevant provisions of the Child Welfare Act only apply to children below the age of 15, and NIM notes with concern that the level of care and protection provided for unaccompanied and separated children above the age of 15 is still not equivalent to the level of care for other children in Norway. The Norwegian Parliament recently passed a bill on the legal responsibility for unaccompanied minors, which in the preparatory work states that these children receive more limited follow-up and care than other children, arguing that this is not discriminatory or in any other way violates the rights of the child.[12]

NIM encourages the Committee to consider addressing the issue of the States' obligations regarding care and protection for unaccompanied minors, and in particular the issue of equal treatment between this group and other children in alternative care.

4. The use of force by the police against children in the child welfare system

Reference is made to the UN Guidelines for Alternative Care, para. 97, outlining the use of force in the context of alternative care. Recent findings in a Norwegian newspaper state that the police assisted the Child Welfare Services in 2,800 cases concerning children in 2019.[13] The articles give an overview of the types of force that have been registered when the police assist the child welfare system in cases involving children.

The Norwegian Government is now working on new guidance material on how the police and Child Welfare Services should cooperate in such matters.[14]

The Police Act states that the use of force must be necessary and appropriate.[15] Yet, this act and the relevant regulations, instructions and guidance material do not give

[11] In particular, para. 39 and 40.

[12] Act 11 May 2021 no. 36 (amendment to the Immigration Act, section 95). Prop. 82 L. page 22.

[13] 12. February 2021, Stavanger Aftenblad, p. 6-15.

[14] 28. April 2021. Letter from the minister to the Parliament, The department's ref. 21/2253 - SK.

[15] Para. 6. section 4.

particular guidance as to the methods of force that can be used against children and under which circumstances.

In 2012, spit masks were implemented as a tool for the police in Norway. Spit masks are restraint devices placed over a person's head to prevent them from spitting or biting (also known as spit hoods, guards or shields). There is a lack of statistical data in Norway relating to the circumstances in which this method of restraint has been used, and if it has resulted in any form of harm.[16] The Police Directorate has expressed that it will provide a national training plan for the use of spit masks, that police districts may be required to report training on the use of spit masks and that the regulations concerning the use of spit masks may be revised.[17] In NIM's view, the evidence base regarding injuries related to the use of spit masks, alone or together with other coercive measures, is insufficient.[18]

NIM encourages the Committee to consider discussing the use of force against children in the child welfare system, including the circumstances in which this might be legitimate and proportionate. NIM further encourages the Committee to discuss the circumstances in which particular methods of force towards children can be prohibited on a general basis, such as the use of spit masks.

Best regards
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[16] 21. May 2021, Stavanger Aftenblad «Gjennomgår politiets regler for maktbruk (aftenbladet.no)».

[17] 1. June 2021, Stavanger Aftenblad «Aftenbladet avslører: Politiet trener ikke på å bruke spytthette».

[18] As NIM is aware, there was not a professional assessment from the health authorities before spit masks was introduced as a tool for the police, and so far the police do not keep statistics on the use of this coercive measure - or subsequent injuries after such use.