Care order cases in the European Court of Human Rights
Parents' vs children's rights

1 Introduction

Article 1 of the European Convention on Human Rights (ECHR or the Convention) states that the rights presented in the Convention shall be granted to everyone. Article 14 of the ECHR explicitly mentions that age discrimination is a violation of the Convention. The ECHR does not specify at what age a child may enjoy its rights. Nor are there any written differences in how the ECHR perceives young children and children nearing adulthood. Seemingly, the rights given by the ECHR are primarily to protect adults. Nevertheless, the European Court of Human Rights (ECtHR or the Court) rules in cases involving both children and adults. Previous research has revealed that the extent of children's rights under the ECHR is up to the ECtHR's discretion (Kilkelly, 1999).

In the timespan from 1959 to 2020, 61 care order cases have appeared before the ECtHR, claiming that there has been a violation of article 8 of the ECHR. Article 8 of the Convention states that everyone is entitled to 'respect for private and family life and that there shall be no interference from authorities '…except such as in accordance with the law and is necessary in a democratic society … for the protection of health or morals, or for the protection of the rights and freedoms of others' (*ECHR,* 1950, art. 8). In order to justify interference in your private sphere, the ECtHR have repeatedly reiterated that a care order can only be justified if it is "in accordance with the law" or "necessary in a democratic society" (see, i.e. *Y. C. v. The U.K.,* 2012). The Court also underlines that a care order should only be issued as a last result and only if a child's health, well-being, or development is at risk (ibid.).

By conducting an argumentation analysis of the judicial precedence set by all 61 care order cases, this article aims to examine the intersection where parents' rights meet the children's rights and examine how the ECtHR balance these rights when ruling in care order cases.

1.1 Supplementary research objectives

Three supplementary research questions have been created to address the beforementioned aim: two questions pertaining to the Court's decision-making process and one question pertaining to children's rights under the ECHR.

(1) *how does the ECtHR assess care order cases and secure the rule of law for both the biological parents and the child?;* and (2) *on what ground does the ECtHR base their decision of what is in the child's best interests?*

As mentioned in the introduction, adults' rights are secured by the ECHR. The children's rights, however, can be discussed. When discussing children's rights, there is no avoiding the argument of the child's best interests. Decision-makers use the argument of the child's best interest to legitimise decisions made on behalf of a child (Archard and Skivenes, 2010; Skivenes and Pösö, 2017; Skivenes and Sørsdal, 2018). With regard to care orders, as this article will show, the ECtHR reiterates time and time again that it is up to the domestic authorities' margin of appreciation to assess whether to interfere in the life of the biological parents and remove a child from its home (see, i.e. *P., C. and S. v. The U.K.* 2002: para. 116; *Strand Lobben and others v. Norway*, 2019: para. 211). When issuing a care order, the main argument used by the domestic authorities is the child's best interests (Archard and Skivenes, 2010; Skivenes and Sørsdal, 2018). The child's best interest is not a clear-cut argument. It is both vague and ambiguous. Children are not alike. They do not all fit the same template. To generalise and say what is best for one child is best for all children would plainly be wrong (Mnookin and Szwed, 1983; Breen, 2002). However, it is a prerequisite for cases appearing before the ECtHR that all national remedies have been exhausted (*ECHR,* 1950, art. 35). Meaning that the domestic authorities and – courts have assessed what they believe to be in the child's best interests and acted accordingly. Furthermore, the ECtHR underlines on several

occasions that the domestic authorities have '…the benefit of direct contact with all persons concerned, often at the very stage when care measures are being envisaged or immediately after their implementation.' (*N.P. v. The Republic of Moldova*, 2016: para. 67), which indicates that the ECtHR believes that national authorities are in a favourable position for assessing what is in the child's best interests compared to the ECtHR. However, the ECtHR still overrules the national authorities on several occasions. The fact that the ECtHR overrules the decisions made by domestic authorities, who – according to the ECtHR itself – are in a favourable position to make a well-consider decision, underlines the importance of examining both how the Court assess the care order cases and assess what is in the child's best interests.

(3) *how are children's rights adhered to by the ECtHR?*

As aforesaid, children are not explicitly mentioned in the ECHR. There are, however, articles in the Convention which open for preferential treatment of minors. Art. 5 states that minors may be detained for the purpose of educational supervision and art. 6 states that the press and public may be excluded from any legal proceeding regarding juveniles (*ECHR*, 1950, art. 5 & 6). Besides art. 5 and art. 6, there are no differences in the rights given to children and to adults. Art.14 of the ECHR explicitly states that any and all discrimination is a violation of the Convention. This includes age discrimination. With that said, the ECtHR has stated that it is justified to treat children differently from adults if the aim is to protect children from harm or negative influence (Kilkelly, 1999). In addition, case-law from the ECtHR depicts that children *are* being treated differently than adults. Seemingly, there is no clear definition as to what constitutes children's rights under the ECHR, which highlights the importance of examining how the ECtHR adheres to children's rights.

2 Theoretical Approach – Habermas' three worlds and discourse ethics

The upcoming analyses build on Habermas' (1996) idea that a purposive-rational way of thinking is not sufficient to understand human behaviour. One needs to see purposive rationality in light of

the "world" in which the subjects live. Habermas divided the social sphere into three worlds: the objective; the social; and the subjective world, each with corresponding discourses. Examining the ECtHR's reasoning pertaining to children's and biological parents' rights, in light of each of the three worlds and corresponding discourses, may give insight into the reasoning used by the judges of the Court in their deliberations. An increased understanding of the deliberation within the Court may give insights as to how the judges balance children's and biological parents' rights and whether there are arguments that sway the Court in one direction or the other. The three worlds and the corresponding discourses lay the foundation on which the article's analyses are built. In the following section, each of the three worlds and corresponding discourses will be presented.

2.1 The Objective World – Legal and Pragmatic discourse

The objective world considers facts. There are two directions within the objective world, cognitive and teleological. If the subject's understanding of the facts corresponds with the actual facts, the subject will consider the facts as true and correspond accordingly. The teleological approach considers facts as a means to gain the desired results. With this approach, facts can be manipulated, to an extent, in order to achieve the desired goal (Habermas, 1996; Eriksen and Weigård, 2014).

The legal discourse, rooted in the objective world, aims to see facts through the perspective of adjudicators (Baxter, 2011). While the other three discourses are practical discourses, the legal discourse is a theoretical discourse. Through conversation and existing theories and descriptions, the legal discourse aims to unveil facts and reveal the truth (Outhwaite and Habermas, 1996). Regarding the upcoming analyses, the legal discourse includes arguments referring to established Court practices, as well as arguments referring to specific articles within the ECHR and written laws.

The pragmatic discourse is also based on the objective world. In a pragmatic discourse, the subjects focus on reaching their goals most efficiently, which implies that there may be a one-way communication where one subject manipulates his/her surroundings in order to achieve the desired goal. The discourse itself aims to show rational decisions (Outhwaite and Habermas, 1996; Eriksen and Weigård, 2014). In the analysis, the pragmatic discourse includes arguments that indicate rational choices to achieve the desired solution.

2.2 The Social World – Moral Discourse

The social world is related to the norms in society. As part of society, one is part of a group. The group the person belongs to may have their own norms that deviate from norms in society at large. Within the group, there are unwritten rules as to desirable behaviour or what constitutes desired behaviour. Breaking these unwritten rules may not be in violation of the law, however, there may be consequences within one's group. The trueness of what one ought to do may be morally conditioned (Habermas, 1996; Habermas, Smith, and Smith, 1999).

The moral discourse has its grounding in the social world. Any action in this discourse is driven and regulated by norms. By understanding the norms in "our" world of society, the moral discourse aims to find fair solutions to normative conflicts (Habermas, 1996). Regarding the upcoming analysis, the moral discourse includes arguments revolving around, i.e. culture, values, and the unwritten rules of society.

2.3 The Subjective World – Ethical Discourse

The subjective world relates to one's inner sphere: one's thoughts, beliefs, perceptions, feelings and personal experiences. In short, everything that relates to one being oneself. Within this world, the subject beholds his/her fellow members of society as an audience for his/her own subjectivity. There are two criteria in the social world: veracity and authenticity. Subjects may be influenced by

society. Manipulative behaviour from other subjects, commercials and political propaganda may all influence a subject. The perception of the subject must give a truthful picture as to how the subject's inner thoughts and beliefs are, not what they have been influenced to be. In other words, the thoughts and beliefs of the subject need to be authentic in order to fulfil the criteria for the subjective world (Habermas, 1996; Eriksen and Weigård, 2014).

The ethical discourse is rooted in the subjective world. Outhwaite and Habermas (1996: 131) explain the discourse as "my world of internal nature", which means that the discourse revolves around your ideas, values, and principles for a way of living, or in other words, your culture (Benhabib, 2002). In the upcoming analyses, arguments coded in the ethical discourse include arguments referring to one's inner self, like interests, feelings, and personal beliefs.

2.4 Separating the Objective World from the Social and Subjective World – Weak and Strong Assessments

Even though Habermas has a clear distinction between the three worlds and, consequently, the four discourses, there are situations where an action can be classified in several discourses. To use the ECtHR as an example: discrimination is a violation of the ECHR and thus the written rules of society. One could also argue that discrimination is morally wrong and thus violates the unwritten rules or norms of society. This means that discrimination could be categorised in both the legal and moral discourse. Arguments overlapping discourse categories will be a factor in the upcoming analysis of the care order judgements and addressed accordingly.

Within Habermas' four discourses, there is a difference in a subject's expected behaviour in each of the discourses. When a subject is in the objective world (legal and pragmatic discourse), an action does not affect the subject at a personal level. The subjects objectify their belief and focus on how to achieve their desired goals. While in the social- (moral discourse) and the subjective world (ethical discourse), your beliefs, values and inner-self may be challenged. Taylor (1985) defines the difference between choices made in the objective world and in the social- and subjective world as

weak and strong assessments. Taylor states that a subject must assess the situation and do what he/she believes is the correct action. Weak assessments do not say anything about *you* as a person. Strong assessments do. Strong assessments may not cause you to break the law or to do something that you find unnatural, even though the action may be natural for others, but strong assessments may challenge your beliefs and inner-self. Table 1 shows how Taylor's assessment criteria can be combined with Habermas' discourses.

Table 1 Taylor assessment criteria combined with Habermas' discourses

	Discourses	
Weak assessments	Legal discourse	Pragmatic discourse
Strong assessments	Ethical discourse	Moral discourse

3 Research Methods and Data Material

3.1 Data gathering and delimitations

This article's data material is limited to judgments available in HUDOC. When searching for care order cases in HUDOC, the following restrictions were made to the search: "Grand Chamber", "Chamber", "art.8", "English", and "sort by relevance", with the search words "child" AND "care" — resulting in 499 cases for the time period 1959 - 2020. All cases were manually assessed. Cases where the parties involved had reached an amicable agreement before the ECtHR had ruled in the case and cases which did not involve care orders were dismissed. In the end, 61 cases were left, which constitute the base for this article's data material. Table 2 shows an overview of which country the 61 care order cases originate from:

Table 2 Overview of cases and their country of origin

Overview of cases and their country of origin					
Country	Cases	Country	Cases	Country	Cases
Norway	11	Romania	3	Lithuania	1
The United Kingdom	11	Russia	3	Malta	1
Sweden	6	Slovenia	3	The Republic of Moldova	1
Finland	5	Austria	2	Poland	1
Italy	4	Croatia	2	Slovakia	1
Germany	3	France	1	Spain	1
				Ukraine	1

When ruling in a case, the ECtHR uses previous judgements as a means to justify its decision. By using established case-law, the Court secures that all applicants are treated equally, given that the merits of the case are of sufficient similarity (Lupu and Voeten, 2010). By looking at the judicial precedents created by each of the care order cases, it is possible to follow any development in arguments within the field of care orders. This article aims to examine how the ECtHR balance biological parents' and children's rights when ruling in care order cases. It is the arguments pertaining to the care orders which are relevant for this article. All arguments referring to cases that are not care order cases are thus omitted from the analysis. In other words, this article will examine all references between the 61 care order cases.

Different citation styles have been taken into account when finding the references. The first five judgements from 1987 are referred to, in different constellations, as one. Each reference to either of the five judgements has thus been examined manually to ensure that all references are present.

All judgements from the ECtHR are divided into sections. When referring to a specific section of a judgment, the ECtHR refers to a paragraph, e.g., *B. v. the U.K.,* 1987: para. 63. This article will use the same method of reference and thus refer to paragraphs when referring to a section of a judgement. In total, there are 342 paragraphs being referred to 710 times, originating from 43

judgments. 18 judgments are not being referred to by any of the 61 care order cases, and five judgements do not refer to any of the 61 cases.

3.2 Categorising the arguments – creating a foundation for analysis

Not all 342 paragraphs are relevant for the purpose of this article. It is arguments pertaining to parents' and children's rights which are of relevance, not to domestic legislation or case-specific details. In order to omit non-relevant paragraphs, five argument-categories were created: 1) Pro-child; 2) Pro-parents; 3) Biological family; 4) The court; 5) Other.

The paragraphs from where the arguments originate are coded according to whom they are in favour. Meaning if a paragraph is coded as pro-child, the essence of the paragraph, as a whole, is favourable towards children. Not all paragraphs are as clear cut as to which argument-category the paragraph should be coded in. Some paragraphs are ambiguous. If the content of a paragraph can be considered to be in favour of equally a child and the parents, the paragraphs have been coded in more than one category. In situations where a paragraph, as a whole, is clearly in favour of the child, the paragraphs have been coded as pro-child, even though there may be single arguments in favour of the parents and/or biological family. In addition, some arguments refer to "two-way"-rights, which are rights influencing both the biological parents and their children. I.e., the ECtHR have on several occasions stated that a care order's ultimate goal is to reunite biological parents and their children. Alternatively, in other words, both biological parents and children have a right to be reunited. Paragraphs referring to "two-way"-rights are coded as both pro-parent and pro-child.

There are potential limitations to the coding of the arguments due to the coding being subjected to the authors' discretion. As previously stated, arguments may be ambiguous. In situations where there are doubts as to whether an argument is, i.e. pro-child or pro-parent, the argument has been coded as both, to reduce the risk for biased research.

The majority of paragraphs coded as pro-child revolve around the child's best interests. Some paragraphs are direct when referring to the child's interest; '…the child's interest must come before all other considerations' (*Gnahoré v. France*, 2001: para. 59); '…consideration of what is in the best interest of the child is in any event of crucial importance…' (*Kutzner v. Germany*, 2002: para. 66); '… the Court wishes to underline that, in all decisions concerning children, their best interests must be paramount.' (*R. and H. v. the U.K.*, 2011: para. 73). Others are more subtle; '…decisions may well prove to be irreversible: thus, where a child has been taken away from his parents and placed with alternative carers, he may in the course of time establish with them new bonds which it might not be in his interests to disturb or interrupt by reversing a previous decision to restrict or terminate parental access to him.' (*B. v. the U.K.,* 1987: para. 63); 'The Court recalls that a fair balance must be struck between the interests of the child and those of the parent … and that in doing so, particular importance must be attached "to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent.' (*E.P. v. Italy*, 1999: para. 62).

The paragraphs coded as pro-parent focus mainly on the biological parents' rights before and after a care order has been issued, i.e. a care order being a temporary measure: 'It would be inconsistent with this aim if the making of a care order or the adoption of a parental rights resolution were automatically to divest a natural parent of all further rights and duties in regard to access.' (*B. v. the U.K.,* 1987: para. 77); 'The Court considers that taking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit and that any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child.'(*Johansen v. Norway*, 1996: para. 78). The paragraphs also cover the biological parents' parental rights, given due to the sole fact that they are the *biological* parents, i.e. 'Even where a mother has been deprived of parental rights … her standing as the natural mother suffices to afford her the necessary power to apply to the Court on the child's behalf too, in order

to protect his or her interests.' (*M.D. and Others v. Malta*, 2012: para. 27). The pro-parent category is diverse. The common denominator is that, in one way or another, biological parents are seen in a favourable light.

The biological family category covers all paragraphs stating, in one way or another, that the natural link as a biological family should suffice as a reason for the family to be reunited as soon as circumstances permits. One-third of all paragraphs in the biological family category include the same sentence 'The exercise of parental rights and the mutual enjoyment by parent and child of each other's company constitute fundamental elements of family life' (*B. v. the U.K.*, 1987: para. 60).

The Court category covers all paragraphs that have created a precedent as to how the ECtHR should act and assess a case. The paragraphs coded in the Court category vary in content, from emphasising the extent of the Contracting States' margin of appreciation, 'The margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake, such as the importance of protecting the child in a situation in which its health or development may be seriously at risk and the objective of reuniting the family as soon as circumstances permit.' (*Kutzner v. Germany*, 2002: para. 67), to the ECtHR's relation to domestic law, 'It is not however the Court's role to examine domestic law in the abstract.' (*P., C. and S. v. The U.K.*, 2002: para. 122).

The last category, "Other", was created to cover all paragraphs that did not fit in the other four categories and which could be used to shed light on how the ECtHR balances parents' and children's rights, i.e. the foster parents' rights and the child's link with the new family: '…the continuation of the access restrictions [for the biological parents] had been that the children had to get attached to their foster family and that too close a relationship with their own parents endangered this purpose.' (*K. and T. v. Finland,* 2001: para. 166).

While categorising the arguments, it became clear that one case differs from the others, *Strand Lobben and others v. Norway* (2019). While most of the referrals to other cases are to single paragraphs or sections of a judgement, where the similarity of two cases is apparent, i.e. references to domestic law, the references to *Strand Lobben and others* are to entire sections of the judgement referring to established case law in the ECtHR. In total, there are references to 43 paragraphs in *Strand Lobben and others.* In comparison, two of the cases with the highest number of paragraphs being referred to, besides *Strand Lobben and others,* are *Kutzner v. Germany* (2002) and *P., C. and S. v. the U.K.* (2002), both of which have 13 paragraphs being referred to. Of the eight cases that potentially could refer to *Strand Lobben and others*, five are from Norway. Some of the references to *Strand Lobben and others* are primarily to point out similarities between the Norwegian cases or to summarise established Court practices. The established Court practices are covered by other judgements. Furthermore, references to similarities between cases are not relevant to this article's research objectives. This article, therefore, limits the paragraphs in *Strand Lobben and others* to the paragraphs with the broadest field of impact, which are the paragraphs being referred to the most. After the delimitation, four paragraphs from *Strand Lobben and others* are left to be categorised and analysed.

After the delimitation, the number of paragraphs has been reduced to 135 paragraphs, which is referred to 463 times, originating from 36 cases. Of the 135 paragraphs, 58 have been coded in more than one category, which gives the following categorisation: Pro-child – 45 paragraphs; Pro-parent – 43 paragraphs; Biological family – 31 paragraphs; The Court – 64 paragraphs; Other – 20 paragraphs. These paragraphs constitute the data material for the upcoming discourse analysis.

4 Findings – The Arguments

The analysis is divided into sections, following Habermas' four discourses (see table 1). First, all arguments pertaining to the legal discourse will be presented, followed by the pragmatic-, ethical-

and, lastly, the moral discourse. The arguments are divided into four argument-categories[1] in which the paragraph from which the argument originates is coded. Whilst examining the arguments in light of each other, the "other"-category is omitted due to the category's unique nature. All relevant paragraphs and, consequently, arguments in the other-category will be presented and discussed in the discussion section of the article.

Each argument has been categorised according to content to get an overview of the arguments. The categorisation and the arguments themselves will be presented in the corresponding sections.

Due to the magnitude of arguments, this article limits itself to presenting a highlight of arguments relevant to the article's research questions. However, the content-categories of all arguments, how many times each argument is used, and how many judgements use the arguments, will be presented in tables in each of the following four discourse sub-sections.

4.1 Legal Arguments

Legal arguments are found in all four argument-categories. Table 3 shows an overview of how all legal arguments are categorised according to content. The Court category has the most legal arguments, with 41 arguments divided into eight content-categories. Pro-parent follows suit, with 36 arguments in seven content-categories, followed by the pro-child category with 22 arguments and six content-categories, and biological family with 18 arguments and six content-categories.

Arguments pertaining to parental rights can be found in three of the four argument-categories. In total, there are 21 arguments referring to parental rights. Two arguments, found in *B. v. the U.K.* (para. 76) and *P., C., and S. v the U.K.* (para. 117), are coded in both the pro-parent and pro-child categories. Meaning there are 19 unique arguments pertaining to parental rights.

[1] 1)pro-child; 2)pro-parent; 3)biological family; 4)the court

Arguments pertaining to representation can be found in both the pro-parent- and the court category. The two arguments in the pro-parent category, found in *M.D. v. Malta* (para. 27), are both coded in the Court category as well, leaving four unique arguments pertaining to representation.

In addition, there are three content-categories which are found in more than one argument-category: arbitrary interference, decision-making, and reunite. However, none of the arguments in the three content-categories is coded in more than one category – making all arguments unique.

In total, there are 113 unique legal arguments.

Table 3 Overview of the legal arguments' content-categories

Pro-child legal arguments		
Category	Judgements	Arguments
Parental rights	7	11
ECtHR - no substitution	4	4
Care order - temporary	2	2
Adoption	2	2
Arbitrary interference	1	2
Authorities' duties	1	1
Total		22

Pro-parent legal arguments		
Category	Judgements	Arguments
Decision-making	8	12
Parental rights	7	8
Family life	6	7
Access	4	5
Representation	1	2
Consideration	1	1
Data	1	1
Total		36

Biological family legal arguments		
Category	Judgements	Arguments
Public interference	8	8
Reunite	5	5
Parental rights	2	2
Care order	1	1
Contact	1	1
Cooperation	1	1
Total		18

The Court legal arguments		
Category	Judgements	Arguments
Decision-making	9	10
Necessary in a dem.s.	9	10
Arbitrary interference	8	10
Assessment	4	4
Representation	2	4
Domestic legislation	1	1
Just satisfaction	1	1
Reunite	1	1
Total		41

In the legal discourse, there are most arguments in the Court category. The arguments in the Court category mainly focus on how the ECtHR should assess cases, as there are no explicit procedural

requirements in art.8 of the ECHR (see, i.e. *McMichael v. The U.K.*, 1995: para. 87). The ECtHR emphasises that the Court will take into account '…whether the conclusion of the domestic authorities [decision making process] was based on sufficient evidentiary bases (including … statements by witnesses, reports by competent authorities, psychological and other expert assessments and medical notes) and whether the interested parties, in particular the parents, had sufficient opportunity to participate in the procedure in question.' (*Saviny v. Ukraine,* 2009: para. 51). Furthermore, the ECtHR emphasises that care orders are a domain which requires a greater call than usual for protection against arbitrary interference (see, i.e. *W. v. The U.K.*, 1987: para. 62; *S.S. v. Slovenia*, 2018: para. 96). In order for a care order to be conceived as legitimate, the reasons for issuing the care order must be "necessary in a democratic society". The ECtHR states that '… in order to determine whether the impugned measures were "necessary in a democratic society", it has to consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of paragraph 2 of Article 8 (*Kutzner v. Germany*, 2002: para. 65).

The ECtHR reiterates time and time again that a care order's ultimate goal is to reunite the biological family (see, i.e. *Strand Lobben and others v. Norway,* 2019: para. 208). With regard to parental rights, the ECtHR emphasises that domestic authorities should be cautious in limiting some parental rights, such as parental rights of access to children, as a limitation of such parental rights could endanger the ties of the biological family and thus hinder a reunion (see, i.e. *P., C. and S. v. The U.K.*, 2002: para. 117; *Dolhamre v. Sweden*, 2010: para. 120). In addition, the ECtHR states on several occasions that interference by the domestic authorities in the biological family is a violation of the right to respect for family life, guaranteed by the ECHR, Article 8 § 1 (*Bronda v. Italy*, 1998: para. 51). However, it is repeatedly emphasised by the ECtHR that '…where the maintenance of family ties would harm the child's health and development, a parent is not entitled under Article 8 to insist that such ties be maintained.' (*Y.C. v. the U.K.*, 2012: para. 134).

4.2 Pragmatic Arguments

Pragmatic arguments are found in all four argument-categories. Table 4 shows an overview of how all pragmatic arguments are categorised according to content. The pro-child category has the most pragmatic arguments, with 28 arguments divided into seven content-categories, followed by the Court, with 25 arguments and five content-categories. Pro-parent and biological families have seven and six arguments, respectively, with one and two content-categories.

Reunite can be found in three of four argument-categories. Two arguments, found in *Scozzari and Giunta v. Italy* (2000: para. 169) and *Gnahoré v. France* (2001: para. 51), are coded in more than one category, which entails that there are 13 unique arguments in the reunite-category.

Arguments coded as "direct contact" are found in both the pro-child and the Court categories. All three arguments in the pro-child category are also coded in the Court category, leaving nine unique arguments.

In addition, the "margin of appreciation" category can be found in both the biological family- and the Court category. However, none of the arguments is coded more than once, which entails that all remaining arguments are unique.

In total, there are 61 unique, pragmatic arguments.

Table 4 Overview of the pragmatic arguments' content-categories

Pro-child pragmatic arguments		
Category	Judgements	Arguments
Child's best interest	7	8
Reunite	5	6
Discretion	3	4
Balance - parent/child	3	3
Direct contact	3	3
Acting children's behalf	2	2
As a whole	2	2
Total		28

Biological family pragmatic arguments		
Category	Judgements	Arguments
Reunite	4	4
Margin of appreciation	2	2
Total		6

Pro-parent pragmatic arguments		
Category	Judgements	Arguments
Reunite	7	7
Total		7

The Court pragmatic arguments		
Category	Judgements	Arguments
Direct contact	9	9
Margin of appreciation	7	8
Inflexible procedure	4	4
Decision-making	2	3
Purpose	1	1
Total		25

Most of the arguments pertain to the domestic authorities' decision-making process. The ECtHR emphasises that the national authorities have '…the benefit of direct contact with all the persons concerned…' (*Johansen v. Norway*, 1996: para. 64) when making their decisions. The ECtHR also emphasise that the national authorities '…enjoy a wide margin of appreciation in deciding whether a child should be taken into care…' (*R. and H. v. The U.K.*, 2011: para. 81), but that the margin of appreciation will vary '…in light of the nature of the issues and the seriousness of the interests at stake,…' (*Mohamed Hasan v. Norway*, 2018: para. 145). The ECtHR states that they understand the difficulties the national authorities face in reaching a decision in such a sensitive area and stress that it would add to the national authorities' problems if they were required '…to follow on each occasion an inflexible procedure…' (*X. v. Croatia*, 2008: para. 47). The national authorities should thus be allowed room for discretion (*Kutzner v. Germany*, 2002, para. 63).

With regard to the arguments coded as "child's best interests", the arguments vary in content. However, the common denominator is that the arguments focus on how the ECtHR assess what is in the child's best interests, e.g. when it first was determined that it was in the child's best interests to be placed in public care and later a reunification was discussed, the ECtHR states that '…it was also obvious that it would not have been in the interests of J. [the child] to be placed in her

biological parents' home.' (*K. and T. v. Finland*, 2001: para. 154). The ECtHR emphasise that '… a fair balance has to be struck between the interests of the child in remaining in public care and those of parent in being reunited with the child.' (Dolhamre v. Sweden, 2010: para. 111).

With regard to the children's position in the ECtHR, the Court acknowledges that children '…must generally rely on other persons to present their claims and represent their interests…' (*A.K. and L. v. Croatia*, 2013: para. 47) and, furthermore, that a biological parent may represent their child before the court – solely on the base of being their biological parent (*Scozzari and Giunta v. Italy*, 2000: para. 138)

4.3 Ethical Arguments

Ethical arguments are found in all four argument-categories. Table 5 shows an overview of how all ethical arguments are categorised according to content. The pro-child category has the most ethical arguments, with 52 arguments divided into seven content-categories, followed by biological family, with 45 arguments and five content-categories. Pro-parent - and the Court category have 17 and 12 arguments, respectively, with five and four content-categories.

Arguments pertaining to family ties can be found in all four argument-categories. One argument, found in *Gnahoré* (para. 59), is coded as pro-child, pro-parent, and the Court. In addition, two arguments found in *Scozzari and Giunta* (para. 148) and *R. and H. v. the U.K.* (para. 81), respectively, are coded in two argument-categories, leaving 32 unique arguments pertaining to family ties.

Two categories, parental access and parents' interests, are found in more than one argument-category. However, none of the arguments is coded double. Meaning: all arguments in the two categories are unique.

In total, there are 122 unique ethical arguments.

Table 5 Overview of the ethical arguments' content-categories

Pro-child ethical arguments		
Category	Judgements	Arguments
Consideration - interests	16	19
Override	11	14
Family ties	8	9
Link - natural family	4	4
New bonds	3	3
Parental access	1	2
Child's rights	1	1
Total		52

Pro-parent ethical arguments		
Category	Judgements	Arguments
Family ties	7	7
Parents interests	4	4
Parental access	3	4
Parent capacity	1	1
Represent	1	1
Total		17

Biological family ethical arguments		
Category	Judgements	Arguments
Family ties	11	15
Mutual enjoyment	14	14
Reunite	7	7
Balance interests	6	7
Parental access	2	2
Total		45

The Court ethical arguments		
Category	Judgements	Arguments
Family ties	3	5
Child's interests	4	4
Parents interests	2	2
Consent to adoption	1	1
Total		12

Ethical arguments are the largest category. The majority of arguments revolve around the interests of the child. In *Olsson v. Sweden* (1988: para. 72), the ECtHR states that the decision to take a child into public care '…must be supported by sufficiently sound and weighty considerations in the interests of the child. In *Johansen* (para: 64), the wording changed from "sound and weighty consideration" to '…consideration of what is in the best interest of the child is in any event of crucial importance.'.

The ECtHR states on several occasions that 'The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life.' (see, i.e. *R. v. The U.K.*, 1987: para. 64), and reiterates on several occasions that taking a child into care should be considered as a temporary measure, discontinued as soon as circumstances permit (see, i.e. *Saviny v. Ukraine*, 2009: para. 52). However, the ECtHR emphasise that when contemplating whether to reunite the biological family '…a fair balance has to be struck between the interests of the child remaining in care and those of the parent in being reunited with the child.' (*Dolhamre v. Sweden*, 2010: para. 111).

With regard to the child's interests, the ECtHR leaves no doubt that the child's interests may surpass those of the biological parents. In *Johansen* (para. 78), the ECtHR states that '… the Court [ECtHR] will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents.' and in *R. and H. v. the U.K.* (para. 73) the ECtHR states that '…, in all decisions concerning children, their best interests must be paramount.'. With regard to the reunion of the biological family and the balance between the biological parents' – and children's interests, the ECtHR emphasise that a child may, over time, form new bonds and thus become firmly attached to his or her foster family. Furthermore, the ECtHR states that 'The younger the child is, the faster the psychological relationship between the child and the foster parents develops.' (*K. and T. v. Finland*, 2001: para. 151) and thus '…the interests of a child not to have his or her de facto family situation changed again, may override the interests of the parents to have their family reunited.' (*Strand Lobben and others v. Norway*, 2019: para. 208).

However, the ECtHR acknowledged that '…it is an interference of a very serious order to split up a [biological] family' (*Scozzari and Giunta v. Italy*, 2000: para. 148). The ECtHR have reiterated time and time again that a care order's ultimate goal is to reunite the biological family. In doing so, the ECtHR has stated that the domestic authorities have a positive obligation to '…make serious and sustained effort to facilitate the reuniting of children with their natural parents and until then enable regular contact between them, including, where possible, by keeping siblings together.' (*Saviny v. Ukraine*, 2009: para. 52). Furthermore, the ECtHR emphasises that depriving biological parents of their parental rights is a '…particular far-reaching measure … and is inconsistent with the aim of reuniting them [the biological family].' (*M.D. and Others v. Malta*, 2012: para. 76). However, in situations where the biological parents have proven to be "particularly unfit", it is justified to sever the bonds with their child (*Jansen v. Norway*, 2018: para. 92). In addition, a decision to sever the

bonds in the biological family may also be justified if it is '…motivated by an overriding requirement pertaining to the child's best interest.' (*M.D. and Others v. Malta*, 2012: para. 76).

The importance of maintaining the link in the biological family is especially evident in *Strand Lobben and others*. In *Strand Lobben and others* (para. 208), the ECtHR states that in situations '…where the authorities are responsible for a situation of family breakdown because they have failed in their … obligation, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child.'.

4.4 Moral arguments

Moral arguments are only found in two of the four argument-categories: pro-child and the Court. Table 6 shows an overview of how all moral arguments are categorised according to content. There are 15 moral arguments in the pro-child category, divided into five content-categories, and 10 arguments in the Court category, divided into three content-categories.

None of the content-categories are found in more than one argument-category, entailing that all 25 arguments are unique.

Table 6 Overview of the ethical arguments' content-categories

Pro-child moral arguments		
Category	Judgements	Arguments
Child's best interest	4	4
Sever family ties	4	4
Limitation	3	3
Discretion	2	2
Perception	2	2
Total		15

The Court moral arguments		
Category	Judgements	Arguments
Margin of appreciation	4	6
Decision-making	2	2
Culture	2	2
Total		10

Most of the moral arguments revolve around the domestic authorities' decision-making process. The ECtHR acknowledge that '…the appropriateness of intervention by public authorities in the

care of children vary from one Contracting State to another, depending on such factor as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area.' (*Kutzner v. Germany*, 2002: para. 66; see also *Jansen v. Norway*, 2018: para. 95). Furthermore, the ECtHR reiterates that the domestic authorities enjoy '…a wide margin of appreciation in assessing the necessity of taking a child into care.' (*Jansen v. Norway*, 2018: para. 90). However, the ECtHR emphasised that the domestic authorities should always ensure that the views and interests of the biological parents are known when they make a decision (*Strand Lobben and others v. Norway*, 2019: para. 212). With regard to the difficulty of the domestic authorities' decision, the ECtHR reiterates that it is counterproductive to require that the domestic authorities follow an inflexible procedure on every occasion and that the domestic authorities should thus be allowed a measure of discretion (*B. v. The U.K.*, 1987: para. 63).

With regard to the child's best interests, the ECtHR emphasises that '…under no circumstances can a parent be entitled under Article 8 to have measures taken that would harm the child's health and development.' (*Gnahoré v. France*, 2001: para. 59). Furthermore, in *Jansen* (para. 92), the ECtHR states that '…, it is clearly also in the child's interest to ensure his or her development in a sound environment,…'. However, the ECtHR states that when reaching a decision to sever the family ties, '…to show that child could be placed in a more beneficial environment for his upbringing…' (*Y. C. v. The U.K.*, 2012: para. 134) is not enough to justify a measure of that extent.

4.5 Biological parents' rights vs the child's rights – the development

Since the first care order case appeared before the ECtHR in 1987, there have been apparent changes in arguments pertaining to both biological parents' and children's rights. In consideration of the judicial precedence and the argument-categories, there were no arguments in favour of the child prior to 1995. Table 7 shows an overview of the average of arguments that created judicial precedence in favour of the child and parent pr. judgement, divided by decades. In the 1980s, there

were no arguments in favour of the child, and a low average of 0.4 arguments pr. case in favour of the parents. However, it is vital to keep in mind that the first cases appeared before the ECtHR in 1987, which may potentially explain the low number of references to the care order cases. From 1990 – 1999, there was a low average of 0.4 arguments pr. case for arguments in favour of children, and an average of 1.4 for parents. The difference in average indicates that it was more than three times as likely that arguments were in favour of the parent rather than the child. From 2000 – 2009 the average had increased to 2.6 arguments pr. case for children, and 2.0 for parents. Most references in favour of the child refer to paragraphs in *Johansen,* which indicates that *Johansen* vastly changed the ECtHR opinion of the child's rights. From 2010 – 2019, the trend continues. Arguments in favour of the child have increased to 4.1 arguments pr. case, while arguments in favour of parents have an average of 2.4 pr. case. In 2020, the tables turned. For the first time since the 1990s, there are more arguments in favour of the parents than the child, with an average for arguments in favour of parents of 3.5 arguments pr. case, against an average of 3.0 for arguments in favour of children. However, 2020 is only *one* year. It is too soon to state the trend as a fact. What can be said is that most of the references from the 2020 judgements are to *Strand Lobben and others*, which highlights the influence *Strand Lobben and others* have had on the care order field.

Table 7 Overview of the average of arguments in favour of the child and the parents

	Pro-child	Pro-Parent
1980 - 1989	0	0.4
1990 - 1999	0.4	1.4
2000 - 2009	2.6	2
2010 - 2019	4.1	2.4
2020 -	3	3.5

5 Supportive questions – discussion and concluding remarks

The three supporting research questions presented in section 1.1 was created as a means to get a deeper understanding of this article's primary research objective. The article will, in the following section, discuss findings pertaining to each supportive research question and answer each of the three questions in turn. The article will present how each of the four discourses can illuminate

different aspects of the three supportive questions. For supportive question (1), the article will discuss findings pertaining to the ECtHR's assessment of care order cases and how the Court secure the rule of law for both biological parents and child. The central discussion theme is the domestic authorities' margin of appreciation in deciding whether a care order is "necessary in a democratic society" or "in accordance with the law". For supportive question (2), the article will discuss findings pertaining to the foundation on which the ECtHR base its decision of what is in the child's best interests. The central discussion theme is how the Court assess whether the decision made by the domestic authorities was taken on a sufficient evidentiary basis. For supportive question (3), the article will discuss findings pertaining to children's human rights under the ECHR and how they are adhered to by the ECtHR. The central discussion theme is how children's rights are tied to their interests. How the three supportive questions link to the primary research objective and all discussions pertaining to the primary research objective will be presented in section 6.

5.1 The ECtHR's assessments

The legal arguments revolve around the ECtHR's role in assessing the measures implemented by domestic authorities. The Court emphasises that its role is not to be a substitution for the domestic authorities but to assess the measures implemented by domestic authorities. When assessing whether a measure was justified, the ECtHR highlight two key phrases. For a measure to be justified, it must be "in accordance with the law" and/or "necessary in a democratic society".

To assess whether a measure was "in accordance with the law", the ECtHR review, in light of the ECHR, how the domestic authorities justify implementing the measure. By reviewing the measure in light of the ECHR, the ECtHR unveils any infractions on the Convention. However, the phrase "in accordance with the law" does not only pertain to the ECHR. It also points to the content and quality of domestic laws. When a measure is being implemented by the domestic authorities, the measure must be rooted in domestic law. The ECtHR emphasises that there should be a measure

of protection against arbitrary interference in domestic legislation but that it is not the ECtHR's role to assess domestic law in abstract. Nevertheless, the ECtHR underline that the domestic laws should be phrased in a way that is reasonably understandable for anyone who may be affected.

With regard to a measure being "necessary in a democratic society", the ECtHR mentions two considerations: 'First, the Court [ECtHR] must examine whether, in the light of the case as a whole, the reasons adduced to justify the measures were "relevant and sufficient"; second it must be examined whether the decision-making process was fair and afforded due respect to the applicant's rights under Article 8 of the Convention.' (*Y. C. v. The U.K.*, 2012: para. 133). The legal arguments point to the fact that in order for a measure to be justified, the measure must be proportionate to the legitimate aim pursued. If the relation between the measure and its goal is disproportionate, the measure cannot be justified and thus not be considered "necessary in a democratic society". With regard to the decision-making process, the legal argument points to the keyword: "necessary". The ECtHR emphasise that "necessary" implies a pressing social need to interfere. If there is a necessity for interference, the domestic authorities are obliged to do so. Furthermore, the ECtHR emphasised that the Court would assess whether the decision-making process was fair and that the interests of all parties involved were respected.

The pragmatic arguments focus mainly on the domestic authorities' decision-making process. The ECtHR has clearly stated how the domestic authorities should proceed in a decision-making process, thus creating what are basically guidelines as to how the domestic authorities should proceed with their decision-making process in order for a measure to be justified. As with the legal arguments, the pragmatic arguments reiterate that the ECtHR's role is not to act as a substitution for domestic authorities but to ascertain whether the decision reached by the domestic authorities is a result of careful consideration of the interests and rights of all involved.

Looking at the ethical arguments pertaining to the ECtHR's assessments, the focus is mainly on how the Court should assess and balance the interests of the biological parents and their child. The Court emphasises that the biological parents must be involved in the decision-making process leading up to a care order to an extent that ensures their interests are known. With regard to the child's best interests, the ECtHR states that it is an overriding requirement. Meaning all decisions made by domestic authorities and the Court should be taken with the child's best interests in mind.

The moral arguments focus on cultural differences between the Contracting States. The ECtHR acknowledge that the domestic authorities' decision-making process may be culturally conditioned. Meaning, traditions, norms and judicial system may all play a role in the domestic authorities' decision-making process. The ECtHR states that domestic authorities enjoy a wide margin of appreciation in assessing the necessity to take a child into care. However, the ECtHR emphasises that it will take into account whether the domestic authorities '…first attempted to take less drastic measures, such as supportive or preventive ones, and whether these had proved unsuccessful.' (*Strand Lobben and others v. Norway*, 2019: para. 211). The ECtHR reiterates that decisions made by the domestic authorities must be based on relevant considerations, ensuring that the decision neither is nor appears to be arbitrary. Furthermore, the moral arguments underline both the positive and negative obligations the domestic authorities have to the public.

Viewing all arguments pertaining to how the ECtHR assess care order cases, it is clear that the Court does not consider itself to be a substitute for domestic authorities. The ECtHR emphasise that its role is to assess whether the decision reached by the domestic authorities was "in accordance with the law" or "necessary in a democratic society".

With regard to a decision being "in accordance with the law", it is evident that the decision made by domestic authorities must be rooted in domestic law. However, that does not entail that any law

that confers discretion is a violation of the ECHR, '…provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity … to give the individual adequate protection against arbitrary interference.' (*Margareta and Roger Andersson v. Sweden*, 1992: para. 75).

With regard to the phrase "necessary in a democratic society", the keyword is "necessary". If there is a pressing social need to interfere, the domestic authorities are obliged to do so. Any concerns regarding a child's health, development or well-being, or in other words, the child's best interests, will fulfil the requirements of necessity. The child's best interests are an overriding requirement. However, that does not entail that the biological parents' interests are irrelevant. The ECtHR emphasise that the biological parents must be involved in the domestic authorities' decision-making process and that their interests should be balanced against the child's.

To conclude, the ECtHR emphasises that it is not a substitute for domestic authorities. The Court's assessments revolve around the question of whether an interference was "in accordance with the law" or "necessary in a democratic society". The ECtHR reviews whether the domestic authorities' decision-making process took the child's and biological parents' interests into account and thus justified interference. The child's interests surpass those of the biological parents, but the biological parents' interests must be heard. The ECtHR acknowledge that national culture may play a role in the domestic authorities' decision-making process. The ECtHR underlines that the domestic authorities enjoy a certain margin of appreciation in assessing whether interference is necessary but emphasises that any decision reached by the authorities must neither be nor appear to be arbitrary.

5.2 The child's best interests

The legal arguments highlight the decision-making process leading up to a care order. The ECtHR emphasises that biological parents have a right to be involved in the process to an extent that ensures their interests are known. If the domestic authorities reach the decision to remove a child

from its home, the ECtHR states that the decision must be taken on a sufficient evidentiary base. Statements from professionals, laymen and witnesses supporting the domestic authorities may strengthen the authorities' decision (*Saviny v. Ukraine*, 2009: para. 51). However, the ECtHR emphasises that no one is infallible. Actions taken in good faith in the best interests of the child may, in retrospect, prove to be ill-judged. The Court emphasises that domestic authorities cannot be held accountable for decisions made in good faith, which in hindsight proves to be the wrong decision, which in turn underlines the importance of a safety net in decisions pertaining to the child's best interests, such as the biological parents' right to represent their child in the ECtHR in cases where they have lost their parental rights.

The pragmatic arguments pertaining to the child's best interests revolve around the domestic authorities' margin of appreciation in deciding what is in the child's best interests. As in the legal arguments, there are pragmatic arguments stating that biological parents may speak on their child's behalf in situations where the child cannot speak for itself.

The ethical arguments reiterate the importance of involving the biological parents in the decision-making process, especially in situations where the biological parents are in conflict with the domestic authorities. A conflict between domestic authorities and biological parents may influence what both parties believe to be in the child's best interests. As a means to understand what is in the child's best interests, the ECtHR has created "guidelines": '…first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and second, it is in the child's best interests to ensure his development in a safe and secure environment.' (*Y.C. v. the U.K.,* 2012: para. 134). However, there is still room for domestic authorities to use discretion in assessing whether the biological parents are "particularly unfit" or if the child is in a "safe and secure environment".

Turning towards the moral arguments, the arguments' focus revolves around the cultural differences between the Contracting States, highlighting that it is within the domestic authorities' margin of appreciation to decide what is in the child's best interests. However, the ECtHR emphasises that to state that it is a more beneficial environment for the child's upbringing is not enough to justify a care order. The child's health and/or development must be at risk.

In conclusion, the decision of what is in the child's best interests is, to a certain degree, for the domestic authorities' margin of appreciation to decide. However, the decision must be taken on a sufficient evidentiary base, such as on statements from professionals, laymen and witnesses. Furthermore, the decision must include the views of the biological parents. Meaning the ECtHR does not directly assess what is in the child's best interests. The Court reviews the decision reached by domestic authorities in light of the abovementioned criteria.

5.3 Children's human rights under the ECHR

Viewing the legal arguments pertaining to children's human rights, the arguments point to what is in the child's best interests. In other words, it is the child's *interests,* not its *rights* which is the ECtHR's focus. The Court emphasises that if a child's well-being is in jeopardy, the child's interests trump the biological parents' rights. There are, however, no legal arguments stating the extent to which the child is granted rights under the ECHR.

As with the legal argument, the pragmatic arguments also revolve around the child's best interest. The majority of pragmatic arguments focus on reuniting the biological family as soon as circumstance permits after a care order has been issued. Even though established case law dictates that a care order's ultimate aim is to reunite the child with its biological family, the ECtHR emphasise that a child's health and development should never be put at risk. A child's best interest is an overriding requirement. In other words, if it is in the child's best interests to remain in public

care, the child's interests trump the biological parents' right to be reunited with the child. Biological parents may never be entitled to rights that could potentially put a child's health and development at risk.

The ethical arguments point to the fact that a child's best interests are the decisive factor in care order cases. However, the ECtHR emphasises the importance of maintaining and developing the bond between biological parents and the child when the child is in public care. If the relationship between biological parents and the child is curtailed while the child is in public care, that could potentially interfere with the biological parents and child being reunited. To ensure the protection of the natural family bond, the ECtHR stress the importance of allowing contact between a child and its biological family while the child is in public care.

There are very few arguments in the moral category. There is nothing to suggest that, i.e., cultural aspects play an essential role in the ECtHRs assessments. In general, the moral arguments highlight the fact that children have a right to protection of their health, development, and well-being.

In conclusion, children's rights under the ECHR are mostly tied to their interests. A child in public care has a right to be reunited with its biological parents unless it is in the child's best interests to remain with its foster family. The child's interests are an overriding requirement. The child's interests surpass both the child's and parents' rights. There are three categories in which a child's interests can be categorised: 1) health, 2) development, and 3) well-being. If one of the three categories is at risk, the domestic authorities have a positive duty to protect the child.

6 The biological parents' and children's rights – discussion and concluding remarks

The article will, in the following section, discuss findings pertaining to how the biological parents' rights are balanced against the rights of the children, how the child's rights are interlinked with the

child's interests, and how a child's interests, as an overriding requirement, may deprive the child of its rights. In addition, the article will discuss the approach taken by the ECtHR when assessing a case and discuss whether it is a child-, parents-, or family-centred approach.

When focusing on how the ECtHR balance the biological parents' rights against the rights of their children, it is essential to have an understanding of the extent of the rights of both parents and child. While children's rights under the ECHR are debatable, there are no questions as to whether adults (everyone over the age of 18) are entitled to the rights given by the Convention. In regard to children's and the biological parents' rights, the question is: how does the ECtHR handle situations where the children's rights interfere with the rights of the biological parents?

As case law from the ECtHR depicts, children's rights are mainly a question of what is in their interests. The findings are in line with previous studies, which have shown that the child's best interests are central in domestic legislation in cases pertaining to children's rights (Skivenes and Sørsdal, 2018). However, there are differences in how the concept of the child's best interests is perceived by states (ibid.). Viewing the relationship and close bond between biological parents and their children, it is evident that the relationship is a recurring subject when referring to both children's and parents' rights and/or interests (see, i.e. *Jansen v. Norway*, 2018: para. 92). Some rights given to the biological parents may indirectly or directly include the child and vice versa. E.g., established case law from the ECtHR dictates that a care order's ultimate aim is to reunite the biological parents with their child, which means that both the biological parents and child have a right to be reunited. However, these "two-way"-rights are not necessarily in equilibrium between the biological parents and the child. With regard to care orders, the ECtHR has stated that even though a care order's ultimate aim is to reunite the biological parents and the child, what is in the child's best interests must be of primary consideration. Furthermore, the ECtHR has stated that the child's best interests are an overriding requirement and thus surpasses the biological parents'

rights. In other words, the ECtHR emphasise that the child's interests weigh more than the biological parents' rights. Due to the weightiness of the argument of the child's best interests, the child's interests may deprive the same child of their rights. This will be addressed further down in this section.

As shown in section 4.5, there was an increase in arguments in favour of the child in the 2000s, which indicates that the ECtHR turned towards a more child-centred approach in its assessments at the beginning of the millennium. How the ECtHR phrases their judgments further underlines the Court's turn towards a more child-centred approach. Previous research has revealed that it was an increase in child-centrism in child protection in the 2000s (Gilbert et al., 2011). With regard to the findings in this article, in *Johansen* (para. 78), the ECtHR states that '…the Court will attach particular importance to the best interests of the child…'. Para.78 from *Johansen* is one of the paragraphs that is referred to the most. Despite referring to para. 78 of *Johansen*, newer judgements have changed the wording of the paragraph to '…the best interests of the child is paramount.' (see, i.e. *R. and H. v. The U.K.*, 2011: para. 78; *Y. C. v. The U.K.* 2012: para. 134). By changing the wording from "particular importance" to "paramount", the ECtHR leaves no room for doubt as to what role the child's best interests should play. Seemingly the child's best interests come before all other considerations. However, there may be indications of changes in the ECtHR assessments in the latter years (Luhamaa and Krutzinna, 2020). In *Strand Lobben and others* (para. 220), the ECtHR states that 'The Court is fully conscious of the primordial interest of the child in the decision-making process. However …the domestic authorities did not attempt to perform a genuine balancing exercise between the interest of the child and his biological family … but focused on the child's interest instead of trying to combine both sets of interests.'. *Stand Lobben and others* was the first judgement where the child's interests were, in one way or another, restricted. In five out of the seven judgements that have appeared before the ECtHR after the *Strand Lobben and others* judgement, the ECtHR refers to para. 220 of *Strand Lobben and others*, stating that the domestic

authorities have an obligation to ensure that all decisions are '…based on adequate evidence' (*Uzbyakov v. Russia,* 2020: para. 121).

After *Strand Lobben and others,* there has been a significant increase in arguments in favour of biological parents. For the first time since the 1980s, there are more arguments in favour of the biological parents than the child. However, the arguments pertaining to the child's best interests are still ever present. In fact, the ECtHR increasingly view the child as a subject of its own rights (Breen et al., 2020). The ECtHR focus is seemingly on the importance of combining the interests of the child with the interests of the biological parents. The increased focus on the biological parents' rights and interests, combined with the "paramount" consideration of the child's best interests, indicates that the ECtHR turns towards a more family-centred approach rather than a child- or parent-centred.

The increased focus on the biological parents' rights and interests does not affect the importance of the child's best interests in the eyes of the ECtHR. Not all children are in a position to make their views heard by themselves. Some children are taken into public care from birth. The child's development, health and age may all play a part in deciding what is in the child's best interest. The keyword is "deciding". It is not the child who decides (cf. Archard, 2013). The domestic authorities have a positive duty to protect the child's interests. When contemplating what is in the child's best interests, the discussion revolves around what is best for the child's health, development and well-being. For children who have been in public care for a long time and have created new bonds with their foster family, the children's interest in being reunited with their biological family must be balanced against the strain on the children by having their *de facto* family life changed again (Breen et al., 2020). If the ECtHR reaches the conclusion that it would not be in the child's interests to have its *de facto* family life changed, the child's interest surpasses both the biological parents' and the child's rights to reunification (cf. Lingaas, 2020). When making decisions on behalf of others –

including young children – there is a risk that the decision will be perceived as paternalistic abuse (Pope, 2005). As previously mentioned, reuniting biological parents and children is a "two-way"-right. In *Johansen,* a mother's son was removed from her care, even though both mother and son wanted to live together. The boy ran away from public care twice, across the country to live with his mother. Both times, the boy was removed from his mother again and placed in public care. Despite that the boy clearly expressed interest in remaining with his mother, and both mother and son had a right to be reunited, the domestic authority kept the boy in public care – to protect the boy's interests (see *Johansen v. Norway*, 1996: para. 19). In others words, what the domestic authorities believed to be in the child's interests surpassed both mother and child's rights.

Johansen reveals the importance of an equitable decision-making process. The ECtHR repeatedly reiterates that the Court's role is to review decisions made by domestic authorities in light of the ECHR to unveil any infractions on the conventions potentially. The ECtHR is not a substitute for domestic authorities (*Johansen v. Norway*, 1996: para. 64; *R. and H. v. The U.K.*, 2011: para. 81). Whether to issue a care order is up to the domestic authorities' margin of appreciation. However, as to the domestic authorities' decision-making process, the ECtHR has given the authorities what are basically guidelines as to how they should conduct the process. The severity of removing a child from its home is acknowledged by the ECtHR, and the Court states that a care order must be issued with weighty consideration as to what is in the child's best interests. Statements from professionals, laymen and witnesses may all play a role in strengthening the decision. Furthermore, the domestic authorities must ensure that the biological parents' interests are known and heard before reaching a decision (*McMichael v. The U.K.*, 1995: para. 87; *Kutzner v. Germany*, 2002: para. 56). It is the domestic authorities that issue a care order, and the domestic authorities that decide what is in the child's best interests. When deciding what is in the child's best interests, culture, religion, and traditions all play a role (Burman, 2003; Skivenes, 2010). Even though the domestic authorities have taken every step to ensure that their decision is based on a fair and sound evidentiary basis,

some decisions may, in retrospect, prove to be ill-judged. The ECtHR has stated that the domestic authorities cannot be held accountable for actions taken due to genuine and reasonable concerns about a child's well-being (*R. K. and A.K. v. The U.K.*, 2008: para. 36). By stating that concerns about a child's well-being justify even wrongly interferences with the biological parents' rights, the ECtHR has set a benchmark as to what role the child's interests play. The child's interests trump the biological parents' rights.

When viewing the arguments in favour of the biological parents and child, it is evident that the ECtHR use different arguments to support the views of the biological parent and the child. When the ECtHR address the *rights* of either biological parents or child, the arguments are rooted in the legal discourse. When addressing the *interests* of either the biological parents or the child, the arguments are rooted in the ethical discourse. There is an overweight of legal arguments pertaining to the biological parents' rights, indicating that when the ECtHR argue favourably towards the biological parents, they anchor their argumentation in domestic law or the ECHR. For arguments favourable towards children, there is an overweight of ethical arguments, indicating that the ECtHR's focus is on the child's interests. That the argumentation used by the ECtHR in favour of biological parents is, for the most part, tied to the objective world, and the argumentation used by the Court in favour of children is tied to the subjective world, further highlights the difference between biological parents and children's rights under the ECHR. The premises for the objective world build on written law and regulations, such as the Convention, while the premise for the subjective world focus on thoughts, feelings and one's inner self and are thus more receptive to external influence. The potential for external influence may indicate that third-party interveners, acting as advocates for children's rights, may have a significant impact on the deliberations within the ECtHR and, in turn, on the extent and direction of children's rights under the ECHR. However, the extent of the potential influence by external actors on the Court is not clear from the analyses and requires further studies. What is clear is that the child's interests trump the biological parents'

rights — emphasising that arguments pertaining to strong assessments are weightier than weak assessments (cf. Taylor, 1985).

When viewing how the ECtHR weigh children's and biological parents' rights in care order cases, it is clear that the child's interests surpass the biological parents' rights. Seemingly it is not a question of whose rights surpass one another but rather what is considered to be in the child's best interests.

7 Final remarks

The weightiness of arguments pertaining to the social and subjective world may have implications beyond this article's research scope. Previous research has revealed that the cultural background of each judge is irrelevant when assessing a case due to the judges being driven by a common ideal of human rights and, to a certain extent, peer pressure (Arold, 2007). Nevertheless, research has also shown that the development of children's rights has greatly been influenced by social rights movements (Halsaa, Roseneil, and Sümer, 2012), which indicates that the judges are influenced by actors in the social world. Additionally, given the weightiness of arguments rooted in the subjective world, it is likely that judges are, at least to an extent, influenced by both their cultural heritage as well as the organisational culture within the ECtHR (cf. Christensen et al., 2015).

There are indications that i.e. globalisation, legal mobilisation and lawfare, which all potentially can be linked to the social and subjective world, may all play a key role in developing children's rights within the ECtHR in the years to come and directly influence how the Court interprets the ECHR. As the Court itself has stated: 'The Convention [ECHR] cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law.' (*Harroudj v. France*, 2012: para. 42)

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