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Care order cases in the European Court of Human Rights

Parents' vs. children's rights

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Abstract:

At present date, 47 States have committed to the European Convention on Human Rights (ECHR). The Convention aims to give all humans some basic human rights. Children are however not explicitly mentioned. The European Court of Human Rights (ECtHR) is the sovereign authority in interpreting the ECHR. Even though children are not explicitly mentioned in the ECHR, the ECtHR rule in cases involving children.

This study aims to see how the ECtHR adhere to children's human rights in cases involving both adults and children. More specifically, care order cases. By looking at the judicial precedent set by the ECtHR and combining statistical analysis with discourse analysis, this study aims to answer how the ECtHR balance the children's and parents' rights when ruling in care order cases.

In order to get a better understanding of the main research question, this study will also look at who decides what is in the child's best interest, to what extent children are granted rights under the ECHR, the ECtHR's relation to the Convention on the Rights of the Child (CRC) and how the ECtHR assess cases stemming from 47 different judicial systems.

The study revealed that both, biological parents and children's rights, in care order cases where to a certain extent insignificant. It was the child's interests that were the weighty argument. The finding showed that the ECtHR has in latter years turned towards a more child-centric approach. At present date, what is in the child's best interests are paramount to consider when assessing care orders.

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Chapter 1 - Introduction¹

The European Court of Human Rights (ECtHR) is the sovereign authority in interpreting the European Convention on Human Rights (ECHR). The Court is composed of the 47 member States of the Council of Europe, each with its own representative (judge). All rulings from the ECtHR are final. Which means, if the Court rule against you, you cannot appeal.

The ECHR grant everyone some basic human rights, such as right to life (art.2), right to a fair trial (art.6) and right to respect for private and family life (art.8). However, the ECHR does not distinct between children and adults. Nor does the ECHR distinct between newly-born and children nearing adulthood. Seemingly, the rights given by the Convention are primarily to protect adults. Nevertheless, the ECtHR rule in cases involving both parents and adults.

If a child's health or development is threatened, the State may intervene and remove the child from its home. This is an interference of the highest order and arguably one of the most intrusive interventions a State can do in a person's life. Article 8 of the ECHR grants everyone right to respect for private and family life. If a care order is issued and thus a child removed from its parents, that could potentially be a breach on art.8 of the Convention.

Whether to issue a care order is up to the States discretion. To determine whether the impugned measure was a violation against the ECHR is up to the ECtHRs discretion. In their decision making, the judges of the ECtHR exercise strong discretion.

With 47 different domestic judicial systems and 47 judges, one from each member state, how can the ECtHR secure that everyone appearing before the Court is treated fairly? If the children's rights are contradictory to the parents' rights, which rights are most weighty? How is care orders justified and reasoned?

This train of thought led me to my research question, which constitute the base for my upcoming research:

How does the European Court of Human Rights balance the children's and parents' rights when ruling in care order cases?

¹ Parts of Chapter 1 – Introduction is a rewrite of a paper written by me as part of a preparatory paper to my master thesis. The paper was submitted 25.05.2018 to the University of Bergen as part of a compulsory assignment to pass the subject AORG323.

To answer the research question, I intend to perform an argumentation analysis of all care order cases that have appeared before the ECtHR, from 1959 – 2016, in total 44 judgements.

1.1 In-depth presentation of research question

According to Article 1 of the ECHR (1950), everyone is granted the rights presented in the Convention. Article 14, prohibition against discrimination, states that any and all discrimination is a violation against the Convention (ECHR, 1950, art.14). Both of these facts are seemingly ignored regarding children. The ECHR does not mention children. Each case presented before the ECtHR, involving a minor, are looked upon separately. Whether a child is entitled to its rights, is up to the Courts discretion (Kilkelly, 1999, p.18). When it comes to adults or, for all purposes in this thesis, parents, may, indisputably, enjoy the rights granted to them by the ECHR.

Article 8 of the ECHR (1950) states that everyone is entitled to “...respect for private and family life”. There shall be no interference from the authorities “...except such as is 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(2)). In my research, I am looking at care order cases that have appeared before the ECtHR. In their deliberations, the ECtHR repeatedly ask whether the interference from authorities, and thus the care order, was “necessary in a democratic society” (See i.a. *Olsson v. Sweden* (No.1), 1988, para.67, *Kutzner v. Germany*, 2002, para.65, and *Y.C. v. The UK*, 2012, para.133). When reading the care order case judgements from the ECtHR some arguments, used to justify the care order, recurs repeatedly. The most profound argument that reoccur, is that the intervention was in the child’s best interest. The phrase “in the child’s best interests” is used by all parties in a case to justify their views and opinions surrounding the necessity of taking a child into public care. The child’s best interests is an ambiguous principle (Skivenes, 2010, p.1, Skivenes and Søvig, 2016, p.3). Mnookin and Szwed are two legal scholars that have researched extensively on the topic of the child’s best interests. They state: “the flaw is that what is best for any child or even children in general is often indeterminate and speculative and requires a highly individualized choice between alternatives.” (Mnookin and Szwed in Skivenes and Søvig, 2016, p.3-4). In other words, it is difficult to generalize what is in the child’s best interest. The difficulty in assessing what is in the child’s best interests leaves great room for the ECtHR to exercise discretion in its assessments.

The ECHR is not the only human rights convention in existence. Nor is it the most ratified. The most ratified human rights convention in history is the Convention on the Rights of the Child (CRC) (Unicef, 2005). The focus of the CRC is to give children protection, provision and participation rights. In the preamble, the CRC state that children are in need of special safeguards and care due to physical and mental immaturity (CRC, 1990, preamble). In other words, according to the CRC, children need someone to protect them and make decisions on their behalf, in their best interest.

The ECtHR was founded to ensure that the Contracting States complied with the ECHR and had no obligation to the CRC. As is, there is no possible way the CRC can secure that the Contracting States oblige to the convention. However, the CRC is mentioned in the judgements by the ECtHR. In the work leading up to my master thesis I conducted an interview with Dean of law school at the University of Bergen, Karl Harald Søvig, who has previously researched on the relationship between the CRC and ECtHR. Søvig raised the question of whether the CRC has real impact on the decisions made by the ECtHR or if the mention of the CRC merely is a “courtesy-visit” in order to emphasize and justify the decision made by the Court.

When reading about care orders, the ECtHR, the ECHR and the CRC I was baffled. There is no clear definition as to how the ECtHR should assess care order cases. Neither are there any definition as to what would constitute an interference to be “necessary in a democratic society”. Seemingly, it is up to the ECtHRs discretion to assess each case individually.

Looking at previous research, there is little social science research to be found about children’s, and parents, rights in the ECtHR. Searches in the University of Bergen’s database, Oria, and in google scholar came out pretty much empty. There are, however, some legal-studies.² As I am conducting my research in the field of social science, I will limit myself from presenting a review of the legal literature.

One of the social science studies I did find was an article written by Marit Skivenes and Karl Harald Søvig (2016). The article looks at how the judges of the ECtHR exercise judicial discretion in cases involving art.3³ of the CRC and art.8⁴ of the ECHR.

² E.g. Choudhry, Shazia & Fenwick, Helen (2005) Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act. *Oxford Journal of Legal Studies*, 25 (3), p. 453-492.

³ Child’s best interests.

⁴ Right to respect for private and family life.

When ruling, the ECtHR exercise discretion. Skivenes and Søvig (2016, p.5) argue that the Court have authority to exercise strong discretion and that "...there are no limits to their authority on particular issues...". Even though the judges have the authority to develop norms and first-order rules, they can still "...be criticised for making a good or bad decision based on the strength of the reasoning of their decision (Skivenes and Søvig, 2016, p.5).

Skivenes and Søvigs findings is supported by an article in the Strasbourg Observer (2018). The article presented what had been voted the best and worst judgements of 2017 (Strasbourg Observers, 2018). What was voted the worst judgement, was not actually a judgement. It was the dissenting opinion of judge Dedov in the case of *Bayev and others v. Russia (2017)* The case was brought before the ECtHR stating that Russia's LGBT-politic were discriminating the LGBT-community. In the judgement judge Dedov voted against the rest of the Commission, stating that the Russian government had done what needed to be done to protect public moral and children (Bayev and others v. Russia, 2017). The Strasbourg Observers (2018) called judge Dedovs dissenting opinion for "homophobic" and "shocking". Judge Dedovs dissenting opinion highlights the extent of which the judges may exercise discretion in their decisions. It is inevitable that the judges are influenced by the culture of the State of which they originate (Hofstede, 1980). In principle, all shall be treated equally and are granted the same rights by the ECHR. With 47 judges, each representing a Contracting State and each with the opportunity to exercise strong discretion, how do the ECtHR secure the rule of law to everyone?

Care order cases have at least three parties, the child, the parents and the authorities, all with rights that needs to be balanced against each other. According to the CRC, the child is in a position where all decision made on its behalf shall be in its best interests. This includes court-decisions (CRC, 1990, art.3). Article 35 of the ECHR (1950) state that "The Court [ECtHR] may only deal with the matter after all domestic remedies have been exhausted...". Which entails that if parents bring a case before the ECtHR, the domestic courts have ruled against them. However, the ECtHR does not assess the rulings made by the domestic courts, it assesses whether there has been a breach on the parents' human rights.

As aforesaid, the child's best interest is frequently used as an argument in the cases concerning children (Skivenes, 2010, Skivenes and Søvig, 2016) and the CRC are the most ratified human rights convention in history. Looking at cases concerning children, Skivenes and Søvig (2016) examined the relationship between the CRC and ECtHR, and found that "...the CRC is not a prominent source for the ECtHR and that the child, to a varying degree, is represented in the

case material.”. The principle of the “child’s best interest” is evident in the cases, but to varying degrees. Furthermore, Skivenes and Søvig (2016, p.14) found that “The discretionary power and practice of the ECtHR are somewhat bound by the national states legislation...”. However, the ECtHR are still the sovereign authority in interpreting the ECHR. To which extent the Court wish to exercise its powers is up to the Courts discretion.

My main area of research focus is how the ECtHR balance biological parents’ and children’s rights in care order cases. In order to examine my main research question, the child’s best interests, children’s rights, the CRC and the ECtHRs assessments, all play a role. I therefore created four supportive questions, that will help to get a deeper understanding of my field of research and the ECtHRs assessments. They will also help to illuminate all sides of my main research question.

Firstly, there are no definition as to how the ECtHR should exercise its power. Each care order case is assessed separately. In the end, the question of whether there has been a breach on the ECHR is up to the ECtHR discretion to decide. With 47 judges, each representing a Contracting State, all with different judicial schooling and cultural background, how does the ECtHR exercise its discretion? In other words, how does the ECtHR assess cases, and how does the ECtHR secure the rule of law to everyone, when dealing with different judicial systems?

Secondly, the child’s best interests are ever present in cases pertaining to children. Looking at how the ECtHR refers to the child’s best interests, who decides what is in the child’ s best interests? Is the decision up to the discretionary power of the Court, or is the decision based on, *inter alia*, statements from professionals? In the latter case, to what extent do professionals influence the Courts decisions?

Thirdly, to what extent are children granted rights under the ECHR? The ECtHR rule in cases concerning children even though children are not specifically mentioned in the ECHR, which entails that children, at least, have some rights under the Convention. How are the children’s human rights adhered to by the Court?

Lastly, I want to look at the relationship between the CRC and the ECtHR. More specifically, if the CRC plays a role in the ECtHRs judgements, and if so – to what extent? Does the CRC affect how the ECtHR assess care order cases?

1.2 Outline of the paper

This thesis consists of eight chapters. Chapter 1 is the introductory chapter, where I have presented my main research question and my supportive questions. In chapter 2, I will present the context in which I am researching. I will start by giving a short presentation of care orders, before presenting the ECtHR, the ECHR and the CRC. Chapter 3 is the framework which supports my theoretical approach. I will present theories surrounding children's rights and interests, and paternalism, which will help to give a deeper understanding of my research questions. I will also present discretion which is the main focus, in my research. In chapter 4, I will present the argument theory that constitute the base of my analysis. In Chapter 5, I will first present my research methods and thereafter present how I gathered my data material. Chapters 6 and 7 are both analysis-chapters, where I present my findings. Lastly, chapter 8 is titled discussion and concluding remarks. I will start by discussing the findings presented in chapter 6 and then the findings in chapter 7, before giving my concluding remarks pertaining to my main research question.

When reading the paper one should be aware of how I refer to judgements from the ECtHR. When I first present a new judgement, I will present the judgements name in its entirety in italic, i.a. *Kutzner v. Germany (2002)*. When referring to judgments that previously have been presented, I will only use the applicants name, i.a. *Kutzner*. Looking at judgements with an anonymous applicant, such as *B. v. the UK (1987)*, I will keep the country in the referrals to avoid any misunderstandings.

Each judgement consists of several sections, hereafter called paragraphs and abbreviated para., which is each numbered by the ECtHR. All references to a specific paragraph of a judgement will be presented as, i.a., *Kutzner (para.65)* or *B. v. the UK (para. 63)*.

Chapter 2 - Context⁵

This thesis revolves around care order cases in the ECtHR. I will start by giving a brief presentation of care orders, before presenting the ECtHR. In order to understand how the ECtHR assess cases, one must have an understanding of the inner workings of the Court. The care orders that have appeared before the ECtHR range from 1987 to 2016. In this timespan

⁵ Parts of Chapter 2 - Context is a rewrite of a paper written by me as part of a preparatory paper to my master thesis. The paper was submitted 25.05.2018 to the University of Bergen as part of a compulsory assignment to pass the subject AORG323.

the ECtHR have gone thru major structural changes. In the following section, I will give a brief presentation of the ECtHR background, then present the changes in the Court that came with protocol 11 and 14 and lastly present the inner workings of the Court today. I will there thereafter give an in-depth presentation of the ECHR and the CRC.

2.1 Care orders

If parents are deemed unfit to care for their child, the social services remove the child from their home. The order to remove a child from their home is called a care order. The ECtHR have stated that a care order should only be issued as a last resort, and can only be justified if it is “in accordance with the law” or “necessary in a democratic society” (ECHR, 1950, art.8). If the child’s health, wellbeing or development are at risk, that would fulfill the necessity demand and a care order would thus be justified (Y.C. v. The UK, 2012).

ECHR (1950, art.8) states that you have the “right to respect for private and family life.” Any direct interference with your family life could be considered a violation of your human rights. However, the ECtHR states that the parents may never be entitled to have measures taken that potentially could harm a child’s health and development (Johansen v. Norway, 1996, para.78, Gnahoré v. France, 2001, para.59).

In short, when the domestic authorities are contemplating whether to intervene and issue a care order, they must balance the biological parents’ rights against the child’s interests. If the biological parents believe a care order to be a violation against their human rights, they can bring their case before the ECtHR. The ECtHR then assess whether the domestic authorities’ decision-making process leading up to the care order, were fair and afforded due respect to the parents’ rights under art.8 of the ECHR (A.D. and O.D. v. The UK, 2010, para.82).

The assessments done by the ECtHR constitute the base of my research.

2.2 European Court of Human Rights

2.2.1 Background:

To enforce the obligation from the ECHR three institutions were established: The Commission for Human Rights, the European Court of Human Rights and the Committee of Minister of the Council of Europe.⁶ If one of the Contracting States breached the ECHR, complaints were filed

⁶ The Committee were composed of the Ministers of Foreign Affairs of the member States or their representatives.

against them either by another Contracting State or by individual applications. Until Protocol No.11⁷ came into force in 1998, the recognition of the right of individual application was optional (CoE, n.d., p.4333).

All complaints were sent to the Commission and were subjected to a preliminary hearing. The Commission then decided whether a case was admissible. If the Commission found the case admissible, it was sent back to the parties to give them the opportunity to reach a friendly settlement. If the parties fail to come to an agreement, the Commission drew up a report with the merits of the case and sent it to the Committee of Ministers. When the case was sent to the Committee of Ministers, the parties had three months to bring their case before the ECtHR. It was only Contracting States that had the opportunity to bring their case before the Court. If the case was submitted by an individual or if the Contracting States did not bring the case before the Court, the Committee decided whether there had been a violation or not (CoE, n.d.).

When the ECtHR was established, it was a part-time court. The Court started out with sessions every three years. With the ever-growing number of cases brought before Court, the sessions became more frequent. The need for a full-time Court was imminent. In 1998 Protocol No.11 came in to force. With it, the Protocol brought big changes to the Court (CoE, n.d., Helland, 2012, s.37).

2.2.2 Changes in the European Court of Human Rights – Protocol No. 11 and No. 14

Protocol No. 11

When Protocol No. 11 came into force in 1998 it changed the entire structure of the ECtHR. One of the biggest changes was that the ECtHR went from being a part-time Court to a full-time Court (ECHR, 1950, art.19).

As part of the structural changes that came with Protocol No. 11, the Commission was abolished, and the ECtHR took over their duties. Art.32 (1) gives the Court jurisdiction in “... all matters concerning the interpretation and application of the Convention and the Protocols...”. Art.32 (2) states that if there are any disputes whether the Court has jurisdiction or not, the Court decides, meaning that the Court has the jurisdiction to deal with any allegations from any of the High Contracting Parties⁸ against another High Contracting Party. States that

⁷ See section 2.2.2 Changes in the European Court of Human Rights, Protocol No. 11, for further information.

⁸ “High Contracting Parties is the representatives of states that have signed or ratified a treaty” Oxford Reference (n.d.) High Contracting Parties.

are not a high contracting parties may not bring cases before the Court, not even if the accused State is a party of the Convention (ECHR, 1950, art.33, Helland, 2012, s.37-38).

Furthermore, individuals were now allowed to bring cases before court (ECHR, 1950, art.34). Art.34 explicitly states that the High Contracting Parties is not to obstruct the exercise of this right in any way. However, there are some limitations to individuals' rights to bring a case before the ECtHR. These limitations are described in art.35 of the ECHR. The idea behind art.35 of the Convention is that human rights should be protected on a national level, meaning that the individual should exhaust all national remedies before bringing their case to the ECtHR. If the national court system fails to secure the applicants rights under the Convention, the ECtHR⁹ (ECHR, 1950, art.35, Helland, 2012, s.38-39). Any application submitted anonymously will not be accepted by the ECtHR. Nor will any cases where the matter in question already has been examined by the Court. However, if there are new circumstances that shed light on a previously examined case, the Court will look at the matter (Helland, 2012, s.39).

Lastly, art.46 of the ECHR (1950) states that "The Contracting Parties undertake to abide by the final judgement if the Court in any case to which they are parties.". To ensure that the Contracting Parties uphold their obligation to the ECHR, the final judgement from the ECtHR are sent to the Committee of Ministers. The Committee then supervise the execution of the judgement (ECHR, 1950, art.46(2)).

Protocol No. 14

Protocol No. 11 helped speed up the processing of cases. In many ways the Protocol was successful in doing so. What no one could anticipate was the unprecedented rate cases submitted to the ECtHR grew at, the following decade after Protocol No. 11 came in to force (Myjer et al., 2010, s.55). It was evident that something needed to be done. The result was Protocol No. 14.

When Protocol No. 14 came in to force, in 2010, it was a new start for the ECtHR. The Protocol aimed to streamline how the ECtHR handled cases. In the work leading up to Protocol No. 14, it was clear that many of the cases submitted to the ECtHR were inadmissible. Other cases were in an area of already well-established case-law. Both of these cases were speedily taken care of, but still took up time from the judges. Protocol No. 14 restructured how many judges that

⁹ This is often referred to as the principle of subsidiarity.

assessed each case and what mandate were given to each of the decision-making bodies of the Court. Prior to Protocol No. 14 it was a three-judge Committee that decided whether or not a case was inadmissible. Protocol No. 14 gave a single judge the power to do the same. When it came to cases within a well-established area of case-law, prior to Protocol No. 14, it was a seven-judge Chamber that handled the cases. After Protocol No. 14 came in to force, it was a three-judge Committee that did the same (Myjer et al., 2010, s.55-56).

Another big change was how the ECtHR could make the Contracting Parties oblige to the judgements from the Court. Before Protocol No. 14, there were no practical way of making sure the Contracting Parties implemented the judgements at a national level. The only possible sanction was exclusion from the Council of Europe, which would be a drastic measure (Helland, 2012, s.40). Protocol No. 14 gave the Committee of Ministers the opportunity to challenge a state before the ECtHR for failing to execute a judgement (ECHR, 1950, art.46(3)(4)).

2.2.3 Judges

There are 47 judges in the ECtHR at present day. One representative from each of the Contracting States. The judges are independent and have no obligation to their nation, even though they are elected from each of the Contracting States (ECtHR, 2018a). The ECHR (1950, art.21(1)) states that judges "...shall be of high moral character and must either possess the qualification required for appointment to high judicial office or be jurisconsults of recognized competence."

There are three measures taken to help ensure that the judges remain independent from the state they are sitting in respect of. First, how the judges are elected. A State does not choose their representative. The State presents a shortlist of three potential candidates to the Parliamentary Assembly of the Council of Europe, which then elects one of the candidates. Meaning, it is the Assembly who elects the judges, not the states (ECHR, 1950, art.22). Second, judges cannot be removed from office by a state. It requires a majority vote of two-third, from the other judges, stating that the judge in question no longer fulfill the requirements of office to remove a judge (Helland, 2012, p.47). Lastly, reelection. Prior to Protocol No. 14 judges were elected for a period of six years with the possibility to be reelected. That opened the door for a theoretical opportunity that a state could choose not to put a judge up for reelection, if the judge in question had voted in disfavor of his nation. Meaning, the reelection process gave the judge a potential incentive to vote favorable for the state he was sitting in respect of (Helland, 2012, p.47). When Protocol No. 14 came into force, the opportunity to be reelected was gone, as were any potential

incentive for the judges to vote in favor for a state party in proceedings before the ECtHR. Judges are now elected for a non-renewable nine years. (Helland, 2012, p.47).

All 47 judges in the ECtHR come from different legal cultures. Arold (2007, p.320) found in her research that the legal cultural differences are irrelevant when it comes to assessing a case. The judges in the court are driven by a common ideal of human rights. The judges believe that unanimity is a sign for higher legitimacy.

2.2.4 Single judge formation, Committees, Chambers and Grand Chamber

To be able to understand how the ECtHR evaluates each case, it is important to understand the structure of the Court. My research is mainly focused on the present day. I therefor limit myself to present the decision-making bodies of the Court as they are at present day.

When a case is submitted to the ECtHR it is first reviewed by a single judge, who decides if a case is admissible. If the case is declared admissible, the judge forwards the case to a Committee or a Chamber for further examination (ECHR, 1950, art.27). When sitting as a single judge, the judge shall not examine any cases involving the Contracting State of which he sits in respect of (ECHR, 1950, art.26(3)).

The Committee consist of three judges. They are given the mandate to either dismiss a case or rule in cases that are in an area of well-established case-law of the ECtHR. Every decision taken by the Committee must be unanimous (ECHR, 1950, art.28). In the Committee, the judge elected from the contracting party may be involved in the proceedings. If the judge is not a part of the Committee, the Committee may invite the judge to take the place of one of the other judges in the Committee at any time in the proceedings (ECHR, 1950, art.28(3)).

The Chamber consist of seven judges. At this point, the judge elected from the contracting party shall be one of the seven judges. The reason for this is to ensure that the Chamber have sufficient understanding of the legal system, in the involved state, to make the correct evaluation of, inter alia, the steps taken by the state to secure the disputed rights (ECHR, 1950, art.26(4), Helland, 2012, p.48-52).

The Grand Chamber consist of seventeen judges. Just as in the Chamber, the judge elected from the state concerned shall be one of the judges. The president of the Court, the vice-presidents and presidents of the chambers shall all sit in the Grand Chamber. However, none of the judges

that were in the chamber that referred the case to the Grand Chamber shall sit in the Grand Chamber (ECHR, 1950, art.(4)(5)).

2.3 The European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms is more commonly referred to as the European Convention on Human Rights (ECHR). Continuing the League of Nations' work on minority protections issues in the years between WWI and WWII, the newly founded Council of Europe (CoE) completed, and signed, the convention in 1950. The ECHR aims to give all humans basic rights and freedoms (ECtHR, n.d.).

The ECHR entered into force on September 3. 1953, after being ratified by 10 of the 14 Member States in the CoE. Today there are 47 Member States in the CoE, all have ratified the Convention (Helland, 2012, s.31).

The preamble of the ECHR states that one of the biggest sources for inspiration was the UN's Universal Declaration of Human rights¹⁰(UDHR) (ECHR, 1950, preamble). Even though the UDHR were the source of inspiration, there are some fundamental differences between the UDHR and the ECHR. Whilst the UDHR is broadly formulated, making it unsuitable for legal action, the ECHR is more to the point. In the ECHR, the Contracting States have concrete obligation they need to fulfil (Helland, 2012, s.32). Each article, and protocol, of the ECHR aim to give all basic rights and freedoms.

“The ECHR grants to everyone the right to life, liberty and security and a fair trial, vouchsafing that no one shall be punished except by law, and prohibits torture, slavery and enforced labour. Respect for private and family life, freedom of thought, conscience and religion, and freedom of speech have been made enforceable rights. It also secures the freedom to assemble and associate with others and the right to marry someone of the opposite sex. In keeping with its underlying premise of equality, the Convention furthermore prohibits discrimination, and the abuse of one's rights as a means to injure others is forbidden. Further rights are protected through various later protocols to the Convention, including, i.a., the right to property, certain rights related to political participation and more extensive procedural rights in criminal, such as the rights to appeal and the right not to be tried twice for the same offence.”(Helland, 2012, s.33).

¹⁰ United Nations General Assembly. n.d. *The Universal Declaration of Human Rights* [Online]. New York. Available: <http://www.un.org/en/universal-declaration-human-rights/> [Accessed 13.03 2018].

The ECtHR was established as a legal system by the ECHR, to help ensure that every State fulfils their obligations to the Convention.

2.3.1 Presentation of central articles in the ECHR

When looking at how the ECtHR weigh children's and parents' rights in care order cases, two articles from the ECHR are central, art.1 and art.8. In the following section I will give a short presentation of the two articles.

Article 1 – Obligation to respect Human Rights

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” (ECHR, 1950, art.1)

Article 1 is the foundation in which the entire convention builds on. The article commits the Contracting States to follow the rest of the articles in the Convention.

Article 8 – Right to respect for private and family life

“Everyone has the right to respect for his private and family life, his home and his correspondence.” (ECHR, 1950, art. 8(1)).

Article 8 is the common denominator of all the care order cases that have appeared before the ECtHR. Part 1 of the article gives everyone the right to respect for private and family life. Part 2 states that the public authorities will not interfere in the exercise of this right, with a few exceptions. Firstly, if you violate the law, the authorities will act. The authorities will also act to prevent crime, if it is the nation's best interest, nation security and the nation's “economic well-being”. Lastly, the authorities will act “... for the protection of health or morals, or for the protection of the rights and freedoms of others.”, (ECHR, 1950, art.8(2)) hereunder children.

2.3.2 Children and the ECHR

Art.1¹¹ of the ECHR states that the rights presented in the Convention shall be granted to everyone. Art.14¹² explicitly mentions that discrimination on any ground is a violation against the Convention. These facts are seemingly ignored with regards to children. At what age a child may enjoy its rights is not mentioned in the ECHR. Nor are there any, written, differences in young children and children nearing adulthood's relation to the Convention. Each case,

¹¹ Art.1: Obligation to respect Human Rights.

¹² Art.14: Prohibition of discrimination.

involving minors, are reviewed separately by the ECtHR. The decision of whether or not a child is entitled to its rights is up to the Courts discretion (Kilkelly, 1999, p.18).

Even though the ECHR does not mention at which age one is considered a child, the ECtHR have thru its rulings defined childhood. The case of *Paton v. The United Kingdom*¹³ raised the following question; should the unborn child, in light of art.2¹⁴, be protected by the Convention? After examining the term “everyone” both in art.2 and in the ECHR as a whole, the ECtHR found that “everyone” was a term that could only be used postnatally. Nevertheless, the Court could not exclude the possibility that in rare cases an prenatal application could occur (Kilkelly, 1999, p.20). At which age childhood ends is clearer than when it begins. Childhood ends the day you are considered an adult in the eye of the law. Meaning when one reaches the age of maturity (Kilkelly, 1999, p.22). At what age one reaches the age of maturity is a matter for domestic law, usually when one turns 18 years of age.

Some articles open for preferential treatment of minors. Art.5¹⁵ states that minors may be detained for the purpose of educational supervision and Art.6¹⁶ states that the press and public may be excluded from any legal proceedings regarding juveniles (ECHR, 1950, art.5 & 6). When looking at rulings from the ECtHR it is clear that the Court is very tolerant about domestic laws and practice that treat children differently from adults. The Court has even stated that is justified to treat children differently from adults, if the aim is to protect children from harm or negative influence (Kilkelly, 1999, p.27).

To summarize, for the Court, childhood begins when one is born and ends when one reaches the age of maturity (18 years of age). The ECHR does not have a section on children rights. Children are protected by the same articles as adults. However, current caselaw shows that the ECtHR acknowledges that children and adult may be treated differently, if it is in the child’s best interest.

2.4 The Convention on the Right of the Child

When talking about children and human rights it would be difficult to ignore the Convention on the Right of the Child (CRC). The CRC is the most ratified human rights convention in history. Every member state of the UN has ratified the agreement, except for the USA. The

¹³ No8416/78 *Paton v UK*, Dec 13.5.80, DR 19, p 244, 3 EHRR 408.

¹⁴ Art.2: Right to life.

¹⁵ Art.5: Right to liberty and security.

¹⁶ Art.6: Right to a fair trial.

USA are, however, signatory to the agreement (CRC, 1990, Unicef, 2005). The CRCs purpose is to protect children against harm and give children basic rights (CRC, 1990). Unlike the ECHR, the CRC have a clear definition of when one is considered to be a child: "...a child means every human being below the age of eighteen years..." (CRC, 1990, art.1).

A difference between the ECHR and CRC is how the two conventions can make sure that the Contracting States comply with the conventions. Until a new optional protocol entered into force in 2014, the UN had no way to enforce that the Contracting States complied with the CRC. The protocol aimed to formalize how each Contracting State enforced the CRC at a national level. The protocol was not an immediate success. Only 10 of the 196 states that have ratified the CRC, ratified the protocol when it entered into force. Today there are 37 states that have ratified the protocol and 22 more that are signatory to the agreement. This is still a relatively small percentage of the total number of states that have ratified the CRC. This means that in regard to most of the Contracting States, the UN have no means to secure compliance with the CRC (Williams and Invernizzi, 2011, p.185, OHCHR, 2014).

2.4.1 Children's rights in the CRC – Protection, Provision and Participation

The rights granted to children by the CRC can be summoned up in three P's; protection, provision and participation.

First, protection. The preamble of the CRC states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care..." (CRC, 1990, preamble). That children are in need of a more extensive protection than what would have been deemed appropriate for adults is considered an accepted truth in modern societies.¹⁷ For these reasons there are articles in the CRC which sole purpose is to protect children's wellbeing¹⁸ (Archard, 2015, p.110-112, Kjørholt, 2010, p.35-38).

Children's basic needs are covered by the provision part of the CRC. The provision rights states that children are entitled to a good, secure, upbringing. All children have the right to "...a standard of living adequate for the child's physical, mental, spiritual, moral and social development." (CRC, 1990, art.27(1)).

¹⁷ See section 3.2 Paternalism.

¹⁸ I.a. The CRC art.19 and art.32.

Lastly, the participation part of the CRC grant children a voice. Art.13 gives the child freedom of expression and art.15 gives the child freedom of association and freedom of peaceful assembly (CRC, 1990, art.13 & 15).

2.4.2 The ECtHR and the CRC

The ECtHR and the CRC are independent from each other. The CRC is not mentioned in the ECHR and the ECtHR does not convict any states for breaching the CRC. Nevertheless, the ECtHR still refers to the CRC as a legal argument for children rights.¹⁹

Even though the CRC is used as a legal argument by the ECtHR, it is not a prominent source. (Skivenes and Søvig, 2016, p.14). As stated in chapter 1, in the work leading up to my master thesis I conducted an interview with Dean Karl Harald Søvig where I asked him about these findings. He then stated that one can divide the ECtHR's references to the CRC in to two groups. The first group is when the ECtHR performs a "courtesy visit" in their judgement. This group of references is like an ornamentation to underline the ECtHR's views and have little to no impact on the outcome of the judgements. The other group of references are the references where the ECtHR changes their view to show responsiveness. The latter is the group that have a real impact on the judgements from the ECtHR.

One of my supportive research questions revolve around the ECtHRs relation to the CRC. I intend to see if the CRC is used by the ECtHR as means to justify its decisions. Discussion surrounding my findings will be addressed in chapter 8 – Discussion and concluding remarks.

Chapter 3 - Building a theoretical framework²⁰

Children's rights are a complex field. Some will even argue that children do not have rights (cf. Archard, 2015, p.59). When looking at how the ECtHR weigh children's- and parents' rights, it is a prerequisite that children have rights. Even so, there are elements that put children in a special position relative to adults and which may potentially influence how the ECtHR assess cases. The common denominator in all the elements presented in the following chapter is children's rights. The elements presented will act as supporting theories for my theoretical framework.

¹⁹ See i.a. case No.2561/94 L v. Finland (2000) or case No.52502/07 Aune v. Norway (2010).

²⁰ Parts of Chapter 3 – Building a theoretical framework is a rewrite of a paper written by me, as part of a preparatory paper to my master thesis. The paper was submitted 25.05.2018 to the University of Bergen as part of a compulsory assignment to pass the subject AORG323.

3.1 Rights theory – do children have rights?

As mentioned in the introduction to this section, some will argue that children do not have rights (cf. Archard, 2015, p.59). I will argue that to say children do not have any rights will be a grossly understatement. However, to what extent a child has rights is actually up for debate.

3.1.1 Will theory and interest theory

Will- and interest theory are two competing theories about right-holders. While will theory focuses on the rights to *do* something, the interest theory focuses on the rights to *have* something. The two theories are seemingly complementary to each other, but they have a distinct difference: "...what it is to have a right, not what one might have rights to." (Archard, 2015, p.58-59).

Will theorists see rights as the opportunity to exercise ones' choice. As a right-holder you are entitled to do as you please. Here there is a difference between children and adults. Children do not have the same opportunity to choose for themselves as adults do. There are laws and regulations restricting children's freedom to do as they please.²¹ When a child legally cannot make a decision on its own behalf, it is the child's guardians that make the decision.²² When one is not able to decide for one self, in the eyes of will theorists, one have no rights. Ergo, according to will theorists children do not have rights (Archard, 2015, p.59). This is a big shortcoming for the will theorists. Keeping in line with their original thinking, will theorist sought out a way to pass this obstacle. If the guardian act on their child's behalf in the same manner that the child itself would act, if able, then the child has exercised its rights thru its representative and consequently has rights (Archard, 2015, p.58-59)

Interest theorists do not see hindering as will theorist when looking at children's rights. Interest theorists sees rights as a protection, or promotion, of ones' interests. Since the child has interests, it has rights. A child does not necessarily have the opportunity to make legal decision, even if the decision influences the child interests. Interest theorists states that if a child cannot decide on its own, others have an obligation to further the child's interest on behalf of the child (Archard, 2015, p.58, Wenar, 2015)..

One of my supportive questions revolve around children's rights. More specifically, to what extent children are granted rights under the ECHR and how the ECtHR adhere to these rights.

²¹ This will be addressed further in section 3.1.2 Children's legal rights.

²² E.g. if you are under the age of 18, you need your guardians' permission to enter into a contract.

If one looks at the assessments done by the ECtHR in care order cases through the eyes of a will theorist, it is a prerequisite that the child's guardian act as the child itself would act, in order for the child to have rights. In care order cases brought before the ECtHR there are at least two parties, the biological parents and the domestic authorities. The domestic authorities issue a care order and deprive biological parents of their parental rights, if they believe it to be in the child's best interests. If one had asked the child if it would like to remain with its biological parents or be placed with an unknown foster family, I would not be surprised if the child in most cases would choose its biological parents. Which would entail that, according to will theorists, the child does not per se have rights.

On the other hand, in the eyes of interest theorists the child has rights if others, i.e. domestic authorities or the ECtHR, fulfil their obligation to further the child's interests on behalf of the child. Meaning that the child has rights, even if it disagrees with its guardians.

As I will explain later in my thesis, the ECtHR have reiterated time and again that the child's best interests are central in the Courts assessments. Which entails that children, according to interest theorists, have rights. There are no interviews of the children in the care order cases I am analysing. Therefore, there is no way of confirming if the child agrees with the ECtHRs assessments and thus have rights according to will theorists. For these reasons, for the remainder of the thesis, I will limit myself to the mindset of the interest theorists. Children do have rights. The question is to what extent?

3.1.2 Children's legal rights

The CRC states that every human under the age of eighteen is considered a child²³ (CRC, 1990, art.1). Nevertheless, to say that a newborn baby inhabits the same physical and mental state as a seventeen-year-old would be absurd. This is taken into account when one looks at children's legal rights. As the child grows older, its rights become more extensive (Barneombudet, 2018). How different states perceive a child may differ. I.e. in Norway one is not permitted to buy or drink alcoholic beverages²⁴ before one turns eighteen (Alkoholoven, 1990, § 1-5). In Norway's neighboring country, Denmark, the age limit to buy and drink alcohol is sixteen (Danske Love, 2008, §2).

²³ See section 2.4 The Convention on the Right of the Child.

²⁴ In Norway one needs to be 20 to buy, or drink, alcohol which has an alcohol-content higher than 22%. While the age-limit for alcohol-content below 22% is 18 years.

The child's age will play a role in the child's involvement in care orders. I.a. in Norway adults must, in a greater manner than before, take into account what the child wants to do in cases regarding the child when it turns 12.²⁵ At twelve the child no longer can be adopted without its consent (Barneombudet, 2018)

3.2 Paternalism

“Paternalism is the restriction of a subject's self-regarding conduct primarily for the good of the same subject.” (Pope, 2004, p.660).

Parents and children's relationship are the classic example of paternalism. The word paternalism derives from the Latin word *pater*, or *paternus*, which means father/fatherly. There are many levels and forms of paternalism. All paternalistic decisions are an intervention in a subject's freedom. There are laws requiring motorcyclist to wear helmets, car drivers to wear seatbelts and there are laws prohibiting drugs. All these laws are paternalistic (Goodin, 1993, p.233). The government has decided that you are not allowed to choose for yourself in these matters, because it is for your own good that you do not use drugs and wear a seatbelt and helmet. Paternalism can be divided in two groups, soft- and hard paternalism. While both soft- and hard paternalism are defined as “...two liberty-limiting principles.” (Pope, 2004, p.667), there are some distinct differences between the two groups.

The difference in soft- and hard paternalism is to what extent it limits a subject's freedom. Soft paternalism states that if a subject lacks the capacity to make a well-considered choice, paternalistic interference is justified. “People do not always mean what they say; they do not always say what they want; and they do not always want what they say they want.” (Elliot, 1993, cited in Pope (2004), p.669, Pope, 2004, p.667). Soft paternalism enables a subject to make a more informed decision (Pope, 2005, p.685). Pope (2005, p.673) uses an example of a man walking towards an unsafe bridge, as an example of soft paternalism. If you stopped the man from walking out on the bridge, your action would be paternalistic on the base of you restricting the man's liberty to walk where he pleases. The man may not have known that the bridge was unsafe and therefore lacked the knowledge to make a well-considered decision. You stopping the man is in the man's best interest and therefore are justified as a soft paternalistic intervention.

²⁵ I.a. where to live if your parents' divorce.

While soft paternalism enables the subject to make a more informed decision, hard paternalism overrides the subject's decision (Pope, 2005, p.685). Dworkin (1995, cited in, Pope, 2005, p.683-684) presents three definitional conditions for paternalism:

“P acts paternalistically toward Q if and only if...”:

1. “...P's act is a limitation of Q's autonomy or liberty.”
2. “...P acts with the intent of averting some harm or promoting some benefits for Q.”
3. “...P acts contrary to (or is indifferent to) the current preferences, desires, or values of Q.”

To make a clear distinction between soft- and hard paternalism in Dworkin's definitional conditions, Pope (2005, p.684) added a fourth condition:

4. “...the agent either disregards whether the subject engages in the restricted conduct substantially voluntarily, or deliberately limits the subject's substantially voluntary conduct”.

Dworkin's three conditions could be used for both soft- and hard paternalism, while Pope's fourth condition can only be considered true for hard paternalism. Hard paternalism, in other words, doesn't help the subject to make an informed choice, it eliminates the opportunity to choose all together (Pope, 2005, p.685).

Looking at paternalistic decision with regard to the field of care orders, the ECtHR have stated that all other options must be considered before taking a child into public care (see i.a. Moser v. Austria, 2006, para.66). Any measure taken by the domestic authorities influencing the biological parents' parental rights, are to an extent paternalistic. If the domestic authorities guide the biological parents to make the right decision for their child, it may be considered soft paternalism. However, if the domestic authorities deprive biological parents of their parental rights, they eliminate the biological parents' opportunity to choose what they believe to be in the child's best interests, and this may be considered hard paternalism.

3.3 Discretion

Discretion is used in many forms every day. In relation to the care order cases, which is the focus of this thesis, discretion has been used both by domestic social services and legal system before the case appear before the ECtHR. Within the ECtHR discretion is exercised by all

decision-making bodies of the Court. In short, discretion is exercised at all bureaucratic levels. In the legal sphere, judicial discretion is an important part of the decision-making. Discretion enables legal rules to be interpreted and therefore makes the rules applicable to the different merits of each case (Hart, 2013, p.652-655, Hawkins, 1986, p.1162-1164).

Dworkin (1967) distinguishes between two types of discretion, weak and strong. Weak discretion means that "...for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgement." (Dworkin, 1967, p.33). This is expressed in two forms. One relates to having authority to make judgements, the other to giving decision-makers final authority to make a non-appealable decision on a particular issue (Magnussen and Skivenes, 2015, p.708). Strong discretion on the other hand relates to decisions not "...bound by any standards set by an authority." (Dworkin, 1967, p.33, in Magnussen and Skivenes, 2015, p.708). If judges are given the authority to decide the best interests of the child with no instruction on how to do this, it would be strong discretion (Magnussen and Skivenes, 2015, p.708, Skivenes and Søvig, 2016).

3.3.1 Judicial discretion

Related to my research, understanding how judicial system exercise discretion, both in domestic legal systems and in the ECtHR, is crucial to understand the outcomes of the care order cases that are the base of my research.

All courts exercise judicial discretion to a certain extent. In the ECtHR, every decision-making body²⁶ exercise judicial discretion. From the single judge formation who exercise discretion when deciding whether a case should be admissible, to the grand chamber where the judges exercise discretion in interpreting the law.

The ECtHR have, at several occasions, pointed out that art.8 of the ECHR does not contain any explicit procedural requirements (see i.a. *McMichael v. The UK*, 1995, para.87). Which entails that assessments made by the Court is based on strong discretion. The ECtHR is the sovereign authority in interpreting the ECHR (Skivenes and Søvig, 2016). As I will explain in chapter 5, the ECtHR base its assessments on established case law.²⁷

²⁶ See section 2.2.4 Single judge formation, Committees, Chambers and Grand Chamber.

²⁷ See section 5.4 Creating a foundation for statistical foundation.

3.3.2 Margin of appreciation

Margin of appreciation is a well-established concept in the ECtHR. The ECHR does not mention to what extent the Contracting States are able to exercise discretion in their decision. One saw the need for balancing the Contracting States' opportunity to make discretionary choices with the ECtHRs requirement to keep control, and the result was the concept called margin of appreciation. In short, margin of appreciation gives the Contracting States an area of which they can exercise discretion (Grant and Barker, 2009, p.361).

Looking at care order, the Contracting States are given a certain margin of appreciation in assessing whether an interference with the biological parents' rights under art.8 of the ECHR where "in accordance with the law" and "necessary in a democratic society" (ECHR, 1950, art.8, Grant and Barker, 2009, p.361). To what extent the Contracting States have margin of appreciation will be duly discussed in chapters 7 and 8.

3.4 In the child's best interest – discretion, paternalism and children.

There are differences between how the law perceives children and adults. As are the how society perceives the latter. Children encounter paternalistic decisions every day.²⁸ Every decision made on behalf of the child, should be in the child's best interest. I will in the following section address children's relation to both paternalism and discretion. I will, in addition give a brief introduction to the topic of the child's best interests.

3.4.1 Paternalism, children and children's rights

There are limitations as to what a child is entitled to do. There are others, *inter alia* guardians, parents and school teachers, that make decisions on behalf of the child on an everyday basis. Children do not choose their own representative. The standard is that when a child is born, its parents becomes its representatives. In the child's upbringing, parents make the decisions they believe to be in the child's best interest. However, who the best person to choose for a child is, is widely discussed (Archard, 2015, p.69).

In his book, *Children: rights and childhood*, Archard (2015, p.69-70) address a series of issues pertaining to the child's guardians-, and the child's own, ability to choose what is in the child's best interests. Firstly, parenthood does not automatically constitute a competence to know what choices would be in the child's best interest. Secondly, it is not given that the choices a child

²⁸ I will explain this further in section 3.4.1 Paternalism, children and children's rights.

would take, if able, are the best choices for the child. Given the choice, a child may want chocolate spread for lunch at school every day, instead of healthy food. Thirdly, is the child bound by the choices made by others? If the child has no real saying in the choices made on its behalf, the choices made would be considered paternalistic, not a prolonged-arm for the child's own wishes.

When parents or the child's representatives make decisions on behalf of the child, they are assumed to do so to further the child's best interests. The idea of representatives furthering a subject's interests are in line with how interest theorists perceives children's rights.²⁹

The child's representative is not totally free to act as they please when they choose what would be in the child's best interest. There are laws and regulation protecting children and consequently restricts some choices for the child's representatives. As written in section 2.4 The Convention on the Right of the Child, the CRC gives children right to, *inter alia*, "...a standard of living adequate for the child's physical, mental, spiritual, moral and social development." (CRC, 1990, art.27(1)). The rights given to the child by the CRC are followed up by domestic law (Barneombudet, 2018, Barnevernloven, 1993). If parents fail to follow the laws and regulation protecting the child, social services will intervene.

3.4.2 Discretion and children

Discretion is dependent on one's ability to reflect over a decision. If one is not able to reflect over the matter in question, one is not able to exercise discretion. The British philosopher John Locke writes about children as strangers in our world. Children experience all things for the first time. Everything is new, everything, including the ability to reason, must be taught (Locke and NetLibrary, 2000, p.60, section 120).

Children do not learn the ways of the world in one evening. They have an incremental learning curve. Children cannot walk, talk, read or write when they are newly born. Nor are children born with a certain political or religious view. By teaching children about how the world works and thru socialization, children get an opinion about what is right or wrong. Thus, children slowly become prepared for a life in our culture and society. However, culture is only a piece in an otherwise large jigsaw puzzle that depicts children's development. To understand a child's

²⁹ See section 3.1.1 Will theory and interest theory.

development, one needs to see the totality in which the child exists (GSI Teaching & Resource Center, n.d., Benhabib, 2002, p.5-11).

Children are prepared for a life where one is responsible for the choices one makes, by the society in which it lives. As explained in section 3.1 Rights theory – do children have rights?, there are limitation as to how a child may choose for itself. For newborns, a guardian makes all the decisions. As the child grows older it is given more rights and therefor may take more decisions on its own accord, and it gets more acquainted with our world and can take more deliberate decisions. It would be farfetched to believe that children are sheltered from all decisions calling for the use of discretion. However, a child cannot exercise discretion in the same manner an adult can, as long as the child's final decisions lay in the hands of others.

3.4.3 The child's best interest – liberation or caretaking

“The child's best interest is the guiding principle when enforcing the law. Providing the child with the security of good adult contact and care is an important consideration when evaluating what is in the child's best interest. The same principle applies to the child's need for having the same adult caregivers over a longer period of time.” (Fylkesnemndene for barnevern og sosiale saker, n.d.).

The best interest of the child is a legal term used to make decisions on behalf of the child (US Legal, n.d.). The question is; how does one decide what is in the child's best interest?

Liberation and caretaking are two different views on how children rights should be enforced. Liberationist believes that children should be liberated and that the restriction on children's rights should be lifted (Archard, 2015, p.64-65). By restricting children's freedom to, *inter alia*, vote, work and travel, liberationist argue that the society discriminates every child. Caretakers do not agree with the argument put forward by the liberationist. Caretakers argue that “...adults may choose paternalistically for children as the latter would choose if they were adults.” (Archard, 2015, p.72). The main question for the liberationist and caretakers boils down to who decides what is best for the child, the adult or the child itself?

Archard (2015, p.80) states that it would be unjust to deny children rights solely on the basis of a child being a child. Age should not be the only factor when deciding if a child should be entitled to certain rights. Age is only one of several factors that must be taken in to consideration when deciding what is in the best interest of the child. That children are given more rights as they grow older is due to the correlation between age, mental state and relevant competence

(Archard, 2015, p.80). In conclusion, when deciding what is in the child's best interest, one needs to take all circumstances affecting the child, including development and age, into account (US Legal, n.d.). There are differences between children of all ages. What is right for one child may be wrong for another.

Chapter 4 - Theoretical framework

Looking at the care order cases that have appeared before the ECtHR, it is clear that the Court exercises strong discretion in its assessments. I intend to conduct an argumentation analysis on the care order judgements from the ECtHR. Looking at the argumentation used by the ECtHR, it will give me an insight into what extent the Court uses discretion, and how the Court weighs the different considerations in each case.

I will in the following chapter present the theories that constitute the foundation of my research. The theories will act as backdrop for, both, my analysis and discussion surrounding how the ECtHR balances children's and parents' rights in care order cases. Any questions as to how the theories will be used, will be answered in chapter 5 – Research methods and data material.

4.1 Discourse theory

Discourse relates to the way we communicate with each other. The words we choose to express our meaning are not arbitrary. By analyzing the words that have been chosen, we can give statements both a cognitive and normative meaning (Bratberg, 2017, p.34-36).

Discourse theory is a diverse field. There are several roads to travel within the field of discourse theory. Two acknowledged discourse theory concepts are Foucauldian and Habermasian. Foucauldian stems from the works of French philosopher and historian of ideas, Michel Foucault, and Habermasian from the works of German philosopher and sociologist, Jürgen Habermas (Stahl, 2004, King, 2009, Allen, 2009). Foucauldian and Habermasian represent two different directions in the field of discourse theory. Habermas and Foucault, both, commented on the others work. Habermas, especially, was critical to Foucault's work (Allen, 2009, p.1-2). Foucault did comment on Habermas work, but passed away soon after and thus ended the debate between the two philosophers (Stahl, 2004, p.4333).

The comparison between Foucauldian and Habermasian did not end with Foucault's death. Secondary literature, discussing the two philosophers' ideas, has kept the debate alive (Allen, 2009, p.1). There has been a tendency that the Habermasians have been more active in the

debate then the Foucauldians. Whilst the Habermasians repeatedly criticize Foucault's work, the Foucauldians seemingly believe that Habermas' work "... is so boring and irritating (so German?) that it is beneath discussion" (Allen, 2009, p.2). As is, the debate is in an interesting deadlock: the Habermasians act as they have won the debate, while the Foucauldians act as they have not participated (Allen, 2009, p.2).

The two concepts are seemingly opposites. However, there are some similarities. Both concepts see discourses as constitutive for our reality (Stahl, 2004, p.4332 - 4334). Both concepts state that political judgements are insusceptible to any final justification, by appeal to a foundational principle. However, while Foucault states that all political judgements must be insusceptible to such justification, Habermas states that only some political judgements need to be the same (King, 2009, p.289). Lastly, both concepts acknowledge power as an important component in discourse analysis. However, whilst Foucault has a wide approach, stating that power is omnipresent, Habermas has a narrower approach, stating that authorities, relations and communicative action may play a role in defining power (Allen, 2009, p.14 - 24).

Habermas' ideas about communicative action and – rationality and his distinction between moral and ethics, separates him from Foucault (Eriksen and Weigård, 2014, Allen, 2009, p.24 - 28). Habermas' ideas on moral and ethics, and the right- or good choices, are intriguing when looking at the care order cases in the ECtHR. For these reasons, I have chosen to focus mainly on Habermas and his ideas.

4.1.1 Communicative rationality and – action.

Max Weber is one of the originators in the field of rationality. In order to understand rational behavior, he looked at action theory. He defines social action as all human behavior in which an individual ties a subjective meaning to (Eriksen and Weigård, 2014, p.34). Unlike the 19th-hundred French philosophers, Weber believed that humans had always, subjectively, been rational. He stated that rationality was not a result of the Enlightenment. He argued that "primitive" men's specific religious rituals in order to favor a specific God, were indeed subjectively rational (Kalberg, 1980, p.1148). Weber divided rationality into four typologies of social action: affectual, traditional, value-rational and purposive-rational.³⁰ (Eriksen and Weigård, 2014, p.34 - 36, Kalberg, 1980, p.1148 - 1149).

³⁰ Purposive-rational is a translation of Weber's term, *zweckrational*. It is also known as mean-end rationality or instrumental rationality.

Table 1 Weber's action typology (Eriksen and Weigård, 2014, p.36).

Social actions:	Subjective meaning include the following elements:			
	Mean	Goal	Value	Consequence
Purposive-rational	+	+	+	+
Value-rational	+	+	+	
Affectual	+	+		
Traditional	+			

In a purposive-rational way of thinking, based on one's own subjective values, one has a complete overview of what goal one wants to reach, what means one ought to use to reach set goal and the consequences of one's actions. Purposive-rational is Weber's ideal-rationality. In a value-rational way of thinking, one does not consider the consequences of one's actions towards reaching a goal. Otherwise, it is similar to purposive-rational. Affectual is an emotion-based rationality. One does know what the goal is, and which means to use to reach the goal, but one cannot control consequences and values. In a traditional way of thinking one does what one always does. One knows what means to use, but goal, value and consequences are unclear (Kalberg, 1980, p.1147 - 1150, Eriksen and Weigård, 2014, p.34 - 37).

Habermas used Weber's thoughts about purposive rationality as the base for his idea about communicative rationality and -action. Habermas saw that purposive rationality could not, by its own, explain all actions in society. He divided actions into three categories: instrumental-, strategic- and communicative action (Eriksen and Weigård, 2014, p.39 - 40). Both instrumental- and strategic action are result-oriented. However, instrumental action is considered a non-social action while strategic action is considered a social action. As result-oriented actions, both actions are driven by a pre-determined goal. The goal is often hidden, and are therefore not, in the eyes of Habermas, normal communication (Ritzer and Smart, 2001, p.203 - 205). Habermas saw the need for a category that covered normal, day to day, communication. Communication that was not aimed at reaching a goal, but a joint understanding as to how society works, namely communicative action. Communicative action differs from instrumental- and strategic, as it is understanding-oriented rather than result-oriented. However, communicative action may also have a goal, but the communication builds on consensus between the participants not negotiation and power struggle (Eriksen and Weigård, 2014, p.38 - 43, Ritzer and Smart, 2001, p.204).

Table 2 Habermas' action typology (Eriksen and Weigård, 2014, p.40)

	Result-oriented	Understanding-oriented
Non-social	Instrumental action	
Social	Strategic action	Communicative action

Habermas defines the distinction between the two social communication methods as "...the difference between mutual understanding and mutual influencing" (Ritzer and Smart, 2001, p.204). The recognition of humans as autonomous and the mutual understanding of how to reach a goal thru communicative action, gives an insight to rational behavior that elopes a result-oriented approach.

Habermas defines communicative action meaningful interaction between persons (Edgar, 2006, p.21). The term involves both language- and gesture-based interactions. A key word, however, is meaningful. Habermas states that if an interaction should be considered meaningful there are some conditions that need to be fulfilled. He sums up the conditions in a term he calls validity claims. The four conditions are: truth, rightness, truthfulness and meaning (Edgar, 2006, p.163 - 165, Eriksen and Weigård, 2014, p. 53 - 57).

Habermas' first condition is that the statement one utters needs to be true. If I state that it is sunny outside when it is raining, my statement is not true and therefore a violation against Habermas' first validity claim (Edgar, 2006, p.164). Habermas' second claim relates to where and when one utters a statement. Telling your friend about your day is not a violation against Habermas' claims. However, stopping a stranger in the street to tell about your day is. When talking about rightness it is important to remember that situations may be cultural conditioned. In some cultures, it may be inappropriate to enter a near empty bus and choose to sit next to one of passengers, while in other cultures it may be rude not to. In other words, the actions need to be considered right in a normative context (Eriksen and Weigård, 2014, p.55, Edgar, 2006, p.164 - 165). When it comes to the third condition, Habermas recognizes that the interaction may be ironic, a lie, a joke or something similar. If the recipient of the action does not get the irony or the joke, a continued conversation may be difficult. If one is repeatedly caught lying, the recipient of the action may not believe one is truthful. If the recipient does not trust you, meaningful interaction is difficult (Edgar, 2006, p.164). Lastly, if one does not speak the same language, a conversation is problematic. As is it, if one does not share any common interest. In order to sustain a conversation, all parties must consider the content of the conversation

meaningful. If one of the parties in the conversation fail to keep interest in the conversation, it will not be sustainable (Edgar, 2006, p.164 - 165).

4.1.2 Habermas' three worlds

Habermas stated that in order to understand human behavior, a purposive-rational way of thinking is not sufficient. One needs to see purposive rationality in light of the “world” the actors live in. Habermas divided the social sphere in to three worlds; the objective-, the social- and the subjective world (Eriksen and Weigård, 2014, p.46).

Table 3 Traits with Habermas' three worlds (Eriksen and Weigård, 2014, p.51)

	Content	Actor-attitude	Actor/world relation	Rationality criterion	Action orientation
The objective world	Existing subject matters	Objectifying	Cognitive	Truth	Understanding-oriented
			Teleological	Efficiency	Result-oriented
The social world	Norm-driven relationships	Norm conformity	Norm regulated	Rightness	Understanding-oriented
The subjective world	Inner experiences	Expressive	Dramaturgical	Truthfulness /authenticity	Understanding-oriented

The objective world considers facts. There are two direction within the objective world, cognitive and teleological. If the actors understanding of the facts correspond with the actual facts, the actor will consider the facts as true and correspond accordingly. The teleological approach considers facts as a mean to gain the results one wants. With this approach, facts can be manipulated, to an extent, in order to achieve the desired goal (Eriksen and Weigård, 2014, p.46).

The social world is related to the norms in society. As part of the society, one is part of a group. Within the group one lives, there are unwritten rules as to how the group believes one ought to behave. Breaking these unwritten rules may not cause any legal ramifications, however there may be other consequences within the group one lives. The trueness of what one ought to do may be morally conditioned (Habermas et al., 1999, p.38-39, Eriksen and Weigård, 2014, p.46-48)

The subjective world relates to one's inner sphere. One's thoughts, believes, perceptions, feelings and personally experiences. Everything that relates to one being oneself. Within this

world, the actor 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. Actors may be influenced by society. Manipulative behavior from other actors, commercials and political propaganda may all influence an actor. The perception of the actor must give a truthful picture as to how the actor's inner thoughts and beliefs are, not what they have been influenced to be. In other words, the thoughts and beliefs of the actor need to be authentic in order to fulfill the criteria for the subjective world (Eriksen and Weigård, 2014, p.48-51).

Even though Habermas has a clear distinction between the three worlds, they may. In certain situations, there may be ethical, morally and legal reasons to act in a certain way. E.g. if you murder someone. A murder is against the law, and thus a violation against the written rules in the objective world. Seen from the viewpoint of the social world, the murder would be considered an un-moral action and therefore be a violation against the norms in society.

4.1.3 Discourse ethics

Following Habermas' ideas about the three worlds I will distinguish between four discourses, legal-, pragmatic-, ethic- and moral discourse. The legal- and pragmatic discourse is closely related to the objective world. The legal discourse is focused around a truth rationality and is understanding-oriented, while the pragmatic discourse is result-oriented and focuses on efficiency, or in other terms purposive rationality. Moral discourse relates to the social world and ethic discourse to the subjective world, both are understanding-oriented.

Discourse ethics basically boils down to two key principles, the universalization principle (U) and the discourse principle (D) (Thomassen, 2010, p.90-91).

(U): "All affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those known alternative possibilities for regulation)." (Outhwaite and Habermas, 1996, p.185).

(D): "Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity *as participants in a practical discourse.*" (Outhwaite and Habermas, 1996, p.185)

When focusing on moral, not legal, norms, it is important that all actors engaging in the action have a joint understanding of the norms in question. (U) Functions as a test for moral norms. If

all affected by the norm accepts its ramifications, the norms is considered legitimate and the actors will come to a consensus (Outhwaite and Habermas, 1996, p.185-186, Thomassen, 2010, p.91). If the norm fails the test, meaning that if one or more of the actors affected by the norm does not accept the ramifications, the norm is not considered legitimate and the actors will not come to a consensus. Habermas underlines that a society cannot function without moral, and legal, norms (Habermas, 1996, p.233-234). While (U) is considered a test, (D) is considered the discourse ethics tenet (Eriksen and Weigård, 2014, p.102).

In line with the principle of (U) and (D) is human’s ability to argue, in order to make their case heard. The principle of arguing is related to communicative rationality. The idea behind communicative rationality is that if one can argue and take on the ideas and thoughts of others, one can come to a consensus – depending on which rationality criterion one focuses on (Habermas et al., 1999, p.105). The pragmatic discourse however, as it is result-oriented, are not as susceptible to the idea behind communicative rationality

There is a difference as to how one expects a person to react in the four different discourses. When one is in the objective world, that does not affect the actor at a personal level. The actors objectify their belief and focus on how to achieve their desired goals. While in the subjective- and social world, your moral and ethics – your inner being – may be challenged. Taylor (1985) defines the difference between the choices made in the objective world, and in the moral- and ethic world as weak and strong assessments. The idea is that an actor 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. However, strong assessments do. Strong assessments may not cause you to break the law or to do something that seems natural to other, however they may challenge your belief.

Table 4 Combining Taylors assessments with Habermas’ discourses

		Discourses	
Weak assessments	Legal discourse	Pragmatic discourse	
	Ethic discourse	Moral discourse	

The legal discourse has its roots in the objective world. Outhwaite and Habermas (1996, p.131) explains the objective world as “the world of external nature”. While the other three discourses are practical discourses, the legal discourse is theoretic (Eriksen and Weigård, 2014, p.111).

Thru conversation and existing theories and descriptions, the legal discourse aims to unveil facts. Thru this discourse, Habermas aims to see facts thru the perspective of adjudicators (Baxter, 2011, p.106). The legal discourse's normative ideal is the truth (Eriksen and Weigård, 2014, p.111).

The pragmatic discourse focuses on how to most efficiently reach one's goal. It is based in the objective world. Unlike the other three discourses, pragmatic discourse is based on strategic action, not communicative action. This means that Habermas' validity claims are not present in this discourse. In this discourse the actors focus on reaching their goals. There may be a one-way communication where one actor manipulates his/her surroundings in order to achieve the desired goal (Outhwaite and Habermas, 1996, p.130). The pragmatic discourse normative ideal focuses on what is useful or/and appropriate. The discourse itself aims to show rational decisions (Eriksen and Weigård, 2014, p.111).

The moral discourse has its grounding in the social world. It uses communicative action in order for the actors to come to a consensus. 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 of normative conflicts. The discourse's normative ideal focuses on what is the right thing to do (Outhwaite and Habermas, 1996, p.130-131, Eriksen and Weigård, 2014, p.111).

The ethical discourse is rooted in the subjective world. Outhwaite and Habermas (1996, p.131) explains the discourse as "My world of internal nature". Meaning that the discourse revolves around your ideas, values and principles for way of living. In other words, your culture (Eriksen and Weigård, 2014, p.109-110). The discourse uses communicative action in order for the actors to understand each other and come to a consensus. The discourse itself aims to give guidance towards personal self-realization. Its normative ideal is to do what is good (Eriksen and Weigård, 2014, p.111).

Table 5 Summary of Habermas' four discourses (Eriksen and Weigård, 2014, p.111)

Discourse	World	Action	Traits with the form of argumentation			
			Discourse type	Content	The discourse's task	Normative ideal
Legal	objective	conversation	theoretically	theories, descriptions	unveil facts	the truth
Pragmatic	objective	purposive-rational	pragmatic*	technologies, strategies	indicate rational choices	the useful/appropriate
Ethic	subjective	dramaturgical	ethical-existential*	values, principles for way of living	"clinical" guidance towards personal self-realisation	the good
Moral	social	normregulated	moral*	norms	just solution of normative conflicts	the right

*practical discourses

I will, in chapter 5 – Research methods and data material, operationalize Habermas' discourse theory in relation to the discourses in the ECtHR.

Chapter 5 - Research methods and data material³¹

The raised research question aims to answer how the ECtHR weigh children's and parents' rights in care order cases. - In the following chapter I will explain the methods I use to answer the research question and how I gathered the necessary data. I will first present the intended research method, before presenting how I gathered my data material. Any questions about validity and reliability surrounding my research method and data gathering will be addressed at the end of the chapter.

5.1 Qualitative- or quantitative method?

When choosing a method, there are two main routes to choose: quantitative- or qualitative method. While quantitative method gives a statistic generalization of the research question being studied, qualitative method gives an analytic description (Grønmo, 2016, p.144).

My data material is mostly qualitative. Grønmo (2016, p.138) state that data expressed by text is the most qualitative type of data there is. In my research, I will use written judgements from the ECtHR as my data material. However, some of my data has a quantitative side to it. As I will explain later in this chapter, I intend to look at the judicial precedent set by the ECtHR.

³¹ Parts of chapter 5 – Research methods and data material was originally written, by me, as part of a preparatory paper to my master thesis. The paper was submitted 25.05.2018 to the University of Bergen as part of a compulsory assignment to pass the subject AORG322.

Which judgements, and which paragraphs are most referred to and which judgements are most referring to others are all metric, quantitative, data.

In my research, I will mainly use qualitative method. When ruling, the judges of the ECtHR use judicial discretion. Nuances in the Courts statements, regarding as to how a case has been assessed, may be difficult to pick up in a quantitative study. All quantitative data will, therefore be used as a supplement to the qualitative data.

5.2 Analysis method –discourse analysis and descriptive statistic

A discourse analysis aims to unveil how a text is structured by a larger pattern of thought. By reading “between the lines”, one can interpret what the author really meant. It is done by dividing the text in to pre-determined categories, inter alia, values, viewpoint or arguments. This analysis method makes it possible to compare different texts to each other (Bratberg, 2017, p.185, Grønmo, 2016, p.142).

In order to shed light on my research question I will conduct a discourse analysis. I will use Habermas’ thoughts about discourse ethics to categorize arguments from the ECtHR.

All arguments stating facts, references to how the ECtHR should assess a law and any legal references are all coded in the legal discourse. Arguments that indicate rational choices and knowledge are coded in the pragmatic discourse. Any argument referring to ones’ inner self, like interests, feeling, and values are coded as ethical arguments. While any argument referring to norms in civil society are coded as moral arguments.

Some arguments can arguably, be placed in more than one discourse category, e.g. there are arguments with a legal-, pragmatic- and ethical side stating that the goal of any care order should be to reunite the child with its biological parents. Discussion surrounding the potential diversity of the arguments will be addressed in chapter 8 – Discussion and concluding remarks.

Combined with the discourse analysis, I will use descriptive statistic. As mentioned in section 5.1 Qualitative – or quantitative method, there are some relevant quantitative data. Grønmo (2016, p.289) explains descriptive statistics as a mean to analyze a single variable. By looking at how many percent of judgements that are citing, *inter alia*, a judgement or a paragraph, I will be able to see the impact each judgement has had on the care order field. I will also use descriptive statistics to discuss and compare the findings in the discourse-analysis.

5.3 Gathering data - Care order cases in the ECtHR

All judgements from the ECtHR are entered into a database called HUDOC. The HUDOC database provides access to the case-law of the ECtHR³², the European Commission of Human Rights³³ and the Committee of Ministers³⁴ (HUDOC, 2018). Decisions made in a single judge formation are not published, nor are Committee decisions prior to April 2010³⁵. Decisions made by the Commission prior to 1960, exists only in hard copy in the ECtHR's archives (HUDOC, 2018).

I received an existing data material reviewed by Marit Skivenes and Karl Harald Søvig. Which included all care order cases that had appeared before the ECtHR from 1959 – 2016. The search itself and the first processing of the material were done by research assistants. The following is a description as to how they gathered the information and a presentation of their findings.

Information about the care order cases in the ECtHR is all searchable in the HUDOC database. The following restrictions were made to the search: “Grand Chamber”, “Chamber”, “art.8”³⁶, “English” and “sort by relevance”.

The search words used were “child” AND “care”. This resulted in 370 cases. Of the 370 cases, 35 were found to be “secure cases”, meaning that it was clear that it was a care order case, whereas 24 cases were marked as “uncertain cases”. 11 cases were marked as “struck out of list”, meaning that the parts involved had reached a friendly agreement before the ECtHR ruled in the case. The remaining cases were dismissed as they did not involve care orders.

The 11 cases that were “struck out of list” are not relevant in this research as I'm only looking at cases where the ECtHR have ruled.

That leaves 59 cases, where 35 cases were considered “certain” and 24 “uncertain”. The material has been jointly reviewed, manually, by Marit Skivenes and Karl Søvig. After the review, they were left with 44 cases that involved care orders for the time period 1959 – January 2016. It is these 44 cases that constitute the base for my data material.

³² Grand Chamber, Chamber and Committee judgements and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note.

³³ Decisions and reports.

³⁴ Resolutions.

³⁵ Just before protocol 14 entered into force.

³⁶ Art.8 – Rights to respect for private and family life.

The following table is an overview over which country the 44 care order cases originate from:

Table 6 Overview of cases and their country of origin

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

There are in total 18 countries that have care order cases brought before the ECtHR. As the table shows, three countries stand for near half of the cases brought before the Court.

5.4 Creating a foundation for statistical analysis

This thesis aims to examine how the court weigh children’s and parents’ rights in care order cases. As previously stated, the Court use established case law when justifying their assessments. Analyzing judicial precedent set by the care order judgements will show if there has been a development in the case law from the aforesaid judgements. I.a. does the ECtHR use the same argumentation at present date as it did in 1987?

Looking at the statistics related to the care order judgements, one senses the development in the care order field. To get a grip on how the ECtHR balance children’s and parents’ rights in their rulings, one must look at the judgments that have had most impact on the care order field. By examining the impact each judgement has had on the care order field and looking as to who is in favour in the paragraphs being referred to, one can see if there has been a visible change in how the ECtHR assess cases. The statistics will give an indication on which judgements and paragraphs that have had the largest impact.

5.4.1 Finding the descriptive statistics – the cases

I will distinct between two types of impact, generic and context-based. Generic impact is impact on the general merits that are similar in all care order cases, that transcends the merits of a single case and are applicable to a larger field. Such as the fact that in all care order cases, a child has been taken into public care. Context-based impact is impact on the merits that lay outside the generic field, i.a. unique merits for the case in question. If the merits of a case are unique for the case in question and not applicable to a larger field, the case may have huge impact on cases to come, with similar merits, but not on the care order field as a whole.

When looking at which cases have made the biggest impact I examined which cases had created judicial precedent for cases to come and thus established case law. Case law is defined as law created by the courts (ICLR, n.d.). Meaning, that when the court rules in a case, that case may influence similar cases to come. Case law helps secure that everyone is treated similar.³⁷

When examining the impact a judgement has had on the field of care orders, I have not limited my search to the references that are relevant for my research. There is a possibility that a case has significant impact in the field of care orders on merits that lay outside my research area. Even though the merits are not relevant for my research, they can still have generic impact on the care order field. In order to ensure that I could see which cases have had the biggest impact on the care order field, as a whole, I included all references where the 44 cases referred to each other.

My data material stretches over three decades. In order to compare judgement from 1987 with judgements from 2016 I looked at the judgements referral-rate. To find the referral-rate, I looked at how many times a judgement had been referred to and divided the number on potential cases that could refer to a judgement. In other words, I looked at how many percent of the cases that potentially could refer to a judgement actually did so. As I am trying to see how great an impact a judgement has on the field of care orders, I am not interested in the number of times a case has been referred to. I am interested in how many different judgements have referred to the case in question. The reason for this is that if a judgement refers to a case several times, the case has great impact on the judgement in question, but not on other judgements. Many references from a judgement to another may also indicate that there are similarities between the merits of the two cases in the judgements. By seeing how many unique cases refer to a judgement, one may get an indication as to how generic the merits of the judgement are. In other words, many different cases referring to a judgement equals large applicability. My interests are on the case law field as a whole, not how a case may or may not influence single judgements. For these reasons each case is only counted once, regardless of the number of references, when finding the referral rate. The referral rate indicates to what extent a judgement has established case-law in the care order field.

The next step in assessing the impact a judgement has had on the care order field is to see how many times the judgement refers to other judgements. If the judgement has several references

³⁷ See also section 5.5 Creating a foundation for discourse analysis - judicial precedence.

to other judgements that may indicate either that the judgment finds itself in an area of well-established case law or that there is a domestic tradition in the State that are a part in the case to anchor the judgement in case-law (Lupu and Voeten, 2018, p.29). For the same reasons as aforesaid, I have only counted how many separate judgements a case refers to. Meaning, that if a case has multiple reference to one judgement, it is counted as one. What is interesting is looking at how many judgements a judgement refers to.

By comparing a judgements referral-rate with the number of times it has referred to others, one can get an indication as to how the judgement has impacted the care order field. I.a., if a case has a high referral-rate and refers to few other judgements that may indicate that the judgement has brought something new to the care order field, or if a judgment has a low referral-rate and refers to several other judgements, that this may indicate that the judgment is in an area of well-established case law.

5.4.2 Finding the descriptive statistics – the paragraphs

In order to identify the paragraphs that have a broad impact on the field of care order cases, I examined how many times each of the paragraphs in the judgements were referred to. If a paragraph is often referred to it indicates that the content of the paragraph is considered generic.

To see if there has been a development in how the ECtHR weigh children's and parents' rights in care order cases, I categorized the paragraphs being referred to in a judgement according to the timespan of which they have been referred. By combining the timespan which the paragraph has been referred to with who the paragraph favours³⁸, one can get an indication of any development in the ECtHRs assessments. Meaning, if there has been a change in the argumentation used by the ECtHR from one year to the next, i.a. a change in the number of arguments in favour of either the child or parents, this can indicate a development in the ECtHRs assessments.

5.5 Creating a foundation for discourse analysis - judicial precedence

In my research, I am interested in the argumentation used by the ECtHR when ruling in care order cases. I intend to conduct a discourse analysis, where I categorize arguments presented by the ECtHR in their judgements. In order to delineate my search for arguments, I will limit

³⁸ I.a. the child or biological parents.

myself to look at the arguments that have had most impact in the field of care order cases, namely, the arguments that have created judicial precedence.

When ruling in a case, the ECtHR use previous judgements as a mean to justify its decision. By using established case-law, the Court secure that all applicant is treated equally. However, this only applies in cases were the merits of the case are of sufficient similarity (Lupu and Voeten, 2018, p.1, LawTeacher, 2013).

An important part of judicial precedent is the principle of *stare decisis*. This means that inferior courts are bound by the legal principles stated by superior courts. E.g. In the ECtHR, chambers are bound by judgements made by the grand chamber (LawTeacher, 2013). This principle is evident in the structural changes made to the Court when protocol No. 14 came into force. The three-judge committee can only rule by using existing case-law in areas that are well-established.³⁹

The ECtHR, as an international court, has one factor that domestic courts do not: cases originate from separate countries, each with its own domestic laws and regulations. However, when the ECtHR use judicial precedence, country-specific factors do not play a part in the Courts decision. The Court solely focus on legal-issues in the case (Lupu and Voeten, 2018, p.27).

Country factors do, however, play a role when it comes to writing the judgements. If the domestic courts have a tradition of anchoring their judgements in case-law, the ECtHR do the same when ruling in cases concerning those legal systems (Lupu and Voeten, 2018, p.29).

I am only looking at the judicial precedence set by the 44 care order cases. As aforesaid, I want to examine the arguments the ECtHR use to justify their decisions, when ruling in care order cases. These are the arguments that have had an impact on how the Court assesses care order cases. For these reasons, I have omitted all references to judgements that are not in the field of care orders from my data material. For the remainder of the thesis, when referring to judicial precedence, it is limited to precedence created by one of the 44 judgements in my data material that is referred to by at least one of the other judgements.

Of the 44 care order cases that have appeared before the ECtHR, 40 cases use judicial precedence in their argumentation. Three of the four cases that do not use judicial precedence are all from 1987. They are *B. v. The UK*, *R. v. The UK* and *W. v. The UK*. These were among

³⁹ See section 2.2 European Court of Human Rights.

the first five care order cases that appeared before the Court. In other words, there were a limited amount of care order judgements that could potentially be referred to. The last judgement that does not use judicial precedence in its argumentation is *R.K. and A.K. v. The UK*. However, all four judgements that do not use judicial precedence in its argumentation are referred to by others. Which means that the four judgements have created precedence for cases to come. The referral-relationship between the 44 judgements will be presented in section 6.1 Statistical findings – the cases. See also appendix D for table.

5.5.1 Finding the judicial precedence

When I read the judgements, I found that different judgements had different reference styles, when referring to past cases, e.g. “case of Johansen v. Norway”, “Johansen v. Norway judgement of 7 August 1996” and “Johansen v. Norway, 7 august 1996”. The common denominator for all references is the applicant and country. I therefore used the applicants name and country, e.g. “Johansen”, as a search phrase. This showed me all the cases that were referring to *Johansen v. Norway (1996)*. However, it did not give an exact number of referrals. If a judgement refers to a case more than once, the second reference may be written differently, e.g. “see Johansen, cited above”. Since the country is omitted from the reference, it was not picked up by my initial query. To bypass this hindering, I performed a second query, only using the applicants name. I then saw how many times the applicants name was mentioned in the judgements which were referring to the case in question. In cases where the applicant was identified by a single letter, and therefore the search phrase was a single letter, the query picked up more than only the references I was seeking. To ensure I only wrote down the references to the cases in question, I manually went thru the result from each query.

In my queries I found that five cases, *B. v. The UK*, *R. v. The UK*, *O. v. The UK*, *H v. The UK* and *W. v. The UK* often were referred to, in different constellations, as one. E.g., *Gnahoré v. France (2001)* refers to “... the W., B. and R. v. The United Kingdom judgements...” (*Gnahoré v. France, 2001, para.52*). To ensure I did not miss any references, I went thru all references to the five cases an extra time.

When looking at *Olsson v. Sweden (1988)* I found that there were two separate cases. “Olsson v. Sweden” No.1 from 1988 and “Olsson v. Sweden” No.2 from 1992. My interests is limited to case No.1 from 1988 as this is a care order case. I therefore dismissed all references to the No.2 case from 1992.

I entered all the data I had gathered in to a cross-table. This way I could see how many times a case had been referred to, how many separate cases that had a reference to the case and how many times that case had referred to other cases. See appendix D for table.

5.5.2 Coding the judicial precedent – initial-categories

In total there are 153 paragraphs, being referred to 465 times by 34 judgements. 10 judgements were not referred to by any other judgement. Not all paragraphs are relevant for my research. To delimit the paragraphs according to my research area, I created five categories. The five categories, hereafter called the initial-categories, are an initial coding that reflects the essence of each paragraph as a whole:

1. Pro-child
2. Pro-parents
3. Biological family
4. The Court
5. Other

The pro-child code covers every paragraph in favor of the child. The paragraphs in this code are all focused around the child's best interest. 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 UK*, 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 UK*, 1987, para.63); "The Court recalls that a fair balance must be struck between the interests of the child and those of the parent (see, for example, the *Olsson v. Sweden* judgment (no. 2) of 27 November 1992, Series A no. 250, pp. 35-36, para. 90) 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). In total there are 30 paragraphs in favor of the child, from 17 different judgements.

The pro-parent code covers all paragraphs in favor of the biological parents. Several of the paragraphs are focused around the fact that care orders are a temporary measures; “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 UK, 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). Other paragraphs focus on the fact that even a mother that has been deprived of parental rights have the right to apply to the ECtHR on her child’s behalf, due to being the child’s biological mother; “Even where a mother has been deprived of parental rights - and indeed that is one of the causes of the dispute which she has referred to the Court - 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 code is diverse. The common denominator is that in one way or another, biological parents are seen in a favorable light. In total there are 32 paragraphs in favor of parents, from 18 different judgements.

The biological family code covers paragraphs in favor of not splitting up a biological family. One third of all paragraphs in this category includes 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 UK, 1987, para.60). This code also includes paragraphs that states that care orders are temporary measures and that the ultimate aim is to reunite the biological family: “It follows that the interest of the child dictates that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to “rebuild” the family. In the interest not only of the parent concerned, but also of the child, the ultimate aim of any “care order” must be to “reunit[e] the ... parent with his or her child” (Gnahoré v. France, 2001, para.59); “The Court recalls that in cases like the present a parent’s and child’s right to respect for family life under Article 8 (art. 8) includes a right to the taking of measures with a view to their being reunited ...” (Margareta and Roger Andersson v. Sweden, 1992, para.91). This code also includes paragraphs stating that parent’s and children’s interests should be weighed against each other; “...a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child” (Johansen v. Norway, 1996,

para.78). In total there are 29 paragraphs in favor of biological family, from 19 different judgements.

When looking at the paragraphs, it was clear that a greater number of paragraphs were about the ECtHRs role in assessing cases. I therefore created a code which I called Court. The Court code covers all paragraphs concerning the ECtHR assessments. This code contains significantly more paragraphs than the other four codes. In total there are 54 paragraphs, from 18 different judgements, in the Court code. The paragraphs themselves vary in content. Some refer to the Contracting States margin of appreciation “...in determining whether an interference is “necessary in a democratic society” or whether there has been breach of a positive obligation, the Court will take into account that a margin of appreciation is left to the Contracting States” (R. v. The UK, 1987, para.65(d)), “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), others refer to the ECtHRs relation to domestic law: “The phrase “in accordance with the law” does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law; it thus implies that there must be a measure of protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by, inter alia, paragraph 1 of Article 8 (art. 8-1)” (Olsson v. Sweden (No.1), 1988, para.61(b)), “It is not however the Court’s role to examine domestic law in the abstract.” (P. C. and S. v. The UK, 2002, para.122). All in all, the Court-code covers every paragraph that creates a precedent as to how the Court should act and assess a case.

I created the last code, other, in order to catch seemingly interesting paragraphs that do not fit into the four other categories. The content of the paragraphs varies from biological parents contact with their children, while the children are in public care, to foster parents contact with the children: “Moreover, telephone conversations between family members are covered by the notions of “family life” and “correspondence” within the meaning of Article 8” (Margareta and Roger Andersson v. Sweden, 1992, para.72), “The applicants also recalled that for the last six years the rationale for the continuation of the access restrictions 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. For the authorities, it had been sufficient that the children were aware of their parents’ existence. As this justification had once passed the administrative courts’

proceedings it had been used for the reasoning of the rest of the restriction decisions from ever since.” (K. and T. v. Finland, 2001, para.166), “...predominant in any consideration of this aspect of the present case must be the fact that the 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. This is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences.” (W. v. The UK, 1987, para.62). In total there are 25 paragraphs, from 15 different judgements, in the other code.

There are paragraphs that have been coded in more than one category. I.a. if a paragraph could be interpreted to be both pro-child and biological family, it has been coded in both categories. The same goes for paragraphs that have more than one section. If different parts of the paragraph fit different categories, they are coded accordingly. See appendix C for a complete overview of the references coded in more than one category

After the initial coding I was left with 92 paragraphs, being referred to 312 times, by 27 different judgements. These paragraphs constitute the base of my analysis.

5.5.3 Discourse analysis – coding and categorizing the arguments

I will in the following section present how I intend to conduct my discourse analysis and compare argumentations across the five initial-categories.

As stated in section 5.5.2 Coding the judicial precedent – initial categories, the paragraphs coded in each initial-category reflect the essence of the paragraph being referred to as a whole. However, the initial-category does not necessarily reflect all arguments presented in the paragraph. In other words, in the paragraphs in each of the initial-categories there may be arguments that contradict the essence in the paragraph, i.a. in a paragraph coded in pro-child category there may be arguments going in favor of the parents.

Keeping in line with Habermas’s ideas about discourse ethics⁴⁰, I will look at the sentence structure in each paragraph and code all arguments in the paragraph in the appropriate discourse-category. To distinct between arguments coded in the four discourse categories, I have named them accordingly to the discourse: legal arguments, pragmatic arguments, ethical

⁴⁰ See section 4.1.2 Habermas’ three worlds and 4.1.3 Discourse ethics.

arguments and moral arguments. Some arguments are ambiguous, meaning that they could be placed in more than one discourse category. The ambiguity of the arguments will be addressed in chapter 8 – Discussion and concluding remarks.

The legal arguments, rooted in the objective world, aim to unveil facts. Arguments coded as legal arguments all revolve around rights given by either the ECHR or domestic law. The pragmatic arguments, rooted in the objective world, indicate rational choices. Arguments coded as pragmatic arguments are arguments that show how the ECtHR aim to reach their desired goal, most efficiently. The ethical arguments are rooted in the subjective world. The subjective world revolves around one's inner experiences. Which entails that the arguments coded as ethical focus on the interests of the children and the biological parents. The moral arguments are grounded in the social world. Moral arguments focus on the unwritten rules in society. Meaning, the norms. Society in each Contracting State has its own culture and thus its own norms.⁴¹

When looking at the arguments, it is clear that the content of some arguments is relevant, and thus repeated, across each of the initial-categories. In order to visualize how arguments are used crosswise the initial-categories, I categorized the arguments according to their content and created tables. I.a. arguments stating that a care orders ultimate aim is to reunite biological parents and child, have been categorized as “reunite”.

One of the initial-categories, “other”, is a mix of references that did not fit into the other four categories, which in turn, separates it from the other initial-categories. Direct comparison between “other” and the other four initial-categories are, for these reasons, not relevant at this point. I have therefore omitted the “other” category in the comparison of argument-categories.

Since some paragraphs are coded in more than one initial-category, that lead to arguments being repeated across the initial-categories.⁴² As I am coding the argument from each of the initial-categories in the fitting discourse category, arguments found in paragraphs coded in more than one initial-category, can potentially be coded more than once. In order to ensure that the arguments are only counted once, I examine how many unique arguments one finds in each of the four discourses. Meaning that if an argument from a paragraph, which is coded as i.a. both pro-parent and the Court, is coded as legal twice, it will only count as one unique argument.

⁴¹ See table 3, section 4.1.2

⁴² See appendix C for complete overview of paragraphs coded in more than one initial-category.

5.6 Validity and reliability⁴³

In the core of every research stands the question of validity and reliability. Validity tells whether or not your research method is the best way of answering your research question. High validity means that the chosen research method is well suited to answer the research question, low validity means that you are researching something else than what you are supposed to be researching (Grønmo, 2016, p.241-242). Reliability on the other hand tells whether or not the data gathered correspond with other collections of data about the same phenomenon. High reliability means good correspondence, while low reliability means that there are no correspondence between the collected data (Grønmo, 2016, p.242).

In qualitative research, validity means that the researches use different procedures to check for the accuracy of the findings. Reliability means that the researches approach is both accurate and consistent (Creswell and Creswell, 2018, p.199-202)

Validity and reliability complement each other. By looking at both factors one can tell whether the quality on the data material is good or not. High reliability is a prerequisite for high validity. However, high reliability is not a guarantee for high validity (Grønmo, 2016, p.242).

5.6.1 Validity and reliability in the data gathering

When searching for care order cases, the search was done in HUDOC.⁴⁴ The HUDOC database is the official database from the ECtHR. All documents in the HUDOC database originate directly from the ECtHR, Commission⁴⁵ or The Committee of Ministers. On the whole, the HUDOC database is a credible source.

Single judge formations and Committees are both omitted from the search. Decisions made in single judge formation are not recorded (HUDOC, 2018). A single judge never rules in a case, neither did the Committee prior to 2010.⁴⁶ After 2010, the Committee can rule in in cases where case-law is well established. I cannot rule out the possibility that the Committee have ruled in care order cases between 2010 and 2016. Meaning, that there may be care order cases, with merits that are in an area of well-established case law, that have not been picked up by the

⁴³ Parts of Section 5.6 Validity and reliability is a rewrite of a paper written by me, as part of a preparatory paper to my master thesis. The paper was submitted 25.05.2018 to the University of Bergen as part of a compulsory assignment to pass the subject AORG322.

⁴⁴ See section 5.3 Gathering data – Care order cases in the ECtHR.

⁴⁵ The Commission were abolished when protocol 11 entered into force.

⁴⁶ See chapter 2 – Context.

search. However, as it is only Chambers and Grand Chamber who rule in cases where the case itself warrant the use of judicial discretion, rulings made in the Committee will not influence my research.

The search is limited to include art.8 of the ECHR. Art.8 – Right to respect for private and family life – is the only article in the ECHR that is guaranteed to show in cases concerning care orders. Although there are big variations in other articles that are allegedly breached, art. 8 is always the common denominator. The delimitation to art.8 in the search for care order cases will consequently not have excluded any cases.

English and French are the only two languages that count as official (ECHR, 1950, preamble). All judgements in the ECtHR are written in either French or English (ECtHR, 2018b, rule 76(1)). Many judgements are written in both languages. In the search for care order cases, the search has been limited to only include cases written in English. When limiting the search to English it excludes all care order cases written only in French. In my research, I want to see how the ECtHR balance children's and parents' rights in cases involving care orders. In the data material provided to me by Skivenes and Søvig, I have 44 cases that are included in this category. The cases originate from 18 different countries. The judgements came from the two decision-making bodies of the ECtHR that rules in cases where case-law is not well established and the Court needs to use discretion. The variety of cases, both in content and origin, leads me to the conclusion that the data material will be sufficient to answer my research question, without jeopardizing the validity and reliability of my research.

5.6.2 Validity and reliability in the data processing – delimitations and analysis

The question surrounding validity and reliability in my delimitations and analysis is closely knitted together. I have, in my analysis, restricted my research to judicial precedent set by the ECtHR. I have looked at all references between the 44 care order cases. It is, in each of the 44 care order cases, references to judgements that are not in the field of care orders. It is also a possibility that the 44 care order cases are referred to by judgements outside the field of care orders. I cannot positively rule out that there are no judgements outside the care order field, that influence how the ECtHR assess care order cases. I do, however, deem it highly unlikely.

As previously mentioned, not all care order judgements are referred to by one of the other care order judgements. Meaning, not all judgement is present in the data material I am analyzing. Looking at the judgements that are not referred to by other judgements, they all refer to at least

one other care order-judgement. This entails that even though the judgement is not directly present in the data material, it is indirectly present. By using judicial precedent, the judgement makes its viewpoints heard. However, by delimitating my research to judicial precedent, there is a risk that groundbreaking, context-based⁴⁷, merits are not picked up by my queries.

This thesis aims to answer how the ECtHR balance children's and biological parents' rights in care order cases. My research revolves around the field of care orders as a whole. Meaning that I am, for the most part, interested in the generic-impact a care order judgement has on the care order field. I cannot rule out the possibility that there may be judgements that have created larger context-based impact on the care order field, than I give the judgement credit for. This does not, however, influence my research on judgements that have created generic-based impact.

Chapter 6 - Descriptive statistics – findings

Some judgements have created larger ripple-effects in the field of care orders than others. To better understand how the ECtHR weigh children's and parents' rights in care order cases, it is important to look at the cases that have created the largest impact on the field. Which cases have had the largest impact, what makes a case important and to what extent has a case created a ripple-effect in the care order field?

I will, in the following section, focus on the numbers behind the care order cases, i.a. which judgements have been most referred to, which judgement refers mostly to other judgements and which paragraphs are most referred to. In other words, statistics that will help point out which judgements have had greatest impact on the care order field and thus created the largest ripple-effect. It will also give an indication as to which initial-categories⁴⁸ are most prominent. Lastly, the statistic will show if there has been a development in the number of care order cases having appeared before the ECtHR over the last three decades.

In order to understand the significance of the statistical findings, it will help to have a deeper understanding of the content of the judgements and paragraphs being discussed. I will therefore discuss the statistical findings after presenting my discourse analysis in chapter 8.

⁴⁷ See section 5.4.1 Finding the descriptive statistics – the cases.

⁴⁸ See section 5.5.2 Coding the judicial precedent – initial-categories.

6.1 Statistical findings - the cases

In total, there are 44 care order cases in my data material. The first cases appeared before the ECtHR in 1987, the last in 2016. The first ten years, from 1987 to 1996, there were 10 cases appearing before the Court. The next ten years, from 1997 to 2006, there were 14 cases. The last years, from 2008 to 2016, there were 20 cases. Meaning, that every decade, there has been an increase in care order cases that have appeared before the ECtHR. It is, however, not every year a care order case appears before the Court. Table 7 shows an overview how many cases appeared before the ECtHR the last three decades.

Table 7 List of how many care order cases appeared before the ECtHR each year

First decade		Second decade		Third decade	
Year	Cases	Year	Cases	Year	Cases
1987	5	1997	0	2007	1
1988	1	1998	1	2008	2
1989	1	1999	1	2009	1
1990	0	2000	2	2010	2
1991	0	2001	2	2011	2
1992	1	2002	3	2012	4
1993	0	2003	1	2013	6
1994	0	2004	1	2014	0
1995	1	2005	0	2015	0
1996	1	2006	3	2016	2
Total	10	Total	14	Total	20

When looking at the impact a judgement has had on the field of care orders, I have included all references where the 44 judgements referred to each other.⁴⁹ There were, in total, 465 references between the 44 judgement, referring to 153 paragraphs, from 34 judgements. There are 10 judgements that have 0 referrals. See appendix E for a complete list of the referral rate of all 44 judgements. Table 8 shows all judgements that are referred to at least once. When looking whether a judgement has had generic- or context-based impact (I return to this below), it is a prerequisite that the judgements has been referred to. Otherwise it has not yet had an impact on the care order field.

⁴⁹ See section 5.4.1 Finding the descriptive statistics – the cases.

Table 8 List of judgements with referral-rate (above 0%)

Judgement	Being referred to	Potential referrers	Referral rate
Johansen v. NO (1996)	23	34	68 %
Olsson v. SE (1988)	23	38	61 %
K. and T. v. FI (2001)	16	29	55 %
Kutzner v. DE (2002)	14	26	54 %
W. v. UK (1987)	22	43	51 %
R. and H. v. UK (2011)	4	12	33 %
Gnahoré v. FR (2001)	9	28	32 %
McMichael v. UK (1995)	11	35	31 %
Scozz. and Giu. v. IT (2000)	9	30	30 %
P., C., and S. v. UK (2002)	7	25	28 %
R.K. and A.K. v. UK (2008)	5	18	28 %
B. v. UK (1987)	11	43	26 %
M.D. and Oth. v. MT (2012)	2	8	25 %
X. v. Croatia (2008)	4	17	24 %
K.A. v. FI (2003)	5	24	21 %
Y.C. v. UK (2012)	2	10	20 %
Eriksson v. SE (1989)	7	37	19 %

Judgement	Being referred to	Potential referrers	Referral rate
E.P. v. IT (1999)	6	32	19 %
Moser v. AT (2006)	3	21	14 %
P. and S. v. PL (2013)	1	7	14 %
M. and R. Anders. v. SE (1992)	5	36	14 %
Saviny v. Ukraine (2009)	2	16	13 %
Buchberger v. AT (2002)	3	27	11 %
R. v. FI (2006)	2	22	9 %
V. v. SI (2012)	1	11	9 %
Haase v. DE (2004)	2	23	9 %
Aune v. NO (2011)	1	13	8 %
A.D. and O.D. v. UK (2010)	1	14	7 %
R. v. UK (1987)	3	43	7 %
L. v. FI (2000)	2	31	6 %
Bronda v. IT (1998)	2	33	6 %
H.K. v. FI (2006)	1	20	5 %
H. v. UK (1987)	2	43	5 %
O. v. UK (1987)	1	43	2 %

10 judgements, that has a 0% referral-rate, are omitted from table 8. See appendix E for overview. The lack of referrals indicates that the judgements in question have not broken new ground. Meaning that they are in an area of well-established case law, but it may also indicate that it is a question about time. Meaning that the judgements are still so fresh that any precedent they may have established will not be visible for some years. It is, however, worth noting that *R. and H. v. The UK*, which is a fairly new judgement, has a referral rate of 33%. This put *R. and H. v. The UK* amongst the most cited judgements. The newest judgement that has created precedence is *P. and S. v. Poland*, which has a referral rate of 14%.

As shown in table 8, there are big inequalities as to how many times a judgement has been referred to by others. There are also big inequalities in how many times each judgement refers to others. Table 9 shows how many different judgements each judgement refers to. For the same reasons as aforesaid, I only look to how many care order judgements each judgement refers to, not how many times. Unlike the referral-rate presented in table 8, the percentage of how many judgements each judgement refers to is not as relevant for the impact of the judgement. Both *Eriksson v. Sweden (1989)* and *P. and S. v. Poland* refers to two care order judgements. Even though the two judgements being referred to may influence the two judgements equally, there is a big difference in percentage. I have, for these reasons, sorted the table after how many care order judgements each judgement refers to, and I use percentages as an indicator of how many of the past care order judgements the ECtHR use in its rulings.

Table 9 List of number of referrals found in each judgement

Judgement	Refers to	Potential judgements	In total
Haase v. DE (2004)	15	20	75 %
R. and H. v. UK (2011)	12	31	39%
Kutzner v. DE (2002)	11	17	65 %
M.D. and Others v. MT (2012)	11	35	31%
NMD16	11	42	26%
Y.C. v. UK (2012)	11	33	33%
Gnahoré v. FR (2001)	10	15	67%
HFI06	10	23	43%
A.K. and L. v. HR (2013)	9	37	24%
Dolhamre v. SE (2010)	9	28	32%
P., C. and S. v. UK (2002)	8	27	30%
ARU13	8	39	21%
Moser v. AT (2006)	11	42	26%
RES13	8	40	20%
Saviny v. UA (2009)	8	27	30%
JSE16	6	43	14%
VSI12	5	32	16%
Johansen v. NO (1996)	4	9	44%
K.A. v. FI (2003)	4	19	21%
LFIO0	4	12	33%
Scozz. and Giun. v. IT (2000)	4	13	31%
Buchberger v. AT (2002)	3	16	19%

Judgement	Refers to	Potential judgements	In total
McMichael v. UK (1995)	3	8	38 %
RFI06	3	21	14 %
XHR08	3	26	12 %
Aune v. NO (2011)	2	30	7 %
Bronda v. IT (1998)	2	10	20 %
E.P. v. IT (1999)	2	11	18 %
Eriksson v. SE (1989)	2	6	33 %
KTFI01	2	14	14 %
M. and R. And. v. SE (1992)	2	30	7 %
P. and S. v. PL (2013)	2	36	6 %
X. v. SI (2012)	2	34	6 %
A.D. and O.D. v. UK (2010)	1	29	3 %
B. v. RO (2013)	1	38	3 %
Berecová v. SK (2007)	1	24	4 %
H. v. UK (1987)	1	4	25 %
Mircea Dum. v. RO (2013)	1	41	2 %
Olsson v. SE (1988)	1	5	20 %
O. v. UK (1987)	1	4	25 %
B. v. UK (1987)	0	4	0 %
R.K. and A.K. v. UK (2008)	0	25	0 %
R. v. UK (1987)	0	4	0 %
W. v. UK (1987)	0	4	0 %

When reading tables 8 and 9, it is important to keep in mind that in order to use judicial precedence, the precedence must be relevant for the case in question. If there are no similarities between cases, the ECtHR cannot use judicial precedence in its deliberation. That may be the case for *Aune v. Norway (2011)*. *Aune* has a low referral rate of 8% and only refers to two other judgements. The low number of referrals in the judgement and the low referral rate indicate one of two things. Either that the judgement in question is in an area of unproven ground. Meaning that the circumstances surrounding the case are so special that there has not been many cases that can compare to the actual case. Or, it may be that it is a clear-cut case. Which means that the law in this case is uncomplicated and that the result is given. This could potentially explain why the judgement does not refer to more than two other judgements and has a low referral rate. However, *Aune* came after Protocol No. 14 came into force. It was the chamber that ruled in the case. If the case had been in an area of well-established case law, it should have been ruled by a three-judge committee.

If one compares table 8 and table 9, one will see that, in one way or another, all judgements are affected by each other. *R.K. and A.K. v. The UK*, which refers to no other judgement are in turn referred to by five other judgements. Meaning that in *R.K. and A.K. v. The UK*, the ECtHR does not lean on past judgement in its deliberations. A referral rate of 28% may indicate that the judgement has broken new ground and created new precedence.

Haase v. Germany (2004) refers to the most judgements, both in percentages and in actual numbers. *Haase* refers to 15 separate judgements which is 75% of the judgement it potentially could refer to. It has, however, a referral rate of only 9%. The high number of references in *Haase* compared to the low referral rate by other judgements, indicate that *Haase* is in a well-established area of case law.

6.2 Statistical findings - the paragraphs

Table 10 shows all paragraphs that have been referred to seven times or more. These are paragraphs that are most referred to and thus have had broadest impact on the care order field. Column number three, “coded as” shows how the paragraphs are coded in the initial-categories⁵⁰, which gives an indication as to which initial-categories are most generic.

The paragraphs in table 10 derived from six different judgements, five of which are the judgements with the highest referral rate. The sixth judgement, *Gnahoré*, is number seven on the list of highest referral rate. Of the six judgments, with the highest referral rate, *Johansen* is the only one that has a high number of referrals on every paragraph that is being referred to. The other five judgements have paragraphs that do not show on the top list. It is also worth noting that all the 12 paragraphs presented in the table 10 have been referred to in the entire timespan since their respective judgement was written. This indicates that the paragraphs are just as relevant at present as they were when the ECtHR wrote the judgements. Viewing how the paragraphs are coded, the two most cited paragraph are both pro-child. Pro-child is also the initial-category that are most represented in the top 10 list of most cited paragraphs, with five paragraphs. There are only two paragraphs coded as pro-parent among the 10 most cited paragraphs, both of which are ambiguous. Meaning that they are coded in more than one initial-category. Paragraphs coded as biological family are the least ambiguous of the paragraphs. With three out of four paragraphs coded as only biological family. The Court-category have four paragraphs in the top 10 list, three of which are ambiguous, and lastly, the “other”-category have three paragraphs in the top 10 list, two of which are ambiguous.

⁵⁰ See section 5.5.2 Coding the judicial precedent – the initial categories.

Table 10 List of most cited paragraphs

Judgement	Paragraphs	Coded as	Referrals	Judgement	Paragraphs	Coded as	Referrals
Johansen v. NO (1996)	para.64	Court, child	15	Kutzner v. DE (2002)	para.67	Child, court	11
Johansen v. NO (1996)	para.78	Bio.fam., child	15	W. v. UK (1987)	para.62	Court, other	9
Johansen v. NO (1996)	para.52	Bio.fam.	13	W. v. UK (1987)	para.59	Bio.fam.	8
W. v. UK (1987)	para.64	Parent, other	13	Gnahoré v. FR (2001)	para.59	Child, parent	8
Olsson v. SE (1988)	para.81	Bio.fam.	12	K. and T. v. FI (2001)	para.154	Child	8
Olsson v. SE (1988)	para.68	Court	11	K. and T. v. FI (2001)	para.166	Other	7

As explained in section 5.4.2 Finding the descriptive statistics – the paragraphs, in order to map any development in the ECtHRs assessments, I categorized all paragraphs going in favor of the child, of the parent and of the biological family according to the timespan of which they have been referred. I created three tables which can be found in appendix H, H1-3.

Firstly, looking at how many times each of the three categories were mentioned, it is clear that arguments in favor of the child are considerably more referred to than arguments in the other two categories, with 94 referrals against pro-parents' 72 and biological families 77.⁵¹ However, looking at the number of paragraphs being referred to, there is a predominance of arguments in favor of the parents. 27 paragraphs are in favor of parents, 24 in favor of children and 17 in favor of biological family. This indicate that the arguments in favor of the child have had a broader range of impact than the arguments in the remaining two categories. If one looks at the number of times each paragraph is referred to, that supports the aforesaid indication. There are six paragraphs, in the pro-child category, that have six or more referrals. In the pro-parent category, there is two, and in the biological family category there is five. It may also indicate that arguments in favor of parents are more case-specific, while argument in favor of the child or biological family are more generic.

Looking at timespan in each of the three tables in appendix H, one can see that both the pro-parent- and the biological family category have arguments stretching back to 1987, when the first five care order cases appeared before the ECtHR. Arguments in favor of the child, however, first started being referred to by the Court in 1995.

⁵¹ See section 5.5.2 Coding the judicial precedent – initial categories, for definitions of the three categories.

Chapter 7 - Discourse analysis

I will in the following section, keeping in line with Habermas’ discourse ethics, distinguishing between legal-, pragmatic-, ethical- and moral arguments, conduct a discourse analysis on the arguments presented in each of the paragraphs.⁵²

I will start by presenting the legal discourse. First, I will give an overview as to how the legal arguments are categorized, before I give an in-depth presentation of all legal arguments in each of the initial-categories; pro-child, pro-parent, biological family, the Court and other.⁵³ Lastly, I will discuss the findings in the legal discourse. This process is repeated with each of the remaining three discourses.

When categorizing the arguments in each of the discourses, the “other”-category is omitted. This is due to the category’s unique nature. See section 5.5.3 Discourse analysis – coding and categorizing the arguments.

7.1 Legal discourse – findings and discussion

Legal arguments are arguments pertaining to rights given by the ECHR or domestic law. The Court-category has the most legal arguments, with 29 arguments. Pro-parent and pro-child have nearly the same number of legal arguments, with 21 and 20, respectively. Biological family has 14 legal arguments and the “other”-category have five legal arguments. See table 11 for overview.⁵⁴

Table 11 Number of legal arguments in each initial-category

Number of legal arguments in each initial-category			
Pro-child	20	Pro-parent	21
Biological family	14	The Court	29
Other	5		

7.1.1 Categorizing the legal arguments

Legal arguments can be found across all the other four initial-categories. Table 12 shows an overview of how the legal arguments are categorized in each of the four initial-categories, respectively. In the Court category, with a total of 29 arguments and seven argument-categories,

⁵² See section 5.5.3 Discourse analysis – coding and categorizing the arguments.
⁵³ See section 5.5.2 Coding the judicial precedent – initial categories, for definitions of the initial-categories.
⁵⁴ Not every legal argument in, *inter alia*, the pro-child category is in favor of the child. An in-depth presentation of all legal arguments in each of the five initial-categories is found in sections 7.1.2 – 7.1.6.

one finds the most legal arguments. Pro-parent and pro-child follow suit, with respectively 21 arguments and seven argument-categories, and 20 legal arguments and five argument-categories. While the biological family category has the lowest amount of legal arguments with 14 legal arguments coded in five argument-categories. In total there are 84 legal arguments spread across 18 different argument-categories.

Table 12 Overview of the legal argument categories

Pro-Child legal arguments		
Category	Judgements	Arguments
Parental rights	7	11
ECtHR - no sub.	4	4
Care order	2	2
Arbitrary interference	1	2
Authorities duty	1	1

Pro-Parent legal arguments		
Category	Judgements	Arguments
Decision-making	5	8
Family life	3	3
Parental rights	2	3
Access	2	3
Representation	1	2
Consideration	1	1
Data	1	1

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

The Court legal arguments		
Category	Judgements	Arguments
Decision-making	7	8
Necessary in a dem.s.	6	7
Arbitrary interference	4	5
Representation	2	4
Assessments	3	3
Domestic legislation	1	1
Just satisfaction	1	1

The two largest argument-categories are “decision-making” and “parental rights”, with 16 - and 14 arguments respectively. “Public interference” is the third largest category with eight arguments. However, while arguments pertaining to “decision-making” and “parental rights” are found in more than one initial-category, arguments pertaining to “public interference” are only found in the biological family category. Six argument-categories, spread over all four initial-categories, have only one argument.

Arguments revolving around parental rights can be found in three of the four initial-categories, in total 14 arguments. Two of the arguments in the pro-parent category, found in *B. v. The UK* para.76 and *P., C., and S. v. The UK* para.117, are also coded in the pro-child category, which means that there are 12 unique arguments pertaining to parental rights.

The category labeled representation is found in both the pro-parent category and the Court, in total six arguments. One argument, found in *M.D. and Others v. Malta* para.27, is found in both categories, which means, there are five unique arguments in the representation category.

There are three more argument-categories which are found in more than one initial-category: “decision-making”, “care order” and “arbitrary interference”. All arguments coded in these categories are unique. Meaning that, in total, there are 16 arguments pertaining to decision-making, three to care orders and seven to arbitrary interference.

The arguments in the other categories are all unique, meaning that, in total, there are 80 unique legal arguments.

7.1.2 Pro-Child - In-depth presentation of legal arguments

The first care order cases brought before the ECtHR are from 1987. Five cases were heard at the same time by the Court “...in the interests of the proper administration of justice...” (B. v. The UK, 1987, para.4). In one of the first five cases, *B. v. The UK*, the ECtHR focused on the need of the public for protection against arbitrary interference from the authorities. The Court emphasized that the domain of care orders “...is an even greater call than usual for protection against arbitrary interferences” (B. v. The UK, 1987, para.63). It is the authorities’ duty to be cautious when assessing whether to issue a care order.

When considering taking a child into public care, the authorities base their decision on, among other things, statements from professionals. However, professionals are not infallible. In *R. and H. v. The UK*, the ECtHR states that

“... mistaken judgments or assessments by professionals do not per se render childcare measures incompatible with the requirements of Article 8 of the Convention. The authorities, both medical and social, have duties to protect children and cannot be held liable every time genuine and reasonably held concerns about the safety of children vis-à-vis members of their family are proved, retrospectively, to have been misguided (*R. and H. v. The UK*, 2011, para.81).

The ECtHR emphasizes that the authorities have a positive duty to protect the child. This duty may surpass the parent’s rights to family life. The Court also states that the authorities’ obligation to the child is so great, that they should not be held accountable for any action taken on the base of a genuine and reasonable concern for the child’s wellbeing.

Two judgements, *Johansen and Kutzner v. Germany (2002)*, stress that care orders are temporary. Both judgements underline that “...any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child.” (*Johansen v. Norway*, 1996, para.78, *Kutzner v. Germany*, 2002, para.76).

In *Johansen* (para.64), *Bronda v. Italy* (1998, para.59), *Kutzner* (para.66) and *R. and H. v. The UK* (para.81), the ECtHR emphasize that the Court is not a substitution for the domestic authorities. The domestic authorities have the responsibility for regulating public care of children and the rights of the biological parents whose children have been taken into care. In other words, the domestic authorities are responsible for their public's welfare. The ECtHR role is to review decision made by local authorities, in light of the ECHR, to potentially unveil any infraction on the convention. The four aforesaid judgements span over a time-period starting prior to the implementation of Protocol No. 11 and ending after Protocol No. 14 came in to force. Meaning, that in regard to the ECtHRs role of assessing these cases, the courts method of assessments has apparently not changed.

11 out of 20 legal-arguments in the pro-child category all relates to parental rights. These 11 arguments derive from seven different judgements.

B. v. The UK has four arguments stating, in one way or another, that a care order should not automatically deprive a biological parent of his/her parental rights.

“... the extinction of all parental right in regard to access would scarcely be compatible with fundamental notion of family life and the family ties which Article 8 (art.8) of the Convention is designed to protect.” (*B. v. The UK*, 1987, para.77).

The ECtHR states that it would not be in line with art.8 of the ECHR to deprive biological parents their parental rights. In the *B. v. The UK*-judgement the ECtHR also states that even though the authorities only allow parents restricted communication and access to their child, that does not necessarily mean that the parents have no parental rights. Parents have still the right to agree or refuse to agree to the child's adoption (*B. v. The UK*, 1987, para.77).

The *Johansen*-judgement states that care orders issued by the authorities is a violation against the applicants rights to family life, according to art.8, unless it is “...in accordance with the law, pursues an aim or aims that are legitimate under paragraph 2 of Article 8 (art. 8-2) and can be regarded as “necessary in a democratic society”.”(*Johansen v. Norway*, 1996, para.52). Meaning that parents should not be deprived of their parental rights unless it is absolutely necessary.

In *Y.C. v. The UK* the ECtHR states 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 UK*, 2012, para.134). The ECtHR emphasizes the importance

of the child's wellbeing. A child should not be put in harm's way due to its biological parents' parental rights. The child's rights trump those of the biological parents.

Kutzner, P., C., and S. v. The UK, R. and H. v. The UK all focuses on biological parents' relation with their children, after their children have been taken in to care.

“Following any removal into care, a stricter scrutiny is called for in respect of any further limitations by the authorities, for example on parental rights of access, as such further restrictions entail the danger that the family relations between the parents and a young child are effectively curtailed” (P. C. and S. v. The UK, 2002, para.117, see also *Kutzner v. Germany*, 2002, para.67 and *R. and H. v. The United Kingdom*, 2011, para.81)

The ECtHR emphasize that any limitation, set by the authorities, beyond the care order could potentially jeopardize the family relation between the biological parents and a young child. *R. and H. v. The UK* makes a point of mentioning the national authorities' margin of appreciation in regard to taking a child into care, but that the authorities should be careful with any further restriction regarding parental access. This is due to parents' opportunity to sustain a relationship with their children.

7.1.3 Pro-parent – In-depth presentation of legal arguments

In *M.D. and Others*, the ECtHR states that a parent may represent his/her child in Court, even if one has been deprived of parental rights. Especially if the dispute surrounding the depriving of parental rights is the reason as to why one wishes to apply to Court. The ECtHR further states that parents' right to act on their child's behalf in the ECtHR includes cases where parents are not “...entitled under domestic law to represent another...” (*M.D. and Others v. Malta*, 2012, para.27). The ECtHR reiterates that a parent standing as a natural parent suffices to “...afford her [the child's mother] 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 right to act on a child's behalf is also discussed in *B. v. The UK*. Here the ECtHR states that a parent “...enjoys a continuing right to apply to the courts for the discharge of the order or resolution on the ground that such a course is in the child's interests.” (*B. v. The UK*, 1987, para.77). Meaning that a parent may file for a care order to be lifted on behalf of a child, claiming it would be in the child's best interest. The ECtHR emphasize that a care order aims is not to “...extinguish all rights and responsibilities of the natural parent in respect of the child.”

(B. v. The UK, 1987, para.77). A parent retains the rights to, *inter alia*, refuse or agree to a child's adoption.

In *P., C., and S. v. The UK*, the ECtHR address the importance of not to do anything to hinder a reunion between biological parents and child, after a child has been taken in to care. This includes, but is not limited to, parental rights of access. The Court reiterates that the taking of a child into care should be regarded as a temporary measure with the ultimate aim to reunite the biological parents and child. No measures that could hinder such a reunification should be implemented (*P. C. and S. v. The UK*, 2002, para.117).

Parental rights of access are also discussed by the ECtHR in *B. v. The UK*.

“It would be inconsistent with this aim [sustain link between biological families] 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. ... Moreover, the extinction of all parental right in regard to access would scarcely be compatible with fundamental notions of family life and the family ties which Article 8 (art. 8) of the Convention is designed to protect ... The Court thus concludes that it can be said, at least on arguable grounds, that even after the making of the care orders the applicant could claim a right in regard to her access to P [the child].” (*B. v. The UK*, 1987, para.77)

Here the ECtHR points out that the removal of parental access would doubtfully be in line with art.8 of the ECHR. The Court also underlines that it would act against a care orders ultimate aim of reuniting biological parents and child, if biological parents are automatically deprived of all rights regarding access following the removal of a child into care. The ECtHR acknowledge that there may be dissenting opinions in this matter but concludes that a parent may claim a right in regard to his/her access to the child.

The care orders ultimate aim of reuniting the biological parent and child and rights regarding access has also been discussed by the ECtHR in *Margareta and Roger Andersson v. Sweden (1992)*. The Court states that there must be weighty reasons for taking measures that restricts parental access and that all measures must be consistent with the ultimate aim of reuniting the biological parents and child (*Margareta and Roger Andersson v. Sweden*, 1992, para.95)

Art.8 of the ECHR gives all right to private and family life. In *H. v. The UK*, the ECtHR states that any questions regarding the applicants family life can solely be determined “...in the light of all relevant considerations...” (*H. v. The UK*, 1987, para.90). The Court further states that

the effluxion of time should not be a decisive factor when considering whether or not there has been a violation of art.8 in regards to family life.

The ECtHR acknowledges, both in *R. v. The UK* and *X. v. Croatia*, that the removal of a child from care is an interference with the biological parents family life (*R. v. The UK*, 1987, para.64, *X. v. Croatia*, 2008, para.45). The Court also emphasizes that biological bonds are not broken due to a child being taken in to care (*R. v. The UK*, 1987, para.64). The relationship between biological parents and children is, to a certain degree, everlasting. In *P., C., and S. v. The UK*, the ECtHR states that to take the momentous step of severing the link between biological parents and child and effectively cut the child from its roots "... could only be justified in exceptional circumstances or by the overriding requirement of the child's best interests." (*P. C. and S. v. The UK*, 2002, para.118). In other words, the child's interests may surpass those of the parent. The Court emphasizes that one must look at the content of each case, and especially the parent-child relationship, before deciding which measures are justified. If a parent never had custody or care for a child, the ECtHR has stated that severing the biological bonds, with that parent, fall under the margin of appreciation within the domestic courts (*Söderbäck v. Sweden*, 1998, para.31-34).

When deciding in cases concerning children, the ECtHR has on several occasions underlined the importance of letting the child's biological parents be a part of the decision-making process. In both *X. v. Croatia* and *R. and H. v. The UK*, the ECtHR states that if a parent has not "...been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests" (*X. v. Croatia*, 2008, para.48, *R. and H. v. The UK*, 2011, para.75), the authorities have failed to respect the parents' family life and the decision made by the authorities will therefore be a violation against art.8 of the ECHR. However, if a child is in imminent danger, the parents can be excluded from the decision-making process. A child should not be put in harm's way due to parental rights. In order to justify an emergency-action, there must be weighty reasons to do so. If there is no urgency in the matter at hand, the parents shall be involved (*Haase v. Germany*, 2004, para.99).

In *W. v. The UK*, the ECtHR explains that the reasons to involve parents in the decision-making process is to "...secure that their [the parents] views and interests are made known to and duly taken into account by the local authority..." (*W. v. The UK*, 1987, para.63). Further, the Court states that by including the parents in the decision-making process, one secures the parents ability to explore and exercise the remedies available to them, in due time. If one is not given

the opportunity to use the appropriate remedies as a counter-measure for the authorities' intervention in one's family life, it can be a violation against art.6 or 13⁵⁵ of the ECHR. However, the Court emphasize that there are situations where the involvement of the parent in the decision-making process is neither possible nor meaningful. This includes situations where the parents are mentally ill or impossible to reach and in emergencies (*W. v. The UK*, 1987, para.64).

When it comes to involvement of parents in the decision-making process, the ECtHR have stated that the contact between parents and the responsible social-workers can count as an appropriate communication channel for the parents to get their views heard by the authorities (*W. v. The UK*, 1987, para.64). However, the Court emphasizes that the contact between parents and social-workers should be regular. The Court also points out that when the authorities come to a decision, the decision is often based on case reviews. However, in the ECtHRs opinion, the decision could equally be based on a continuous monitoring done by a representative from the authorities (*W. v. The UK*, 1987, para.64).

Art.8(2) of the ECHR states that the public authorities should not interfere in a person's family life, unless it is "necessary in a democratic society" (ECHR, 1950, art.8(2)). In *A.D. and O.D. v. The UK*, the ECtHR reiterates that in order to answer the question of whether or not an interference was "necessary in a democratic society" one must examine the case as a whole. This includes examining the fairness of the decision-making process (*A.D. and O.D. v. The UK*, 2010, para.82). The phrase "necessary in a democratic society" will be duly discussed in chapter 8 – Discussion and concluding remarks.

7.1.4 Biological family – In-depth presentation of legal arguments

More than half of the legal arguments in the biological family category revolve around the authorities' interference into parents' family life. The ECtHR has repeatedly stated that a care order is an interference with the parents' family life and consequently is a violation against art.8 of the ECHR (See among others *W. v. The UK*, 1987, para.59, *McMichael v. The UK*, 1995, para.86, *K.A v. Finland*, 2003, para.92). This is further elaborated by the ECtHR in *McMichael v. The UK (1995)*, *Bronda* and *K.A. v. Finland*. In the three judgements the Court states that *any* measures taken by the authorities hindering "the mutual enjoyment between parents and

⁵⁵ Art.6 – right to a fair trial. Art.13 – right to an effective remedy.

child” (McMichael v. The UK, 1995, para.86, Bronda v. Italy, 1998, para.51, K.A v. Finland, 2003, para.92) would constitute an interference with the parents’ rights given by the ECHR.

In *Bronda*, the ECtHR emphasize that a child is to be returned to its parents and their home even in cases where the child lives with the parents’ family (Bronda v. Italy, 1998, para.51). The child’s home is with the biological parents not the biological parents’ family.

However, the ECtHR points out that there are situations where an interference is justified. In, among others, *K.A. v. Finland* the ECtHR underline that measures interfering with parents’ right to family life is justified if it is “...“in accordance with the law”, purses an aim or aims that are legitimate under paragraph 2 of Article 8 and can be regarded as “necessary in a democratic society”.” (K.A v. Finland, 2003, para.92). The Court further states that a more beneficial environment for the child’s upbringing does not constitute a necessity. There must be special circumstances pointing to necessities for the child’s wellbeing in order to justify measures that would interfere with the parents’ right for family life.

The importance of weighing the biological parents’ rights against the child’s best interest have been emphasized by the ECtHR on several occasions (see *i.a.* *E.P. v. Italy*, 1999, para.69, and *M.D. and Others v. Malta*, 2012, para.76). The ECtHR have also repeatedly stated that any care order issued has an ultimate aim of reuniting biological parents and their child.⁵⁶ Any measures taken that would be inconsistent with that aim “...should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child’s best interests.” (*M.D. and Others v. Malta*, 2012, para.76). Meaning that the child’s best interests would justify an interference with the biological parents at the expense of their right to family life. Even so, in *E.P. v. Italy*, the ECtHR states that if the authorities fail to “...take all the necessary steps [to reunite the biological parents and child], ... which could reasonably be expected of them in the circumstances...” (*E.P. v. Italy*, 1999, para.69) it would be a violation against the biological parents’ rights under art.8 of the ECHR. The reason for the violation is that the authorities in doing so failed to strike a balance between the best interest of the child and the parents’ rights given by the ECHR.

The importance of reuniting biological parents and child is also brought up by the ECtHR in *Margareta and Roger Andersson* and *Saviny v. Ukraine* (2009). In *Margareta and Roger Andersson*, the Court states that “...in cases like the present a parent’s and child’s right to

⁵⁶ See *i.a.* section 7.2.3 Pro-parent – In-depth presentation of pragmatic arguments.

respect for family life under Article 8 [of the ECHR] include a right to the taking of measures with a view to their being reunited.” (Margareta and Roger Andersson v. Sweden, 1992, para.91). In other words, the authorities have an obligation to take measures ensuring a reunion between biological parents and child. In *Saviny*, the ECtHR underline that any care order should be regarded as a temporary measure. The Court emphasizes that a care order could not be justified without “...prior consideration of the possible alternatives.” (Saviny v. Ukraine, 2009, para.52). Meaning that the Court considers a care order to be a “last-resort” measure. In *Saviny*, the ECtHR also states that a care order “...should be viewed in the context of the State’s positive obligation to make serious and sustained efforts 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). Keeping siblings together and allowing contact between parents and children ensures that there is a relationship between parents and children even though the children have been taken in to care by the authorities.

In *Margareta and Roger Andersson*, the ECtHR states that “...telephone conversations between family members are covered by the notions of “family life” and “correspondence” with the meaning of article 8 [of the ECHR]” (Margareta and Roger Andersson v. Sweden, 1992, para.72). When children are taken in to care it is the authorities’ duty to ensure that a relationship between biological parents and children can continue to develop. To hinder contact, both in person and over telephone, would be a violation against the children and parents’ right to family life.

In *Saviny*, the ECtHR points out that “...severing family ties means cutting a child off from its roots...” (Saviny v. Ukraine, 2009, para.49). The Court further states that in order to justify such a measure there must be “very exceptional circumstances” (Saviny v. Ukraine, 2009, para.49). In other word there are reasons that would justify breaking contact between biological parents and children. However, all measures taken by the authorities must be carefully considered and weighed against each other in order to ensure that the measures taken are in line with the biological parents’ and the child’s rights given by the ECHR.

7.1.5 The Court – In-depth presentation of legal arguments

Art.8(2) of the ECHR states that “there shall be no interference by a public authority ... except such as in accordance with the law and is necessary in a democratic society...” (ECHR, 1950, art.8(2)). Both the phrase “in accordance with the law” and “necessary in a democratic society” have repeatedly been addressed by the ECtHR. In *Olsson*, the Court points out that “in

accordance with the law” does not only refer to domestic law, “...but also relates to the quality of the law, requiring it to be compatible with the rule of law; it thus implies that there must be a measure of protection in domestic law against arbitrary interference...” (Olsson v. Sweden (No.1), 1988, para.61(b)). Meaning that, according to the ECtHR, there shall be safeguards in the domestic legal system that protects their citizens against arbitrary interference.

In *Margareta and Roger Andersson*, the ECtHR further elaborates on what the Court means with “in accordance with the law”. As in *Olsson*, the Court points out that art.8(2) of the ECHR refers not only to domestic law but also the quality of law. However, the ECtHR emphasize that “...the impugned measures should have a basis in domestic law.” (*Margareta and Roger Andersson v. Sweden*, 1992, para.75). Meaning that any care order issued by the public authorities in a Contracting State, must be based on domestic law. Further, the ECtHR states that the domestic law should be “...formulated with sufficient precision to enable them - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” (*Margareta and Roger Andersson v. Sweden*, 1992, para.75). In other words, the domestic law must be phrased in a way that is reasonably understandable for anyone who may be affected by it. The ECtHR emphasize that a law that confers discretion is not necessarily inconsistent against the before mentioned requirement, “...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).

In *X. v. Croatia*, the ECtHR states that “The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities.” (*X. v. Croatia*, 2008, para.47). This is justified, by the Court, by the fact that some actions are irreversible, such as if a child has been taken into public care and later is freed for adoption. The ECtHR emphasizes that “This [care orders] is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interference.” (*W. v. The UK*, 1987, para.62, *X. v. Croatia*, 2008, para.47). The reason being that if one acts rashly and commits to an irreversible measure, the consequences for those affected by the measure would not be acceptable.

When it comes to assessing whether or not an interference was “necessary in a democratic society” the ECtHR states, in *Olsson*, that “...the notion of necessity implies that the interference corresponds to a pressing social need, and, in particular, that it is proportionate to the legitimate aim pursued...” (*Olsson v. Sweden (No.1)*, 1988, para.67). Meaning that any

interference in a persons life must correlate with the social need to intervene and that the interference must be commensurate with the need for intervention. Further, the ECtHR underline that “...in determining whether an interference is “necessary in a democratic society”, the Court will take into account that a margin of appreciation is left to the Contracting States.” (Olsson v. Sweden (No.1), 1988, para.67). This highlights the fact that the ECtHR acknowledge that a certain degree of discretion is needed for the respective authorities to assess the necessity of a measure. The ECtHR further states that the Court cannot confine itself to look at the impugned decision in isolation but see the case as a whole, to determine whether the justification of the measure was “relevant and sufficient”. The Court emphasize that the Courts review “...is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith.” (Olsson v. Sweden (No.1), 1988, para.68).

In *Kutzner* (para.63), *P., C., and S. v. The UK* (para.114), *R.K. and A.K. v. The UK* (para.34), *A.D. and O.D. v. The UK* (para.82) and *Y.C. v. The UK* (para.133), the ECtHR states that in order to determine whether a measure were “necessary in a democratic society” one needs to see each case as a whole. The five judgements also emphasize that in order to justify any measure, the measures must be “relevant and sufficient”. The ECtHR does not elaborate as to what the Court considers as “relevant and sufficient” in neither *Kutzner* nor *P., C., and S. v. The UK*, other than “...the reasons adduced to justify them [the measures] were relevant and sufficient for the purposes of paragraph 2 of Article 8.” (*Kutzner v. Germany*, 2002, para.63, *P. C. and S. v. The UK*, 2002, para.114). The same concerns *A.D. and O.D. v. The UK*. However, in *A.D. and O.D. v. The UK*, the ECtHR emphasize that in addition to measures being “relevant and sufficient” the decision-making process must be fair and afford due respect to the applicant’s rights under art.8 of the ECHR (*A.D. and O.D. v. The UK*, 2010, para.82). The need to see each case as a whole is also the focus in *R. and H. v. The UK* (para.81). However, unlike in the other five judgments, the ECtHR does not use the phrase “necessary in a democratic society”. The Court mere states that one must consider the case as a whole in order to examine if the reasons “...adduced to justify this measure were relevant and sufficient...” (*R. and H. v. The UK*, 2011, para.81).

In *Y.C. v. The UK*, the ECtHR gives a summary on established case-law.

“The Court’s case-law regarding care proceeding and measures taken in respect of children clearly establishes that, in assessing whether an interference was “necessary in a democratic society”, two aspects of the proceedings require consideration. First, the Court 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 UK, 2012 para.133)

The summary of case-law does not bring anything new to the field. However, it provides an overview of established practices as to how the ECtHR assesses whether an interference was “necessary in a democratic society”.

The ECtHR points out, on several occasions, that although art.8 of the ECHR “...contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8.” (McMichael v. The UK, 1995, para.87, Kutzner v. Germany, 2002, para.56, P. C. and S. v. The UK, 2002, para.119, and R. and H. v. The UK, 2011, para.75).

As mentioned, the ECtHR has stated that there are no procedural requirements in art.8 of the ECHR. However, how the Court assesses decisions, and the related decision-making process, made by domestic authorities are repeatedly brought to attention by the Court.

Time is recognized by the ECtHR as a factor in the domestic authorities’ decision-making process and in any related judicial proceeding. The Court states that in cases concerning care orders there is a “...danger that any procedural delay will result in the de facto determination of the issue submitted to the Court before it has held its hearing.” (W. v. The UK, 1987, para.65). For these reasons, the ECtHR underline that any decisions regarding future relations between biological parents and child shall be “...determined solely in the light of all relevant considerations and not by the mere effluxion of time.” (W. v. The UK, 1987, para.65). In other words, time is not an adequate argument in decisions regarding respect for family life.

In *P., C., and S. v. The UK* (para.121-122), the applicants claim that a domestic law, governing adoptions, is in breach of the ECHR. In response, ECtHR emphasize that it is not the Courts role to examine domestic law in abstract. However, the Court states that it can envisage situations where the domestic law in question may be applicable and not a violation against the ECHR and therefore the law *per se* is not in breach of the Convention. Instead of assessing the domestic law, the ECtHR states that it will examine if the measures taken in the particular case are in accordance with art.8 of the ECHR.

In *Saviny*, the ECtHR focuses on the quality of the decision-making process. The Court states that, in order to assess the quality of the decision-making process, it will see “...whether the

conclusion of the domestic authorities were based on sufficient evidentiary bases.” (Saviny v. Ukraine, 2009, para.51). To determine whether the conclusion has come on a justifiable basis, the ECtHR has made a list of both professionals and laymen that could strengthen the conclusion reached by domestic authorities: “...statements from witnesses, reports by competent authorities, psychological and other expert assessments and medical notes.” (Saviny v. Ukraine, 2009, para.51). The ECtHR also emphasize that the biological parents must have had “...sufficient opportunity to participate in the procedure in question.” (Saviny v. Ukraine, 2009, para.51) and that children must have been able to express their views.

Regarding decisions made by authorities based on statements from professionals, the ECtHR acknowledge that the professionals may be mistaken in their assumptions.

“...mistaken judgments or assessments by professionals do not per se render child-care measures incompatible with the requirements of Article 8. The authorities, medical and social, have duties to protect children and cannot be held liable every time genuine and reasonably-held concerns about the safety of children vis-à-vis members of their families are proved, retrospectively, to have been misguided.” (R.K. and A.K. v. The UK, 2008, para.36)

In other words, the authorities’ positive duty to protect the health and development of children justifies any measures taken, if the measures are taken on the base of genuine and reasonably held concern about the child’s welfare. This includes cases where the concerns later prove to be unjustified.

The ECtHR acknowledge that there may be discrepancy between biological parents and the authorities, when it comes to decide what is in the child’s best interest. In both *Scozzari and Giunta* (2000 para.138) and *M.D. and Others* (para.27), the ECtHR states that even in situations where biological parents have been deprived of parental rights, they may represent their child in cases before the Court. This is particularly important if the biological parents and the authorities are in conflict. Further, the ECtHR states that a mothers standing as a “...natural mother suffices to afford her the necessary power to apply to the Court on the children’s behalf...” (Scozzari and Giunta v. Italy, 2000, para.138, and *M.D. and Others v. Malta*, 2012, para.27).

7.1.6 Other – In-depth presentation of legal arguments

The ECtHR have summarized established case-law in both *B. v. The UK* and *R. v. The UK*. The summary is identical in the two judgments. Firstly, the Court emphasizes that any interference

from the domestic authorities with a person's right to respect for family will be a violation against art.8 of the ECHR, "...unless it was "in accordance with the law", had an aim or aims that is or are legitimate under Article 8 § 2 (art.8-2) and was "necessary in a democratic society" for the aforesaid aim or aims." (B. v. The UK, 1987, para.61(a), R. v. The UK, 1987, para.65(a)). In other words, unless there are compelling reasons that would justify an interference in a person's right to respect for family life, the interference will be a violation against art.8 of the ECHR. Further, the ECtHR points out that although the object of art.8 of the ECHR is to protect individuals against arbitrary interference from the authorities, there may be additional obligations inherent in an effective "respect for family life" (B. v. The UK, 1987, para.61(c), R. v. The UK, 1987, para.65(c)).

In *R. and H. v. The UK*, the ECtHR emphasize the importance of taking extra care in proceedings that may lead to a child being put up for adoption. The Court points out that "...the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8" (R. and H. v. The UK, 2011, para.75). In order for an interference to be justified, the parents must be involved in the decision-making process to a degree that is sufficient to protect their interests. The ECtHR points out that it is the same principles that apply in all cases involving children, "...but they apply with greater force when those proceedings may culminate in a child being removed from their biological parent and placed for adoption." (R. and H. v. The UK, 2011, para.76).

7.1.7 Discussing the legal arguments

In section 1.1 In-depth presentation of research question, I presented four supportive questions that would guide my research towards understanding how the ECtHR weigh children's and parents' rights in care order cases. I will in the following section discuss how the legal arguments may give some answers to the questions.

The first supportive question relates to how the ECtHR assess cases and secure the rule of law, across 47 different judicial systems, for everyone.

Looking at the ECtHRs decision making process, the Court emphasize that it is not a substitution for the domestic authorities. The Courts role is to review decision made by local authorities, in light of the ECHR, to potentially unveil any infraction on the convention (see i.a. *Johansen v. Norway*, 1996, para.64, and *R. and H. v. The UK*, 2011, para.81). When reviewing decisions made by domestic authorities, the ECtHR look towards how the decisions are

justified. As previously mentioned, the decision made by domestic authorities is strengthened if the decision is supported by the statement of i.a. professionals, laymen or witnesses (see i.a. *R.K. and A.K. v. The UK*, 2008, para.36, and *Saviny v. Ukraine*, 2009, para.51). By encouraging the domestic authorities to use, i.a., professionals in their decision-making process, the ECtHR secure that the decisions made by the domestic authorities are rooted in expert knowledge.

The ECtHR points out that any measure implemented by the domestic authorities, should be rooted in domestic law. The ECtHR underlines that there must be safeguards in the domestic legal system to secure against arbitrary interference. Further, the law should be phrased in a way that is reasonably understandable for the ones that are affected by it. Any law phrased in a way that opens for discretionary assessments should ensure that "...the scope of the discretion and the manner of its exercise are indicated with sufficient clarity..." to ensure the individuals protection against arbitrary interference (*Olsson v. Sweden (No.1)*, 1988, para.61, *Margareta and Roger Andersson v. Sweden*, 1992, para.75). On several occasions, the ECtHR emphasizes that in order to assess if the reasons used to justify the measure was relevant and sufficient, one must see the case as a whole. The same is relevant for situations where the ECtHR assess whether the impugned measure was "necessary in a democratic society" (ECHR, 1950, art.8, *A.D. and O.D. v. The UK*, 2010, para.82, and *R. and H. v. The UK*, 2011, para.81).

Art.8(2) of the ECHR states that in order for an interference to be justified it must be "in accordance with the law" or "necessary in a democratic society". While the phrase "in accordance with the law" underlines the authorities' obligation to root any measure taken in domestic law, the meaning behind the phrase "necessary in a democratic society" is more elusive. In *Olsson v. Sweden (No.1) (1988, para.67)* the ECtHR states that the notion of necessity implies that there is a pressing social need to interfere. The Court also reiterates that a margin of appreciation is left to the domestic authorities in determining the necessity of an interference.

To summarize, the legal arguments state that it is the role of the ECtHR to assess whether the measures taken by the authorities are "in accordance with the law" or "necessary in a democratic society. In order to see if the measure was "in accordance with the law", the ECtHR review how the authorities justified the measure. How the ECtHR assess whether an interference was "necessary in a democratic society", has been summarized by the Court in *Y.C. v. The UK (2012, para.133)*: "First, the Court 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.”.

The second supportive question revolves around the child’s best interests. A care order is issued to protect the child’s best interest.⁵⁷ Who is involved in the decision-making process leading up to a care order being issued and who decides what is in the child’s best interests?

As shown in table 12, in section 7.1.1, decision-making is the largest legal-argument category. The decision-making arguments are only found in the paragraphs coded in the pro-parent- and the Court category. The arguments pertaining to decision-making is mainly focused on parents’ involvement in the decision-making process. *W. v. The UK (1987)* is one of the judgements with the highest referral-rate.⁵⁸ Three of seven paragraphs being referred to in the judgement revolve around the decision-making process. In *W. v. The UK (1987, para.63 and para.64)*, the ECtHR states that parents must be involved in the decision-making process to an extent that their interests are heard. However, that does not necessarily mean that the parents must be involved directly. On the contrary, the ECtHR state that if there is regular contact between the parents and a social worker that contact may be enough to let the parents’ interests be known. The fact that parents must be involved in the decision-making process to an extent that their interests are known, are reiterated by the ECtHR time and time again. The ECtHR points out that art.8 of the ECHR does not contain any explicit procedural requirements but that the decision-making process involved in an interference must offer the affected due respect (See i.a. *McMichael v. The UK*, 1995, para.87, and *Kutzner v. Germany*, 2002, para.56). The ECtHR has repeatedly stated that the care order field is an area in need of “...even greater call than usual for protection against arbitrary interference.” (*B. v. The UK*, 1987, para.63). The need for extra protection against arbitrary interference can be seen in light of the lack of procedural requirements. No procedural requirement gives the Courts, and authorities, an even greater discretionary power.

Looking at the legal arguments it is clear that the parents must in one way or another be involved in the decision-making process. The ECtHR has stated that to not include parents in the decision-making process is a violation against the parents’ rights under art.8 of the ECHR (*X. v. Croatia*, 2008, para.48, and *R. and H. v. The UK*, 2011, para.75). However, the ECtHR

⁵⁷ See section 2.1 Care orders.

⁵⁸ See table 8, section 6.1.

emphasizes that if there are pressing reasons to not include the parents in the decision-making process, such as the child's wellbeing, their rights may be waived. The child's wellbeing surpasses the parents' rights (*Haase v. Germany*, 2004). Besides pointing out that the children's wellbeing may cause the ECtHR to waive parents' rights, children are rarely mentioned in legal arguments pertaining to decision-making process. There is only one paragraph, referred to once, that state that children must have been able to express their views in a decision-making process (*Saviny v. Ukraine*, 2009, para.51), otherwise children are not mentioned. This may indicate that due to the children being minors others choose what they believe to be in the child's best interests.

How the authorities reach a decision and the quality of their conclusion has been addressed by the ECtHR. The ECtHR states that the authorities decision is often based on case reviews, but could equally be based on a continuous monitoring done by a representative from the authorities (*W. v. The UK*, 1987). In *Saviny (2009, para.51)*, the ECtHR have made a list of professional and laymen that could strengthen the conclusion reached by domestic authorities: "...statements from witnesses, reports by competent authorities, psychological and other expert assessments and medical notes.". The Court points out that any conclusion the authorities reach must be taken on sufficient evidentiary bases.

A care order is issued to protect the health and development of a child.⁵⁹ In other words, a care order is issued if the authorities believe it to be in the child's best interest. That raises the question, who knows what is best for the child? The ECtHR acknowledge that there may be disagreements between what the authorities believe to be in the child's best interest and what the biological parent believe. "A mother knows best" is a generally known phrase. That phrase is not necessarily always correct. However, the ECtHR points out that in cases where biological parents are in a conflict with the authorities, that may lead to situations where the children's interest is not adequately brought to the Courts attention. For these reasons will a mothers standing as biological mother suffice to give her the power to represent the child in proceeding before the ECtHR (*Scozzari and Giunta v. Italy*, 2000, para.138, and *M.D. and Others v. Malta*, 2012, para.).

To summarize, what is in the child's best interests is up for debate. Professionals, laymen and biological parents all have a say in the matter. As aforesaid, the authorities must base their

⁵⁹ See section 2.1 Care orders.

decision on sufficient evidentiary bases. The authorities' conclusion is strengthened if it is supported by professionals and laymen. However, professionals are not infallible. Neither are laymen. This, in turn, leads to decisions taken on sound ground in the child's best interests, in retrospect, not to be in the child's best interests. In both *R.K and A.K. v. The UK (2008, para.36)* and *R. and H. v. The UK (2011, para.81)* the ECtHR states that authorities cannot be held accountable for actions taken due to genuine and reasonable concerns about a child's wellbeing. Which, in turn, relates back to the fact that the child's best interests surpass the biological parents' rights. The fact that errors are made emphasize the importance of a safety net, such as a biological parents' right to represent their child in the ECtHR in cases where they have lost their parental rights (See i.a. *Scozzari and Giunta v. Italy, 2000, para.138*).

The third supportive question revolves around the children's human rights, to which extent they are granted rights under the ECHR and how their rights are adhered to by the ECtHR.

Looking at the legal arguments, there are no arguments directly stating as to what extent children have rights, nor how the child's rights are adhered to. Seemingly, children's rights are of a more in-direct nature. In *Y.C. v. The UK (2012, para.134)* the ECtHR states that a child should not be put in harm's way due to its biological parents' rights. The statement does not say to what extent children have rights. However, it does say that children's right to protection trumps the biological parents' right to family life.

The child's right to protection is also brought to the table in *R. and H. v. The UK (2011, para.81)*. The ECtHR states that the authorities have a positive duty to protect the child's wellbeing to an extent that parents' right may be surpassed. The authorities' duty towards the child is of such a magnitude that they cannot be held accountable for decision proven, in retrospect, to be misguided. Meaning that any decision taken in the child's best interests, on the base of "...genuine and reasonably held concerns about the safety of children vis-à-vis members of their family..." (*R. and H. v. The UK, 2011, para.81*) is justified, even though it is a violation against the biological parents' rights.

The ECtHR has stated on several occasions that the child's interests must always be weighed against the biological parents' rights (See i.a. *E.P. v. Italy, 1999, para.69*, and *M.D. and Others v. Malta, 2012, para.76*). Even so, the ECtHR reiterates on several occasion that the child's best interests is an "...overriding requirement..." (See i.a. *P. C. and S. v. The UK, 2002, para.118*, and *M.D. and Others v. Malta, 2012, para.76*). An overriding requirement indicates that the

child's interests surpasses the biological parents' rights, and in situations where children and parents' interests differ, the biological parents' interests are not taken into consideration. However, there must be special circumstances pertaining to the child's wellbeing in order for any measures taken in the child's best interests to be justified (K.A v. Finland, 2003, para.92).

The biological parents' rights and the child's interests can be related. When one speaks about the biological family, it is a two-way relationship. When the child is taken into public care, it would constitute a violation against both the child's and parents' rights to automatically sever all ties between them. The ECtHR stress the importance of letting the relationship continue to develop, while the family is apart. Therefore, sustaining contact between the biological parents and child while the child is in public care is of the utmost importance and hindering such a contact is a violation against both the biological parents' and the child's rights, unless there are compelling reasons to justify abolishing all contact (Margareta and Roger Andersson v. Sweden, 1992, para.72).

To summarize, the legal arguments points to the fact the child's interests and rights trumps those of the parents. It is, however, not enough to state that being in public care is a more beneficial environment for the child. There must be compelling reasons pertaining to the child's wellbeing for a measure, interfering with the biological parents' right to family life, to be justified (K.A v. Finland, 2003, para.92). There are no legal arguments directly stating how children's rights should be adhered to by the ECtHR. Seemingly, the bottom line is that children's rights are a question of what is in the child's best interests. If the child's health or development is at risk, any interference with the biological parents' rights is justified.

The last supportive question revolve around the ECtHRs relationship with the CRC and if the CRC influence the decisions made by the Court. There are no legal arguments pertaining to the CRC. Meaning that, seen from a legal-argument perspective, there is no judicial precedent stating if and how the CRC affects the ECtHR.

7.2 Pragmatic discourse – findings and discussion

Pragmatic arguments are arguments indicating rational-choices, or how one most efficiently can reach the desired goal. There are most pragmatic arguments found in the pro-child category, with 24 arguments. The Court-category have 15 pragmatic arguments. Pro-parent and

biological family each have five, and the “other”-category have one pragmatic argument.⁶⁰ Table 13 shows an overview of how many pragmatic arguments are found in each of the five initial-categories.

Table 13 Number of pragmatic arguments in each initial-category

Number of pragmatic arguments in each initial-category			
Pro-child	24	Pro-parent	5
Biological family	5	The Court	15
Other	1		

7.2.1 Categorizing the pragmatic arguments

As with legal arguments, pragmatic arguments can be found in all four initial-categories. The pro -child category, with 24 pragmatic arguments and eight categories, has as many pragmatic arguments as found in total in the remaining three initial-categories. In total there are 48 argument coded in nine argument-categories. The largest argument-category is “reunite” with 13 arguments, followed by “direct contact” with nine arguments. Both “child’s best interest” and “margin of appreciation” has eight arguments. Of the four largest argument-categories, “child’s best interest” is the only one that is only found in one of the initial-categories. The other three categories are all found in more than one initial-category. In both “the Court”-category and in “pro-child” one finds both discretion and margin of appreciation. In its argumentation, the ECtHR distinct between the states margin of appreciation and the discretionary choice the domestic authorities make when issuing a care order. The two aforesaid categories can arguably be overlapping. This will be addressed in chapter 8 – Discussion and concluding remarks. Table 14 shows an overview of the pragmatic argument categories.

⁶⁰ Not every pragmatic argument in, *inter alia*, the pro-child category is in favor of the child. An in-depth presentation of all pragmatic arguments in each of the five initial-categories is found in sections 7.2.2 – 7.2.6.

Table 14 Overview of the pragmatic argument categories

Pro-Child pragmatic arguments		
Category	Judgements	Arguments
Child's best interest	7	8
Reunite	4	5
Direct contact	3	3
Margin of appreciation	2	3
As a whole	2	2
Balance parent-child	1	1
Discretion	1	1
Acting on child's behalf	1	1

Pro-Parent pragmatic arguments		
Category	Judgements	Arguments
Reunite	5	5

Biological family pragmatic arguments		
Category	Judgements	Arguments
Reunite	3	3
Margin of appreciation	2	2

The Court pragmatic arguments		
Category	Judgements	Arguments
Direct contact	6	6
Discretion	3	3
Margin of appreciation	3	3
Decision-making	1	2

As aforesaid, “Reunite” can be found in three of the four initial-categories. Two arguments, found in *Gnahoré* para.51 and *Kutzner* para.76, are coded in both the pro-parent – and the biological family category. This entails that there are 11 unique arguments in the “reunite” category.

Arguments coded as “direct contact” are found in both the pro-child- and the Court category. All three arguments from the pro-child category, found in *Johansen* para.64, *Kutzner* para.66 and *R. and H. v. The UK* para.81, is also found in the Court category. Which mean that there are six unique pragmatic arguments pertaining to “direct contact”.

The “margin of appreciation” category is found in the pro-child-, the biological family- and the Court category. Of the eight arguments coded in this category, two, found in *E.P. v. Italy* para.62 and *Kutzner* para.67, are coded in more than one of the initial-categories. In other words, there are six unique arguments pertaining to “margin of appreciation”.

In the pro-child category there is one argument coded as “discretion”. This argument found in *B. v. The UK* para.63, is also coded in the Court category. Meaning that there are three unique arguments in the “discretion” category.

All other arguments are unique. Which mean, there are 40 unique pragmatic arguments divided into nine argument categories.

7.2.2 Pro-child – In-depth presentation of pragmatic arguments

Some of the pragmatic arguments relates to how the ECtHR should view a case. *Olsson and Bronda* both highlight the importance of viewing the case as a whole in order to examine whether or not a measure taken by the authorities were justified.

“The Court reiterates that in determining 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.” (*Bronda v. Italy*, 1998, para.59).

It is worth noting the sentence “necessary in a democratic society”. According to art.8 of the ECHR, in order for a measure taken by the authorities to be justified, it must be “necessary in a democratic society”. What constitutes as “necessary in a democratic society” is not defined by the ECHR.

If a case concerning a young child, the child may not always be able to speak for itself. Who knows what is best for the child has been discussed by the ECtHR. In *Scozzari and Giunta*, the ECtHR stated that “...even though the 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 children’s behalf, too, in order to protect their interests.” (*Scozzari and Giunta v. Italy*, 2000, para.138). Meaning, that a biological parent may represent his or her child in the ECtHR on the base of being the child’s biological parent, even though the parent has lost all parental rights. In other words, the ECtHR acknowledge the biological parents’ knowledge of what is in their child’s best interest and thus they [the biological parents] can apply to the Court on their child’s behalf.

Johansen emphasizes the need to balance children and parents’ rights. “... a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child.” (*Johansen v. Norway*, 1996, para.78). Meaning that what is in the child’s best interest should be weighed against the care orders ultimate aim of reuniting parent and child.

P., C., and S. v. The UK, K.A. v. Finland, M.D. and Others and *Y.C. v. The UK* all focus on the importance of reuniting the biological parents and their children. *K.A. v. Finland* underlines that “...the Court (ECtHR) has reiterated time and again, the taking of a child into public care should normally be regarded as a temporary measure...” (*K.A v. Finland*, 2003, para.138). Since any

care order should be considered a temporary measure the ECtHR, in the four judgements, also stress the importance of national authorities facilitating the reunification of the family as soon as the situation permits. *Y.C. v. The UK* emphasize the importance preserving personal relations in order to “rebuild” the family (*Y.C. v. The UK*, 2012, para.134). However, a reunification of the family should only be permitted as long as the wellbeing of the child is secure. This is underlined by *M.D. and Others*. In *M.D. and Others* the ECtHR states that child’s best interest is an “overriding requirement” (*M.D. and Others v. Malta*, 2012, para.76). The child’s best interest is also highlighted in *K.A. v. Finland*. Here the ECtHR states that the importance of reuniting the family as soon as situation permits should always be balanced “...against the duty to consider the best interests of the child.” (*K.A v. Finland*, 2003, para.138).

The ECtHR repeatedly acknowledge the national authorities’ margin of appreciation. In *B. v. The UK* the ECtHR states that it would add to the national authorities problems, if the ECtHR required the authorities to follow “...an inflexible procedure...” on each occasion (*B. v. The UK*, 1987, para.63). In *E.P. v. Italy*, the ECtHR merely states that “...the State enjoys a certain margin of appreciation.” (*E.P. v. Italy*, 1999, para.62). In *Kutzner* however, the ECtHR states that the national authorities margin of appreciation will “...vary in the light of the nature of the issues and the seriousness of the interests at stake...” (*Kutzner v. Germany*, 2002, para.67). The Court further states that one must protect children in situation where their health or development is at risk.

In *Kutzner*, the ECtHR recognizes the national authorities’ wide margin of appreciation in assessing the children’s need for protection and thereunder the necessity of a care order (*Kutzner v. Germany*, 2002, para.67). The Court stress the fact that national authorities have an upper hand in assessing the situation leading up to a care order and the time afterwards.

“...it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned, often at the very stage when care measures are being envisaged or immediately after their implementation.” (*R. and H. v. The UK*, 2011, para.81, see also *Johansen v. Norway*,1996, para.64 and *Kutzner v. Germany*, 2002, para.66).

The ECtHR acknowledge that the direct contact with the parties concerned as the situation progresses is beneficial when deciding whether or not a care order should be issued. However, it does not mean that the national authorities are infallible. It merely means that the it must be taken into account that the national authorities have first-hand experience with each case, while the ECtHR rely on second hand information.

A third of the pragmatic arguments in the pro-child category revolves around the child's best interest, or more specifically, the importance of keeping the child's best interest in mind when deciding in matters concerning the child. The child's best interest will also be a topic when discussing ethical arguments. In this section the focus is on the pragmatic use of the child's best interest as an argument for deciding in matter concerning the child.

In *Y.C. v. The UK*, the ECtHR states that "...the best interest of the child are paramount.", when considering whether or not a child should be put up for adoption and thus sever all ties with its biological family (*Y.C. v. The UK*, 2012, para.134). The Court emphasizes the importance of doing what is best for the children's development or health. In *R. and H. v. The UK*, the ECtHR states that to authorize adoption and hence sever a child's ties with its biological family "...can only be justified if they [the measures taken] are motivated by an overriding requirement pertaining to the child's best interest." (*R. and H. v. The UK*, 2011, para.81, see also *Aune v. Norway*, 2011, para.66 and *P., C. and S. v. the United Kingdom*, 2002, para.118). In other words, unless the measures are taken based on the child's best interested, they cannot be justified.

In *Saviny*, the ECtHR emphasizes the importance of considering the child's best interest in the decision-making process.

"A relevant decision must therefore be supported by sufficiently sound and weighty considerations in the interests of the child, and it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child has been made." (*Saviny v. Ukraine*, 2009, para.49)

Within the deliberation of what is in the child's best interest, the Court emphasize the importance of assessing the ramifications of the proposed care measure has on both parent and child. However, it is still the child's best interest that is the weighty consideration.

7.2.3 Pro-parent – In-depth presentation of pragmatic arguments

All five pragmatic arguments, in the pro-parent category, revolve around the same principle: the speedy reunion between biological parents and children after a child has been taken in to care.

In both *Johansen* and *E.P. v. Italy*, the ECtHR states that a care order should "...normally be regarded as a temporary measure to be discontinued as soon as circumstances permit" (*Johansen v. Norway*, 1996, para.78, *E.P. v. Italy*, 1999, para.64). In *Kutzner*, the Court has chosen another

phrasing. Here the ECtHR use the phrase *in principle* instead of *normally*, while the rest of the paragraph is the same as in the other two judgements (*Kutzner v. Germany*, 2002, para.76). There is little practical difference between “in principle” and “normally”. All three judgements emphasize that a care order is a temporary measure that should be discontinued as soon as possible. The ECtHR also states in the three abovementioned judgments that all care orders have an ultimate aim of reuniting biological parents and children.

In *Eriksson*, the ECtHR states that it is the parents’ right under art.8 of the ECHR to have measures taken to secure the reunion between biological parents and child. If the authorities fail to implement such measures, that would constitute a violation against the biological parents’ right to family life (*Eriksson v. Sweden*, 1989).

In *Gnahoré*, the ECtHR states that art.8 of the ECHR’s object is to secure the public against arbitrary interference from the authorities. This is used as an argument to underline the authorities’ obligation to facilitate a reunion between biological parents and child, in cases where “...the existence of a family tie has been established...” (*Gnahoré v. France*, 2001, para.51). The Court emphasizes that it is the authorities’ duty to not only take measures to enable biological parents and children to be reunited, but also to make sure that the bond between biological parent and children is being developed (*Gnahoré v. France*, 2001, para.51).

7.2.4 Biological family – In-depth presentation of pragmatic arguments

Three out of five of the arguments in this category focus on the reunion of biological parents and their children after a care order have been issued. The four arguments all originate from different judgements. A common denominator for all four arguments is the discontinuation of a care order, as soon as the circumstances permit. In *Olsson*, the ECtHR states that since there has been no question about the children being adopted, the care order should be “...regarded as a temporary measure...” (*Olsson v. Sweden* (No.1), 1988, para.81). In other words, as long as there are no questions about the permanent care for the children the ECtHR considers any measure taken to be temporary and should hence be discontinued as soon as circumstances permit.

In *Gnahoré*, the ECtHR underline the importance of taking measures that reunite biological parents and children in cases where a family tie has been established. The Court also emphasizes that where a family tie has been established “...the State must in principle act in a manner calculated to enable that tie to be developed...”(*Gnahoré v. France*, 2001, para.51). The ECtHR

emphasizes the importance of maintaining a bond between the biological parents and children when the children are in public care, in order to reach the care orders ultimate aim of reuniting biological parents and children.

The ECtHR have highlighted the importance of a speedy reunion between biological parents and child in *Kutzner*.

“The positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the responsible authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child.” (*Kutzner v. Germany*, 2002, para.76).

The best interest of the child forms the basis of all arguments about the reunification of the biological family. However, the authorities have an obligation to take measures to ensure that the biological family are reunited as soon as circumstances permits. The authorities must consider that the longer the child is in public care the more difficult it will be for the biological parents and children to maintain, and develop, a relationship.

The last two arguments in this category are about the Contracting States margin of appreciation. In *E.P. v. Italy*, after talking about balancing the interests of the child and the biological parents and emphasizing that the authorities cannot authorize any measure that would “...harm the child’s health and development”, the ECtHR simply states “Moreover, the State enjoys a certain margin of appreciation.” (*E.P. v. Italy*, 1999, para.62). The statement comes without any elaboration.

In *K.A. v. Finland*, the ECtHR elaborates on the extent of the authorities’ margin of appreciation.

“Whereas the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into public care, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed. The minimum to be expected of the authorities is to examine the situation anew from time to time to see whether there has been any improvement in the family’s situation. The possibilities of reunification will be progressively diminished and eventually destroyed if the biological parents and the child are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur.” (*K.A v. Finland*, 2003, para.139).

The ECtHR effectively restricts the authorities' margin of appreciation. The Court states that the authorities are free to make the discretionary choices needed when assessing whether or not to take a child into public care and in that regard enjoy a wide margin of appreciation. However, when considering other measures, like restricting parental access or any measure that could endanger the reunion of biological parents and child, the ECtHR calls for "stricter scrutiny". The Court further states that there expectations as to how the authorities should act in cases where a child has been taken in to public care. The Court also sheds a light on the fact that any measure taken that would hinder parental access could potentially cause it to be impossible to reunite biological parents and child, due to the natural bond between them being broken.

7.2.5 The Court – In-depth presentation of pragmatic arguments

In *Johansen* (para.64), *Kutzner* (para.66), *P., C., and S. v. The UK* (para.115), *R.K. and A.K. v. The UK* (para.34), *A.D. and O.D. v. The UK* (para.83) and *R. and H. v. The UK* (para.81), the ECtHR emphasizes that the national authorities have the benefit of direct contact with all persons concerned, when assessing the necessity of a measure. The contact between all persons concerned are "...often at the very stage when care order are being envisaged or immediately after their implementation." (see among others *Johansen v. Norway*, 1996, para.64). For these reasons the ECtHR emphasizes that it is not the Courts task to substitute itself with the domestic authorities. The domestic authorities are responsible for regulating "...the public care of children and the rights of parents whose children have been taken in to care,..." (*P. C. and S. v. The UK*, 2002, para.115), not the ECtHR. The Court acknowledges the authorities' margin of appreciation in assessing the necessity of taking a child in to public care. However, the ECtHR emphasize that when it comes to any further limitation on parental rights, such as restriction on rights of access, "...a stricter scrutiny is called for..." (*R.K. and A.K. v. The UK*, 2008, para.34).

In *B. v. The UK* (para.63), *W. v. The UK* (para.62) and *X. v. Croatia* (para.47), the ECtHR acknowledges that domestic authorities are faced with a task that is "...extremely difficult.", when contemplating whether a measure should be implemented. For these reasons the ECtHR underline that the domestic authorities must be allowed a measure of discretion. "To require them to follow on each occasion an inflexible procedure would only add to their problems." (*B. v. The UK*, 1987, para.63, *W. v. The UK*, 1987, para.62, and *X. v. Croatia*, 2008, para.47).

In *Kutzner* and *P., C., and S. v. The UK*, the ECtHR comments on the reach of the authorities' leeway in their discretionary choices. The Court states:

“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).

In *P., C., and S. v. The UK*, the ECtHR further elaborates as to what the Court expects from the national authorities. The Court states that when one evaluates a measure sat in motion by the national authorities, there must exist circumstances justifying implementing the measure. The national authorities are obliged to assess all possible alternatives before issuing a care order (*P. C. and S. v. The UK*, 2002, para.116).

In *B. v. The UK*, the ECtHR shed a light on some sides of the national authorities’ decision-making process. The Court states that “...there will clearly be instances where the participation of the natural parents in the decision-making process either will not be possible or will not be meaningful – as, for example, where they cannot be traced or are under a physical or mental disability or where an emergency arises.” (*B. v. The UK*, 1987, para.65). In other words, the ECtHR does not necessarily believe that the biological parents should participate in the national authorities’ decision-making process regardless of the situation. The Court points out that there may be special circumstances that hinder such participation. Secondly, the ECtHR states that the national authorities’ decision may evolve from “...a continuous process of monitoring on the part of the local authority’s officials.” (*B. v. The UK*, 1987, para.65). Meaning that monitoring the situation should be equated with testimony from biological parents and/or social workers. Lastly, the ECtHR states that regular contact between social worker and biological parents can “...provide an appropriate channel for the communication of the latter’s views to the authority.” (*B. v. The UK*, 1987, para.65). Meaning that in certain situations a hearing where the biological parents can present their views is redundant.

7.2.6 Other – In-depth presentation of pragmatic arguments:

In *Y.C. v. The UK*, the ECtHR states that the Courts role in assessing cases is to ascertain whether the domestic courts “...made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what would be the best solutions for the child.” (*Y.C. v. The UK*, 2012, para.138). Meaning that the domestic courts must pay due respect to the interests of all parties in a case but that the decision, in the end, must be in the child’s best interests. The ECtHR emphasizes that, in practice, there is likely a

certain degree of overlap of different interests which must be weighed against each other to justify a measure in respect of the care of a child.

7.2.7 Discussing the pragmatic arguments

In the following section, I will look at how the pragmatic arguments may answer the four questions presented in section 1.1 In-depth presentation of research question.

Viewing how the ECtHR assess cases, the pragmatic arguments mainly focus on what the ECtHR expect domestic authorities to do and their decision-making process. In *Y.C. v. The UK (2012, para.138)* the ECtHR states that it is its role to ascertain whether the domestic courts “...made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what would be the best solutions for the child.”. Meaning that when reviewing a case, the ECtHR assess whether the decision made by local authorities were justified and in the child’s best interests.

When a measure is set in motion, there must exist circumstances justifying that measure. This is especially important if the measure is a care order. As previously mentioned, the ECtHR has repeatedly stated that the care order field is an area which calls for extra protection against arbitrary interference from the authorities (see i.a. *W. v. The UK, 1987, para.62*). The ECtHR emphasizes that domestic authorities are obliged to assess all possible alternatives before issuing a care order (*P. C. and S. v. The UK, 2002, para.116*).

In *Gnahoré v. France (2001, para.51)* the ECtHR states that the object of art.8 of the ECHR is to protect the public against arbitrary interference from the authorities. The statement is used as an argument to highlight the authorities’ obligation to facilitate a reunion between biological parents and child as soon as circumstances permit. Further, the ECtHR emphasizes that it is the authorities’ duty to ensure that the natural bond between biological parents and the child continue to develop while the child is in public care. These arguments are in line with well-established case-law stating that a care order’s ultimate aim is to reunite biological parents and children (see i.a. *E.P. v. Italy, 1999, para.64*, and *Kutzner v. Germany, 2002, para.76*).

In regard to the domestic authorities’ decision-making process, the ECtHR has repeatedly stated that the authorities have the benefit of direct contact with all person’s concern, when assessing the necessity of a measure, which the ECtHR does not have (see i.a. *Johansen v. Norway, 1996, para.64*, and *A.D. and O.D. v. The UK, 2010, para.83*). Therefore, it is not the ECtHR’s task to substitute itself with the domestic authorities. It is the authorities that are responsible for

regulating the public care of children and to protect the rights of biological parents whose children have been taken into care (P. C. and S. v. The UK, 2002, para.115). As foresaid, the ECtHRs role is to assess whether the decisions made by domestic authorities were justified. In order for the decision to be justified it has to be “necessary in a democratic society”. To assess whether a decision were “necessary in a democratic society” one must see the case as a whole (Bronza v. Italy, 1998, para.59). There is no explanation as to how one should consider whether a decision was “necessary in a democratic society” in the pragmatic arguments.

To summarize, the pragmatic arguments highlight how the domestic authorities should proceed in a decision-making process. Besides stating that the ECtHR is not a substitution for domestic authorities and underlining that it is the ECtHRs role to ascertain whether the domestic court’s decision was a result of careful consideration of the interests and rights of all involved, there are no pragmatic arguments pertaining to how the ECtHR assess cases across all 47 different judicial systems. However, by emphasizing how the domestic authorities should conduct their decision-making process in order to justify their decision, the ECtHR has essentially created a guideline as to how the domestic authorities should reach a decision.

When it comes to who decides what is in the child’s best interests there is only one pragmatic argument directly stating who should decide on behalf of the child. In *Scozzari and Giunta v. Italy* (2000, para.138) the ECtHR acknowledge that a child may not always be able to speak for itself, i.a. young children that have not yet learned how to speak. To ensure the child’s interests, the ECtHR states that biological parents may represent the child in cases appearing before the Court and speak on their behalf, even in situations where the biological parents have been deprived of their parental rights. Meaning that the ECtHR acknowledge that the authorities are not infallible and decisions taken to protect the child’s best interest may in retrospect prove to be misguided.

There is however several arguments pertaining to the authorities’ decision-making process, more specifically, the authorities’ margin of appreciation. When deciding in matters concerning children, the authorities enjoy a certain margin of appreciation. In *E.P. v. Italy* (1999, para.62), the ECtHR states that the child’s interests should be weighed against the biological parents’ rights. However, the ECtHR emphasize that the authorities can never authorize any measure that could potentially harm the child’s health and development. In other words, the authorities must use their margin of appreciation to act in the child’s best interests. When it comes to the reach of the authorities margin of appreciation, the ECtHR has pointed out that it will vary

“...in the light of the nature of the issues and the seriousness of the interests at stake...”
(Kutzner v. Germany, 2002, para.67)

Looking at the children’s rights under the ECHR and how their rights are adhered by the ECtHR, most pragmatic arguments revolve around the reunion between biological parents and their child and the child’s best interests.

The ECtHR has repeatedly stated that a care orders ultimate aim is to reunite biological parents with their child, as soon as circumstances permits (see i.a. Olsson v. Sweden (No.1), 1988, para.81, and K.A v. Finland, 2003, para.138). In order to facilitate a speedy reunion between biological parents and their child it is important to preserve the natural family bond, while the child is in public care (Y.C. v. The UK, 2012, para.134). The ECtHR have stated that the longer the child is in public care, the authorities’ positive duty to take measure to facilitate family reunification is ever increasing. The longer child is in public care, the more difficult it would be for the biological parents and children to maintain, and develop, a relationship (see i.a. Kutzner v. Germany, 2002, para.76, M.D. and Others v. Malta, 2012, para.76). However, the reunion between biological parents and children should only be permitted as long as the child’s well-being is secured. As aforesaid, the child’s interests is an overriding requirement and the authorities have a duty to always consider what is in the child’s best interests (K.A v. Finland, 2003, para.138).

Looking at children’s rights it is clear that their rights are together with what the authorities, and/or what the courts believe to be in the child’s best interests. In *Johansen v. Norway (1996, para.78)* the ECtHR emphasize that the child’s interests should always be weighed against the biological parents’ rights. The biological parents do have rights. It is therefore important that the authorities carefully assess the impact a measure has on both biological parents and child against the child’s best interest (Saviny v. Ukraine, 2009, para.49). However, children must be protected in situations where their health or development is at risk (Kutzner v. Germany, 2002, para.67) If the authorities and/or courts believe it to be in the child’s best interests to sever all ties with the biological parents or to remain in public care, the child’s interests trump the parents’ rights. However, unless the decision is based on what is best for the child’s health and development, it cannot be justified. It is the child’s interests that is the key-word (see i.a. *Johansen v. Norway, 1996, para.78, P. C. and S. v. The UK, 2002, para.118, and Aune v. Norway, 2011, para.66*).

The ECtHR has repeatedly stated that it is in the child's best interests to maintain its natural bond with its biological family (see i.a. *Y.C. v. The UK*, 2012, para.134). For these reasons the ECtHR emphasize that any restrictions on i.a. parental contact could potentially be a violation against art.8 of the ECHR. Especially if the restriction leads to the natural bond between biological parents and child being broken (*K.A v. Finland*, 2003, para.139).

To summarize question two and three, the pragmatic arguments point to the fact that it is in most cases up to the authorities' margin of appreciation to decide what is in the child's best interest. If the biological parents have been deprived of their parental rights, they may still represent their child in proceedings before the ECtHR. By allowing biological parents who have been deprived of parental rights to speak on behalf of the child, the ECtHR gives the child an extra security to ensure that all aspects of its interest are elucidated.

The pragmatic arguments pertaining to the child's rights are tied up to what is believed to be in the child's best interests. The ECtHR have reiterated time and time again that it is in the child's best interests that the natural bond between biological parents and child is maintained (see i.a. *Y.C. v. The UK*, 2012, para.134). In order to maintain the natural bond between biological parents and child it is important that the authorities facilitate a reunion between the child and its biological parents as soon as feasible. The reunion must always be weighed against the child's interests of staying in public care (*Johansen v. Norway*, 1996, para.78). The authorities may never authorize a measure that puts the child's health and development at risk. To consider the child's best interests is paramount and an overriding requirement (*Kutzner v. Germany*, 2002, para.76, *Y.C. v. The UK*, 2012, para.134, *M.D. and Others v. Malta*, 2012, para.76).

In regard to pragmatic arguments pertaining to CRC, there are none. The CRC are not mentioned in any of the paragraphs coded as pragmatic arguments.

7.3 Ethical discourse – findings and discussion

Ethical arguments revolve around the biological parents' and child's interest. It is their inner-thoughts and beliefs. The largest amount of ethical arguments are seen in the pro-child- and biological family category, with 28 and 25 respectively. There are 11 ethical arguments in the Court category and nine in the pro-parent. In the "other"-category, there is only one ethical

argument. Table 15 shows an overview of how many ethical arguments are found in each initial-category.⁶¹

Table 15 Number of ethical arguments in each initial-category

Number of ethical arguments in each initial-category			
Pro-child	28	Pro-parent	9
Biological family	25	The Court	11
Other	1		

7.3.1 Categorizing the ethical arguments

There are ethical arguments in all four initial-categories. In total, there are 73 arguments and 11 argument-categories that are coded as ethical. The largest category is “family ties”, which can be found in all four initial-categories and has 26 ethical arguments. The next two argument-categories, “consideration – interest” and “mutual enjoyment” with 10 arguments each, can only be found in one of the initial-categories. However, seen as one, most of the ethical arguments revolve around either parents’ interests, child’s interests or the bond between biological parents and child. Table 16 shows an overview of the ethical argument categories:

Table 16 Overview of the ethical argument categories

Pro-Child ethical arguments			Pro-parent ethical arguments		
Category	Judgements	Arguments	Category	Judgements	Arguments
Consider. - interest	10	10	Family ties	6	6
Family ties	8	8	Parents' interests	2	2
Child's interests	5	5	Parental access	2	2
New bonds	3	3	Representation	1	1
Parental access	1	2			

Biological family ethical arguments			The Court ethical arguments		
Category	Judgements	Arguments	Category	Judgements	Arguments
Mutual enjoyment	10	10	Child's interests	4	4
Family ties	7	8	Family ties	2	4
Balance interests	2	3	Parents' interests	2	2
Reunite	2	2			
Parental access	1	1			

There are four argument-categories that are found in more than one initial-category. The first one is “family ties”. As previously stated, the “family tie”-category can be found in all four initial-categories. In total there are 26 ethical arguments in the “family tie”-category. Within

⁶¹ Not every ethical argument in, *inter alia*, the pro-child category is in favor of the child. An in-depth presentation of all ethical arguments in each of the five initial-categories is found in sections 7.3.2 – 7.3.6.

the “family-tie”-category, one argument, found in *Y.C. v. The UK* para.134, is coded in both the biological family – and the pro-child category. One argument found in *B. v. The United Kingdom* para.77, is coded in both the pro-child - and pro-parent category and one argument, found in *R. and H. v. The UK* para.81, is coded in both the biological family – and the pro-parent category. Lastly, one argument, found in *Gnahoré* para.59, is coded in the biological family –, the pro child - and the pro-parent category. Meaning, that in total there are 21 unique ethical arguments pertaining to “family ties”.

The category labeled “Child’s interests” is found in both the Court- and pro-parent category. One argument, found in *Scozzari and Giunta* para.138, is coded in both categories. This entails that there are eight unique ethical arguments in the “child’s interests” category.

The “Parental access” category is found in three of the four initial-categories. The “parents’ interests” category is found in both the Court– and the pro-parent category. Both these argument-categories have only unique arguments. Which entails that, in total, there are 67 unique ethical arguments.

7.3.2 Pro-child – In-depth presentation of ethical arguments

In *B. v. The UK*, the ECtHR cast light on the issue as to who can best tell what is in the child’s best interest. A biological parent who has lost custody can apply to the court stating it would be in the child’s best interest for the care order to be discharged. The Court acknowledge the parents right to apply to the Court on that regard, and states that “...the determination of a parental right is equally in issue where ... a parent claims that the continuance or renewal of access is in the child’s interests.” (*B. v. The UK*, 1987, para.77). The ECtHR acknowledge the biological parents’ ability to know what is best for their children. A care order does not render biological parent rights-free regarding their children. The biological parents may still apply to have a care order lifted and say no to put their children up for adoption, claiming it to be in the child’s best interest.

The ECtHR has also commented on the potential conflict of interests between biological parents and the guardian appointed by the authorities. Due to this, the Court states that “...there is a danger that some of those interests [the children’s] will never be brought to the Court’s attention” (*Scozzari and Giunta v. Italy*, 2000, para.138). If the children’s guardian and biological parents are in a conflict of interests, the children’s interests may suffer accordingly and consequently lead to children being deprived of rights given to them by the ECHR.

Children's bonds towards their families have also been discussed. The ECtHR has reiterated time and time again the importance of a care order being temporary and that measures must be taken to make sure children sustain link with their biological family (See among others *K.A v. Finland*, 2003, para.138 and *Y.C. v. the United Kingdom*, 2012, para.134). However, the decision of whether a care order shall be lifted must always be taken with the child's best interest in mind. The Court states that the authorities has a "...duty to consider the best interests of the child." (*Kutzner v. Germany*, 2002, para.76) when deciding in matters concerning the child. This includes, but is not limited to, the child's health or development. In *B. v. The UK*, the ECtHR states that "...for most children there will be no doubt that their interests will best be served by efforts to sustain links with their natural families." (*B. v. The UK*, 1987, para.77). Therefore, the Court questions what the care orders purpose is. The removal of parental rights shall only be taken with the child's best interest in mind. There must be weighty reasons as to why one shall deprive a biological parent his/her rights. In these settings, the child's best interest is considered a weighty argument.

If a care order is prolonged and the child lives with a foster family, the child most likely creates bond with his/her new family. This is addressed by the ECtHR in both *B. v. The UK*, *K. and T. v. Finland* and *Kutzner*.

"A child often becomes strongly attached to his foster parents and it is therefore harmful for the child to detach him or her from the foster family and the relationships built within that family. The younger the child is, the faster the psychological relationship between the child and the foster parents develops. It may be necessary for the stability of the child that the family situation not be changed back again. Ultimately, both the taking into public care and the termination of public care must be decided in the best interests of the child." (*K. and T. v. Finland*, 2001, para.151, see also *B. v. The United Kingdom*, 1987, para.63 and *Kutzner v. Germany*, 2002, para.67).

The ECtHR focuses on the child's wellbeing. Even though the Court has on several occasions stated that it is in the child's best interest to be reunited with its biological family, there are some exceptions. If a significant period of time has passed since the child was taken into care by the authorities and the child shows strong connection to its foster parents, the child's interest of being with its new family may prevail over the biological parents' rights to family life. It all relates to decision made in cases concerning children, the children's interests are paramount.

The fact that children's interest may surpass the biological parents' interest has been addressed by the ECtHR. In *Johansen, P., C., and S. v. The UK* and *K.A. v. Finland*, the Court states that

“...interest of the child ... may override those of the parents.” (Johansen v. Norway, 1996, para.78, K.A v. Finland, 2003, para.138, P. C. and S. v. The UK, 2002, para.117). While in *Gnahoré* the Court emphasizes that “...in cases of this type[cases concerning care orders] the child’s interest must come before all other considerations.” (Gnahoré v. France, 2001, para.59).

The ECtHR has also addressed issues concerning severing family ties. In *Gnahoré* the court states that since the severing of family ties means to cut a child from its root, the child’s best interest is for the authorities to facilitate a reunion of the family as soon as possible. *Unless* the biological family has proved to be particularly unfit to care for the child (Gnahoré v. France, 2001, para.59). The ECtHR acknowledge that to split up a family is a very serious step to take. The justification of such a measure should only come from a weighty consideration of the child’s best interest, which may override the interest of the biological parent (Olsson v. Sweden (No.1), 1988, para.72, Scozzari and Giunta v. Italy, 2000, para.148, R. and H. v. The UK, 2011, para.81).

When looking at ethical arguments, the child’s interests is a key factor. The ECtHR have, with several occasions, commented on the importance of considering what is in the child’s best interest. The phrase “child’s best interest” appears time and again in the ECtHRs judgements. The Courts use the phrase as means to legitimize its decision. The Court reiterates that decisions must be “...supported by sufficiently sound and weighty considerations in the interests of the child...” (Saviny v. Ukraine, 2009, para.49), and that the consideration of the child’s interests must start with the national authorities and should be a crucial factor when issuing a care order.

In *Y.C. v. The UK*, the ECtHR states that

“In identifying the child’s best interests in a particular case, two considerations must be borne in mind: 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 UK, 2012, para.134).

In the statement the ECtHR presents two facts. First, that it is the child’s best interest to maintain ties with his/her biological parents, *unless* the parents have proved to be unfit to take care of the child. Second, it is in the child’s best interest to be in a safe and secure environment where the child can thrive.

7.3.3 Pro-parent – In-depth presentation of ethical arguments

In both *B. v. The UK* and *W. v. The UK*, the ECtHR states that when the authorities reach decisions involving children it is unavoidable to include “...the views and interests of the natural parents.” (*B. v. The UK*, 1987, para.64, *W. v. The UK*, 1987, para.63). The Court has reiterated repeatedly the importance of weighing all relevant considerations when taking a child in to care. In both *B. v. The UK* and *W. v. The UK*, the ECtHR emphasizes that the biological parent views and interests must be included as a relevant consideration by the authorities (*B. v. The UK*, 1987, para.64, *W. v. The UK*, 1987, para.63).

Six of eleven ethical arguments in total relate to family ties.⁶² In *B. v. The UK*, the ECtHR states that “...for most children there will be no doubt that their interests will best be served by efforts to sustain links with their natural families.” (*B. v. The UK*, 1987, para.77). This Court cites “the Code of Practice on Access to Children in Care” which was a code issued by the UK government in 1983. The citation is used as a means to highlight the importance of a continuation of parental access when a child is taken in to care. In other words, it would be both in the parents and in the child’s interests to maintain parental access even when a care order has been issued (*B. v. The UK*, 1987, para.77).

In *Margareta and Roger Andersson*, the ECtHR focused on the biological parents’ right to maintain a relationship with their child. The parents were not only restricted from meeting their child but also from contacting the child via mail or telephone. The Court emphasized that the measures taken by the authorities were “...particularly far reaching.” and that the reasons for implementing such measures must be strong (*Margareta and Roger Andersson v. Sweden*, 1992, para.95). However, the ECtHR stated further that even though the authorities had strong reasons to act in a certain way, any measure must “...be consistent with the ultimate aim of reuniting the Andersson family.” (*Margareta and Roger Andersson v. Sweden*, 1992, para.95).

The child’s interests are repeatedly used as an argument for maintaining family ties. In *Gnahoré*, the ECtHR underlines that there must be “exceptional circumstances” in order to justify severing family ties. The reason why it calls for exceptional circumstances, is that severing the family ties would violate the child’s best interests. The Court emphasizes that situations where parents have been deemed unfit to care for the child would constitute an exceptional circumstance (*Gnahoré v. France*, 2001, para.59), as would “...the overriding

⁶² See table 16, section 7.3.1.

requirement pertaining to the child's best interests." (R. and H. v. The UK, 2011, para.81). In other words, the child's best interests surpass all other considerations. If keeping the family ties would harm the child in any way, or hinder the child's development, it is justified to sever them.

In *E.P. v. Italy* (1999, para.69), the ECtHR states that it must be a balance between the child's best interests and the biological parents' rights. The authorities are obligated to take the necessary steps to ensure that biological parents and children can be reunited. If the authorities fail to do so, it would be a violation against the biological parents' rights under art.8 of the ECHR.

In both *R. v. The UK* and *Eriksson*, the ECtHR states that to be able to exercise parental rights is a basic part of family life, as are the "...mutual enjoyment by parent and child of each other's company..." (R. v. The UK, 1987, para.64, *Eriksson v. Sweden*, 1989, para.58). If the authorities are hindering these basic parts of family life, that would be a violation against art.8. This is highlighted in *Eriksson*. The authorities' decision to place the child in foster-care, and prohibit contact, for an indefinite period of time was found by the Court to be an interference in the mother's life that violated her rights under art.8 of the ECHR. The ECtHR emphasized that the interference in the mother's life was not affected by the child relationship with its foster parents (*Eriksson v. Sweden*, 1989, para.58). Meaning that the child's relation to its foster parents must be taken into account as a separate consideration.

7.3.4 Biological family – In-depth presentation of ethical arguments

In total 42%, or 10 out of 24, arguments in this category all state that "The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life." (See, among others, *B. v. The UK*, 1987, para.60). Art.8 of the convention grants everyone the rights to respect for private and family life (ECHR, 1950, art.8). The convention does not define what constitutes as family life. However, three of the five care order judgements from 1987⁶³ all contain the abovementioned statement. Meaning that the ECtHR defined the company between biological parents and children as fundamental for family life in the first care order cases that appeared before the Court.

⁶³ *B. v. The UK*, *R. v. The UK*, *H. v. The UK*, *W. v. The UK* and *O. v. The UK* where the first five care order cases that appeared before the ECtHR. All five cases were heard by the same chamber at the same time to "...secure proper administration of justice..." *B. v. The UK* (1987) No. 9840/82 *B. v. The United Kingdom*, Hudoc, ECtHR.

The second part of the above mentioned argument states that "... the natural family relationship is not terminated by the reason of fact that the child is taken into public care." (See, among others, *B. v. The UK*, 1987, para.60). This underlines the fact that the care orders ultimate aim is to reunite biological parents and their children. It also underlines the importance of nurturing the relationship between biological parents and children, while the children are in public care. However, only 6 of the 10 judgements containing these arguments have included the second part. Of the 10 judgements that included the argument in this category, *McMichael (1995)* was the first case to omit the second part of the argument. All judgements that came prior to *McMichael* included the second part, while the judgement that came after did not.

The importance of not severing the bonds between biological parents and their children has been addressed by the ECtHR on several occasions.

"It follows that the interest of the child dictates that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family.

In the interest not only of the parent concerned, but also of the child, the ultimate aim of any "care order" must be to "reunit[e] the ... parent with his or her child." (*Gnahoré v. France*, 2001, para.59).

The Court states that due to the child's best interests it must be "very exceptional circumstances" in order to justify severing the bond between biological parents and children. Further, the Court states that it is in, both, the parents' and children's interest to reunite the biological parents with their child. The Court also states that "everything must be done" to maintain the relationship between biological parents and their children.

In *P., C., and S. v. The UK*, the ECtHR states that severing the bond between biological parents and children can "...only be justified in exceptional circumstances or by the overriding requirement of the child's best interest."(*P. C. and S. v. The UK*, 2002, para.118). The Court has in *P., C., and S. v. The UK* omitted the word "very" when stating that it must be exceptional circumstances in order to justify severing family ties, which separates the judgement from *Gnahoré*. The ECtHR also emphasize that the child's best interest is an overriding requirement. In other words, if a care order is in the child's best interest that would be justification enough to sever the bond between the child and its biological parents. It also implies that it is not necessarily always in the child's best interest to "rebuild" the biological family.

In *R. and H. v. The UK*, the ECtHR focuses on measures taken to deprive parents of their parental rights:

“...measures which deprive biological parents of the parental responsibilities and authorise adoption should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child’s best interests.” (*R. and H. v. The UK*, 2011, para.81).

Again, the Court emphasizes that the child’s best interest is an overriding requirement. While the ECtHR stated in *P., C., and S. v. The UK* that in order to justify a measure it must be either exceptional circumstances *or* in the child’s best interest, the Court states in *R. and H. v. The UK* that it is only the child’s best interest that can justify any measures that severs the bond between biological parents and child.

In *Scozzari and Giunta*, the ECtHR states that “...it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty consideration in the interests of the child.” (*Scozzari and Giunta v. Italy*, 2000, para.148). The Court emphasize that it is the child’s best interests that must be taken into account when deciding whether or not to sever the ties between biological parents and child. The Court also acknowledges the severity of severing biological family ties.

The impact a care order has on both, the parents and the child, is also addressed by the ECtHR in *Saviny*. The Court underlines the importance of a “...careful assessment of the impact of the proposed care measure on the parents and the child...” (*Saviny v. Ukraine*, 2009, para.49). The ECtHR emphasize that it is the respondent State that must assess each measure before implementing it. Any decisions must “...be supported by sufficiently sound and weighty considerations in the interests of the child,...” (*Saviny v. Ukraine*, 2009, para.49).

How to identify what is in the child’s best interest has been addressed by the ECtHR in *Y.C. v. The UK* (2012, para.134). The Court states that it is in the child’s best interest to maintain the ties with its biological parents. However, this does not apply if the parents are deemed unfit to care for the child. What is in the child’s best interest is to grow up in a safe and secure environment, ensuring the child is protection.

In both *Saviny* (2009, para.52) and *M.D. and Others* (2012, para.76), the ECtHR state that a care orders ultimate aim is to reunite the biological family with their child. In *M.D. and Others*, the Court emphasizes that it is only the “...overriding requirement pertaining to the child’s best

interest.” (M.D. and Others v. Malta, 2012, para.76) that can justify any measures that deprive biological parents of their parental rights. In *Saviny*, the ECtHR states that a care order cannot be justified “...without prior consideration of the possible alternatives.” (Saviny v. Ukraine, 2009, para.52). The Court also emphasize that the authorities in the respective State has a “positive obligation” to facilitate a reunion between biological parents and their children. In order to do so, the Court state that the authorities must “...enable regular contact between them [biological parents and children], including, where possible, by keeping the siblings together.” (Saviny v. Ukraine, 2009, para.52). In other words, the ECtHR underlines the importance of keeping siblings together in order to best maintain family ties, even when the children are in public care.

The importance for the biological parents and their child to maintain a relationship, while the child is in public care, in order to facilitate a reunion is addressed by the ECtHR in *K.A. v. Finland*.

“The possibilities of reunification will be progressively diminished and eventually destroyed if the biological parents and the child are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur.” (K.A v. Finland, 2003, para.139).

The ECtHR emphasize the importance of regular contact in order to keep the natural bond between biological parents and their child. If one is not able to maintain contact while the child is in public care, over time, the natural family ties will be severed.

Both the child and the parents’ interest are brought to attention by the ECtHR in *Johansen and E.P. v. Italy*. In *E.P. v. Italy* the Court state that “...a fair balance must be struck between the interests of the child and those of the parent.” (E.P. v. Italy, 1999, para.62). However, the Court emphasizes that in doing so special attention must be paid to the child’s best interest, which may override those of the parents. It is not only the parents’ interest that is being discussed by the ECtHR, it is also their rights. When issuing a care order the authorities must do what they can in order to facilitate a reunion between the child and its biological parents. When doing so, the authorities must balance the parents’ rights, under the ECHR, against the child’s best interest. However, parents may never be granted rights that would harm the child’s health and development (E.P. v. Italy, 1999, para.62 and para.69). The balance of the parents’ rights against the child’s interests has also been a topic in *Johansen*. In *Johansen*, the ECtHR state that “...a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child.” (Johansen v. Norway, 1996,

para.78). In other words, if it is in the child's best interest to remain in public care, this trumps the parents' right to family life under art.8 of the ECHR.

In *K.A. v. Finland*, the ECtHR acknowledge that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, the Court emphasizes that "...a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access." (*K.A. v. Finland*, 2003, para.139). The reason is that any limitations beyond the care order further endanger that the bond between biological parents and child are severed. As reiterated by the ECtHR on several occasions, a care orders ultimate aim is to reunite biological parents with their child. Any limitation on contact between the biological parents and children, while the child is in public care, endanger that there may become an unrepairable breach in their natural bond.

7.3.5 The Court – In-depth presentation of ethical arguments

The ethical arguments in the Court category can be divided into three categories, the interests of the biological parents, the child's interests and the relationship between biological parents and their child.

In regard to the biological parents' interests, the ECtHR focuses on what it has to determine in order to assess whether there has been a violation of art.8 of the ECHR. In both *B. v. The UK* and *X. v. Croatia*, the Court states:

"...what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests." (*B. v. The UK*, 1987, para.65, *X. v. Croatia*, 2008, para.48, *Y.C. v. The UK*, 2012, para.138).

Meaning that unless the biological parents have been given the opportunity, and an appropriate channel, to make their interests heard, it may be a violation of art.8 of the ECHR. However, the ECtHR emphasize that one must take into account the seriousness of the decisions that shall be taken and the particular circumstances of each case, when assessing the involvement of the biological parents.

When it comes to the child's interests, the ECtHR states in both *Scozzari and Giunta* (para.138) and *M.D. and Others* (para.27) that "...in the event of a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian, there

is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his rights under the Convention." Meaning that biological parents and the child's guardian may have opposing views as to what is in the child's best interest.

In *W. v. The UK*, the ECtHR focuses on the child's bond with its foster family. The Court states that over time a child may create new bonds with its foster family, which may cause it to be against the child's interests to reunite the child with its biological parents. However, the ECtHR emphasizes that, for these reasons, it is important for the authorities to facilitate parental access while the child is in public care so that the natural bond between biological parents and child is not broken (*W. v. The UK*, 1987, para.62).

To what extent the national authorities may use their margin of appreciation in assessing whether to keep the child in public care and thus sever the bond between child and biological parents has been addressed by the ECtHR in *P., C., and S. v. The UK*. The Court states that it all depends on the "...nature of the parent-child relationship." (*P. C. and S. v. The UK*, 2002, para.118). If a biological parent has never had care and custody of a child, the severance of link between child and that parent falls under the national courts margin of appreciation to assess what is in the child's best interests.

In both *Johansen (1996, para.64)* and *Kutzner (2002, para.67)*, the ECtHR underlines that the national authorities have a wide margin of appreciation in assessing whether to take a child into public care. However, the Court emphasizes that a stricter scrutiny is called for on any further limitations that may restrict the family relation between biological parents and child.

In *Kutzner* the ECtHR states that "It [the ECtHR] 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." (*Kutzner v. Germany*, 2002, para.65). Meaning that the national authorities have undoubtedly an obligation to preserve the natural bond between biological parents and their children, when the children are in public care.

7.3.6 Other – In-depth presentation of ethical arguments

In *P. C. and S. v. The UK (2002, para.116)*, the ECtHR states that to take a newborn baby into public care at the moment of its birth "...is an extremely harsh measure." In order for such a measure to be justified, the Court states that there must be an "...extraordinarily compelling reason..." (*P. C. and S. v. The UK*, 2002, para.116). This is especially so if the biological parent

has not been part of the decision-making process leading up to the interference. The ECtHR emphasize that the national authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care but that the justification for such measure must be so profound that it can stand up to the Courts scrutiny. The ECtHR points out that the national authorities have an obligation to assess the impact the proposed measures have on the biological parents and the child, and to consider all other options prior to taking a child into care. (See i.a. *P. C. and S. v. The UK*, 2002, para.116, *Haase v. Germany*, 2004, para.90, and *Moser v. Austria*, 2006, para.66). To illustrate what that entails, the ECtHR refers to *K. and T. v. Finland* para.166. In *K. and T. v. Finland*, it is pointed out that the authorities had restricted the parental access to their children in order for the children to get attached to their foster family. The authorities meant it was sufficient that the children were aware of their parents' existence. After this justification had been approved by the domestic court once, it was used as reasoning for all restriction-decisions since (*K. and T. v. Finland*, 2001, para.166). In other words, the authorities did not assess each decision separately.

7.3.7 Discussing the ethical arguments

I will in the following section discuss how the ethical arguments can answer the four questions presented in section 1.1 In-depth presentation of research question.

Viewing ethical arguments pertaining to the ECtHRs assessment of the cases, the main focus is ensuring that the interests of both the parents and child is made clear. In *B. v. The UK (1987, para.64)* and *W. v. The UK (1987, para.63)*, the ECtHR emphasize that it is unavoidable to include the views and interests of the biological parents when contemplating whether to implement a measure, i.a. a care order. In other words, biological parents must be involved in the decision-making process. The biological parents' involvement in decision-making process have been highlighted by the ECtHR on several occasion (see i.a. *B. v. The UK*, 1987, para.65, and *Y.C. v. The UK*, 2012, para.138). The ECtHR emphasize that the biological parents' involvement must correlate with the seriousness of the decision to be taken, taking the particular circumstances of each case into account. If domestic authorities fail to involve the biological parents in the decision-making process to a degree that is sufficient to make their interests heard, it will constitute as a violation against the biological parents' rights under art.8 of the ECHR.

As previously mentioned, established case law dictates that a care orders ultimate aim is to reunite biological parents with their child. When contemplating whether to lift a care order, the ECtHR states that the authorities have a positive duty to consider the child's best interests,

which include considerations on the child's health and development (see i.a. *Kutzner v. Germany*, 2002, para.76). The ECtHR emphasize that it is, in most cases, in the child's best interests to sustain the link between biological parents and their child. To deprive biological parents of their parental rights is a serious interference into their lives, which can only be justified by weighty argumentation that can withstand the ECtHR scrutiny, such as arguments pertaining to the child's best interests. The Court underlines that all other options must be considered before taking a child into public care. If the domestic authorities fail to consider all other options, it may be a violation against the biological parents' rights (see i.a. *B. v. The UK*, 1987, para.77, *Haase v. Germany*, 2004, para.90, *Moser v. Austria*, 2006, para.66, and *Saviny v. Ukraine*, 2009, para.49 and para.52).

The ECtHR focuses on the importance of balancing the child's interests with the biological parents' rights (*E.P. v. Italy*, 1999, para.69). The biological parents have the right to respect for their private and family life. Any interference with this rights is an interference with art.8 of the ECHR, unless it is "necessary in a democratic society" or "in accordance with the law" (ECHR, 1950, art.8). The ethical arguments point to the fact that it is a mutual relationship between biological parents and child. To hinder such a relationship to develop, will be a violation against art.8 of the ECHR (*R. v. The UK*, 1987, para.64).

The relationship, or bond, between the biological parents and child has been addressed by the ECtHR on several occasions. The Court emphasizes that taking a child into public care does not terminate the bond between biological parents and their child (*B. v. The UK*, 1987, para.60). However, the ECtHRs focus shifted with *McMichael v. The UK* (1995, para.86). While all judgements mentioning "the mutual enjoyment of each other's company" prior to 1995 included a sentence stating that the relationship between child and biological parents is not terminated when the child is taken into public care, the judgements after 1995 omitted this sentence. That the focus shifted does not entail that the Courts opinion shifted. The ECtHR has on several occasion, after 1995, highlighted the importance of allowing biological parents and children to maintain contact, while the child is in public care, in order for their bond to be maintained and enabling the family to later be reunited (see i.a. *K.A v. Finland*, 2003, para.139). The ECtHR emphasize that when assessing whether there has been a breach on art. 8 of the ECHR, the Court must examine if the domestic authorities have fulfilled their obligation to enable the ties between parents and their children to be preserved (*Kutzner v. Germany*, 2002, para.65). The ECtHR do, however, acknowledge that the domestic authorities enjoy a wide margin of

appreciation when assessing whether to take a child into public care, but emphasize that if the domestic authorities do not enable regular contact between the child and its biological parents, it endangers that there can become an unrepairable breach in their natural bond. Meaning that any further limitations that may restrict or hinder the natural bond between biological parents and child to be developed calls for stricter scrutiny (see i.a. *Johansen v. Norway*, 1996, para.64, *Kutzner v. Germany*, 2002, para.67, and *K.A v. Finland*, 2003, para.139).

Situation where the ECtHR finds a violation against the biological parents' rights under art.8 of the ECHR raise a new question. How does this affect the child? The ECtHR emphasize that acknowledging that the biological parents' rights have been violated does not affect the child's relationship with its guardians. Meaning that the child's interests, such as its bond with its foster family, calls for a separate assessment (*Eriksson v. Sweden*, 1989, para.58). The ECtHR underlines repeatedly that the child's best interests are an overriding requirement. If it is in the child's best interests to remain with its guardians and not to be returned to its biological parents, the ECtHR states that the bonds with the child's biological family can be severed. The ECtHR acknowledge that it is an interference of a very serious order to sever the bond between the biological family and is only justified in "exceptional circumstances" (see i.a. *Scozzari and Giunta v. Italy*, 2000, para.148, and *P. C. and S. v. The UK*, 2002, para.118).

To summarize, the ethical arguments pertaining to the ECtHRs assessments, revolve around how the Court assess and balance the interests of the biological parents and their child. The arguments also point to what the ECtHR expect from the domestic authorities. Viewing the biological parents' interests, the ethical arguments states that the biological parents must be involved in the decision-making process to an extent that ensure that their interests are known. The arguments also focus on the importance of keeping the biological family together. Concerning the child's interests, the ethical arguments state that the child's interests are an overriding requirement. All decision pertaining to the child, including both the domestic authorities and the ECtHR assessments of a case should be taken with the child's interests in mind.

In the ethical arguments, it is clear that arguments pertaining to the child's best interest is ever present. When it comes to who decides what is in the child's best interests the ECtHR have focused on the biological parents' saying in the matter. When a parent is deprived of his/her parental rights, a guardian protects the interests of the child. The ECtHR acknowledge that the child's guardian and its biological parents may have conflicting opinions as to what they deem

to be in the child's best interests. For these reasons the ECtHR states that, in order to protect the child's interests, biological parents may represent their child's interests before the Court in situations where they otherwise have been deprived of their parental rights (*B. v. The UK*, 1987, para.77, *Scozzari and Giunta v. Italy*, 2000, para.138, and *M.D. and Others v. Malta*, 2012, para.27).

In *Y.C. v. The UK* (2012, para.134), the ECtHR has been clear as to what the Court believes to be in the child's best interests. "...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". By stating what the ECtHR believes to be in the child's best interests, the Court has essentially created guidelines as to what one needs to consider when contemplating whether a measure was in the child's best interests.

The ethical arguments focus on the biological parents, the child's guardian and the ECtHRs role in assessing whether a measure was in the child's best interests. The Court emphasizes the importance of ensuring that the child's interests are safeguarded thru the legal proceedings. The Court acknowledge that if there is a conflict of interest between the biological parents and the child's guardian and/or the domestic authorities, there may be discrepancies between the parties as to what they believe to be in the child's best interests. In order to ensure the protection of the child's best interests, the ECtHR has created guidelines as to how one should consider whether a measure was in the child's best interest. By using phrasing as "particularly unfit" and "ensure his development in a safe and secure environment" in the guidelines, the ECtHR have kept room for the Court to exercise its discretion (*Y.C. v. The UK*, 2012, para.134).

When it comes to what rights the child has, the ethical arguments point to what is in the child's best interests. The ECtHR have stated that the consideration of what is in the child's best interests must start with the national authorities and should be a crucial factor when issuing a care order (*Saviny v. Ukraine*, 2009, para.49).

As aforesaid, the ECtHR has stated that it is in the child's best interests that its ties with its biological family is maintained. In total there is 21 unique ethical arguments pertaining to the ties with biological family.⁶⁴ In *B. v. The UK* (1987, para.77), the ECtHR states that "...there

⁶⁴ See table 16, section 7.3.1.

is no doubt their interest will best be served by efforts to sustain links with their natural families.”. The Court emphasize that the natural link should be sustained also while the child is in public care. However, in situations where the biological parents have been deemed unfit to care for the child, it would be against the child’s interests to maintain a bond with its parents. Established case law dictates that the child’s interests is an overriding requirement and it is thus justified to sever the biological family ties (see i.a. *Olsson v. Sweden* (No.1), 1988, para.72, and *Scozzari and Giunta v. Italy*, 2000, para.148). If maintaining the biological family ties in any way harms the child or hinder its development, “exceptional circumstances” exist and it is justified to sever the ties (*Gnahoré v. France*, 2001, para.59, *R. and H. v. The UK*, 2011, para.81).

The ECtHR has stated that it is important for the biological family ties that there is contact with the biological family while the child is in public care. The ECtHR has stated that to deny biological parents to not only meet their child but also to contact their child via telephone or mail, is “particularly far reaching”, and thus a violation against art.8 (*Margareta and Roger Andersson v. Sweden*, 1992, para.95). In other words, the child and its biological parents have a right to contact while the child is in public care, in order to maintain the natural family ties.

When a care order has been issued, the authorities must do what they can in order to facilitate a speedy reunion between the child and its biological parents. A care orders ultimate aim is for the biological family to be reunited (see i.a. *E.P. v. Italy*, 1999, para.62 and para.69). However, the ECtHR points out that “...a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child.” (*Johansen v. Norway*, 1996, para.78). If it is in the child’s best interests to remain in public care, the child’s interests trump the biological parents’ right to family life.

The importance of maintaining the biological family tie while the child is in public care is closely connected to the child interests of remaining in public care. Over time, a child creates bonds with its caretakers. If considerable time has passed since the child has been removed from its biological parents and placed with a foster family, the bond with its foster parents may be so strong that it would be against the child’s best interests to sever it (see i.a. *W. v. The UK*, 1987, para.62, and *K. and T. v. Finland*, 2001, para.151). Again, the Court points out that the child’s interests trump the parents’ right to family life.

Art.8 of the ECHR (1950) grants everyone “respect for his private and family life”. The question surrounding what constitutes as family life has been discussed since the first care order cases appeared before the ECtHR. In three of the five cases from 1987 the Court stated that “The mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life.” (see i.a. R. v. The UK, 1987, para.64). Meaning that the ECtHR defined the company between biological parents and children as fundamental for family life in the first care order cases that appeared before the Court.

To summarize, the ethical arguments points to the fact that it is the children’s interests that is the decisive factor in cases concerning care orders. The ECtHR have created guidelines as to how one should assess what is in the child’s best interest. The ethical arguments also highlight the relationship between biological parents and their child while the child is in public care, and stress the importance of contact between biological parents and their child.

Lastly, there are no ethical arguments pertaining to the CRC.

7.4 Moral discourse – findings and discussion

Moral arguments revolve around the unwritten rules, or norms, in society. Hereunder all references to cultural differences between the Contracting States. There are no moral arguments in the pro-parent- and biological family category. The pro-child category has the most moral arguments, with 13 arguments. In the Court- and “other”-category there is five and three moral arguments respectively. Table 17 shows an overview of moral arguments in each of the five initial-categories.⁶⁵

Table 17 Number of moral arguments in each of the initial-categories

Number of moral arguments in each initial-category			
Pro-child	13	Pro-parent	0
Biological family	0	The Court	5
Other	3		

7.4.1 Categorizing the moral arguments

The moral argument discourse differs from the other three discourses as there are only two of the four initial-categories that have arguments that can be considered moral.⁶⁶ The pro-child

⁶⁵ Not every moral argument in, *inter alia*, the pro-child category is in favor of the child. An in-depth presentation of all moral arguments in each of the five initial-categories is found in sections 7.4.2 – 7.4.4.

⁶⁶ See table 17, section 7.4.

category has the largest amount of moral arguments, with 13 unique arguments and six different argument-categories. The Court category has five unique arguments and three argument-categories. This makes in total 18 unique moral arguments and nine argument-categories. Table 18 illustrates an overview of the moral argument categories:

Table 18 Overview of moral argument categories

Pro-Child moral arguments			The Court moral arguments		
Category	Judgements	Arguments	Category	Judgements	Arguments
Family ties	4	4	Margin of appreciation	3	3
Limitations	3	3	Decision-making	1	1
Perceptions	2	2	Culture	1	1
Discretion	2	2			
Child's best interest	1	1			
Mutual enjoyment	1	1			

7.4.2 Pro-child – In-depth presentation of moral arguments

As presented in the section concerning pragmatic arguments, the procedures surrounding the national authorities’ decision to take measures to protect a child are not absolute. The national authorities enjoy a wide margin of appreciation. The focus of this section is to present the normative side of the arguments used by the ECtHR.

When referring to severing family ties the ECtHR states that “...such measures should only be applied in exceptional circumstances...” (Aune v. Norway, 2011, para.66). The Court also acknowledges the severity in splitting up a family. For these reasons the ECtHR underline that biological families should not be split up, *unless* there are compelling reasons to do so. The compelling reasons include, but are not limited to, what is in the child’s best interest.

The normative arguments have a cultural side. What is appropriate in one state may not be appropriate in another. The ECtHR therefore rely on the national authorities’ discretionary choices. In both *Johansen* and *Kutzner* the ECtHR address these issues

“...the Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area.” (Johansen v. Norway, 1996, para.64, Kutzner v. Germany, 2002, para.66).

The Court acknowledges that there may be different perceptions as to how the public perceives a measure taken by the authorities. By highlighting the cultural differences between Contracting

States, the Court gives guidance as to how one can judge similar cases, originating from various Contracting States, differently.

The ECtHR has some limitations to the national authorities' margin of appreciation. In *Y.C. v. The UK*, the Court states that "...it is not enough to show that a child could be placed in a more beneficial environment for his upbringing." (*Y.C. v. The UK*, 2012, para.134). This means that in order to justify an intervention into a family, one must have more compelling reasons than just a beneficial environment. The child's wellbeing, health or development must be at risk in order for a care order to be justified. The Court further states that parent may never be entitled, under art.8 of the ECHR, to have measures taken that would harm a child's health and development (*Johansen v. Norway*, 1996, para.78, *Gnahoré v. France*, 2001, para.59).

In *Johansen*, the ECtHR acknowledge the mutual relationship between parents and children in family life. The Court states that any measure taken by national authorities hindering the relationship between parents and child, shall be considered an interference under art.8 of the ECHR (*Johansen v. Norway*, 1996, para.52). However, this do not apply if a child's health or development is at risk.

Keeping in line with the cultural differences between the Contracting States, the ECtHR acknowledge the national authorities' margin of appreciation. However, the Court states that "The margin of appreciation ... will vary in the light of the issues and the seriousness of the interests at stake,..." (*Kutzner v. Germany*, 2002, para.67). The Court further highlights the importance of protecting the child. Meaning that the national authorities should prioritize to ensure and secure the children's health and development. In other words, the ECtHR have given the national authorities some guidelines as to how they should use their discretionary power.

7.4.3 The Court – In-depth presentation of moral arguments

Three of the five arguments in this category all state the same:

"(d) in determining whether an interference is "necessary in a democratic society" or whether there has been breach of a positive obligation, the Court will take into account that a margin of appreciation is left to the Contracting States." (*B. v. The UK*, 1987, para.61, *R. v. The UK*, 1987, para.65, *W. v. The UK*, 1987, para.60)

The argument itself is part of a list were the ECtHR highlights established case-law. The section from which the argument originates is identical in all three cases. In the argument, the ECtHR acknowledge the national authorities' right to make discretionary choices and that the Court

will take the national authorities' margin of appreciation into account when assessing whether there has been a breach on the ECHR, which implies that the ECtHR acknowledge that there may be differences as to how national authorities assess cases across domestic borders. In other words, there may be culturally differences between States that influences the ECtHRs assessment of a particular case.

The concept of a decision being culturally conditioned is further elaborated by the ECtHR in *Kutzner*. In *Kutzner*, the Court underlines the fact that what the public perceives as appropriate may vary from one Contracting State to another, depending on "...such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measure in this particular area" (*Kutzner v. Germany*, 2002, para.66).

However, in *B. v. The UK*, the ECtHR states that the national authorities decision-making process cannot be devoid from the significance of the decision. The Court emphasizes that any decision must be based on relevant considerations and that the decision cannot be one-sided and hence "...neither is nor appears to arbitrary." (*B. v. The UK*, 1987, para.63). Further, the ECtHR states that it "...is entitled to have regard to that [decision-making] process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 [of the ECHR]" (*B. v. The UK*, 1987, para.63). Meaning that the ECtHR emphasize that in order to ensure everyone's protection under art.8 of the ECHR, it may look at the national authorities' decision-making process. The Courts assessment will surpass the national authorities' margin of appreciation.

7.4.4 Other – In-depth presentation of moral arguments

In both *B. v. The UK* and *R. v. The UK*, when summarizing established case-law, the ECtHR addresses the notion of necessity in an interference with an individual's right to respect for family.

"(b) the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued." (*B. v. The UK*, 1987, para.61(b), *R. v. The UK*, 1987, para.65(b)).

In other words, the ECtHR underlines that the necessity of an interference should correlate with the social need for the authorities to intervene and that the interference must be proportionate to what the authorities want to achieve.

All Contracting States have both positive– and negative obligations under the ECHR. Positive obligations entail the Contracting States to actively secure the fundamental rights of all people, while negative obligations entail the Contracting States to not violate the ECHR. In *Gnahoré*, the ECtHR state that there is no precise definition of the boundaries between positive- and negative obligations. The Court emphasizes that in assessing these obligations, “...a fair balance ... has to be struck between the competing interests of the individual and of the community as a whole...” (*Gnahoré v. France*, 2001, para.52). Furthermore, the ECtHR emphasize that when assessing these obligations, the State enjoys a certain margin of appreciation.

7.4.5 Discussing the moral arguments

Unlike the other three discourses, moral arguments are not found in all initial-categories. Viewing how the moral arguments can answer the four questions presented in section 1.1 In-depth presentation of research question, it is clear that not all the questions can be answered by the moral arguments. There a few to none moral arguments giving answers to the last three questions. I will therefore limit myself to discuss how the moral arguments can answer how the ECtHR assess cases and point to eventual statements that shed a light on the first three questions.

The moral arguments focus on the norms and culture in society. In *Aune v. Norway* (2011, para.66), the ECtHR states that a natural bond between biological parents and their child should not be broken, unless there are exceptional circumstances justifying severing such a bond. By stating “exceptional circumstances” the ECtHR opens the door for discretionary assessments. What constitutes an exceptional circumstance may vary from State to State. Meaning that culture may play a role in assessing whether an interference was justified.

The cultural differences between each of the Contracting States have been addressed by the ECtHR. The Court emphasizes that tradition relating to family, what tradition the domestic authorities have in interfering with family affairs and what resources are available for public measures all affect how appropriate the public perceives a measure to be (*Johansen v. Norway*, 1996, para.64, *Kutzner v. Germany*, 2002, para.66). It is up to the domestic authorities’ margin of appreciation to assess the appropriateness of a measure.

The ECtHR acknowledge that the domestic authorities enjoy a wide margin of appreciation but have given the authorities some restriction as to how they can use their discretionary power.

Looking as to how a care order is justified, it is not enough to simply state that it is a more beneficial environment for the child's upbringing and thus acceptable to remove the child from its biological parents. In order for the care order to be justified, the child's health, development or wellbeing must be at risk (*Y.C. v. The UK*, 2012). Turning the table and looking at what rights are given to the biological parents, the ECtHR states that the parents may never be entitled to have measures taken that potentially could harm a child's health and development (*Johansen v. Norway*, 1996, para.78, *Gnahoré v. France*, 2001, para.59). To what extent the domestic authorities may exercise their margin of appreciation will vary in light of the issues and seriousness of the interests at stake. The ECtHR emphasize that any measure taken by the domestic authorities hindering the relationship between biological parent and their child, is considered a violation against art.8 of the ECHR (*Johansen v. Norway*, 1996, para.52). This does not apply if the child's health or development is at risk. The ECtHR underlines that what is important is to secure the children's health and/or development (*Johansen v. Norway*, 1996, para.52, *Kutzner v. Germany*, 2002, para.67).

The phrase "necessary in a democratic society" is found in the moral arguments. The ECtHR underlines that the necessity of an interference should correlate with the social need for the authorities to intervene and that the interference must be proportionate to what the domestic authorities want to achieve (see i.a. *R. v. The UK*, 1987, para.65(b)). The ECtHR also point out that when assessing whether there has been a breach on the domestic authorities positive obligations under the ECHR, the Court will take the domestic authorities margin of appreciation into account (see i.a. *R. v. The UK*, 1987, para.65(d)). Meaning that the ECtHR acknowledge that the assessment of necessity initiated by the domestic authorities may be culturally conditioned. However, the ECtHR emphasize that the decision made by the domestic authorities must be based on relevant considerations, ensuring that the decision neither is nor appears to be arbitrary (*B. v. The UK*, 1987, para.63). When assessing whether an interference from the domestic authorities was a violation against art.8 of the ECHR, the ECtHR point out that it will view the domestic authorities decision-making process. Any assessment made by the ECtHR surpass the domestic authorities margin of appreciation (*B. v. The UK*, 1987, para.63).

Viewing how the domestic authorities should adhere to the ECHR, the ECtHR have pointed out that the domestic authorities have both positive- and negative obligations. Or, in other words, the domestic authorities have obligations to actively secure the fundamental right of all people and to not violate the ECHR. There is no clear definition of the boundaries between positive-

and negative obligations. The ECtHR emphasize that when one assesses the obligations, one must balance the competing interests of the individual and the community as a whole. In doing so, the domestic authorities enjoy a certain margin of appreciation (*Gnahoré v. France*, 2001, para.52). Meaning, *inter alia*, that the domestic authorities must balance the negative obligation of not violating the parents' right to respect for private and family life with the positive obligation to protect the health and development of the child.

To summarize, there are few to none moral arguments revolving around the last three supportive questions.⁶⁷ The moral arguments point to the fact that children do have a right to protection for their health, development and wellbeing. Otherwise, the moral arguments focus on how the ECtHR and domestic authorities assess cases. The moral arguments highlight the cultural differences between the Contracting States and acknowledge that how one assesses a case may be culturally conditioned. For these reasons, the ECtHR emphasize that the domestic authorities enjoy a certain margin of appreciation in their assessments. Looking at the domestic authorities' margin of appreciation, the ECtHR have created some basic guidelines as to what the Court expects the domestic authorities to consider in their assessments. Lastly, the moral arguments highlight the positive- and negative obligations the domestic authorities have opposite the public and emphasize that there is no clear boundary between the obligations.

Chapter 8 - Discussion and concluding remarks

This thesis aims to answer how the ECtHR weigh children's and parents' rights in care order cases. In order to highlight all sides of the research question I conducted two analysis', a statistical- and a discourse analysis. The statistical analysis revealed which judgements and paragraphs have created the biggest impact in the care order field, as well as the development in the ECtHR. The discourse analysis revealed the argumentation used by the ECtHR when justifying its decisions and indicated the development in the Courts argumentations.

To get a better understanding of the ECtHR assess cases, the children's rights and how the Court balances the interest of biological parents and child, I raised four supportive questions.⁶⁸ How each of the discourses may answer the supportive questions were presented in chapter 7 –

⁶⁷ See section 1.1 In-depth presentation of research question, for presentation of supportive questions.

⁶⁸ See section 1.1 In-depth presentation of research question.

Discourse analysis. I will in the following chapter pull the threads together and link the two analysis' to my main research question. The chapter is divided in to three sections.

I will first discuss the statistical findings presented in chapter 6 – Descriptive statistics – findings. I have divided the discussion surrounding the statistical finding in to three parts. Firstly, I will discuss the development in the number of care order cases that have appeared before the ECtHR. Next, I will discuss which cases have had the largest impact on the care order field and how they have impacted the field. Lastly, I will discuss the paragraphs being referred to in the judgements, with a special focus on the development of the initial-categories. More specifically, I will examine which paragraphs have mostly influenced the care order field and look at any development in the pro-parent, pro-child and biological family categories.

In the second section, I will summarize the discourse analysis presented in chapter 7 and answer the four supportive questions by combining the arguments used in the four discourses. I will also address the ambiguity in some of the arguments.

Lastly, I will combine the statistical findings with the findings from the discourse analysis and present my concluding remarks surrounding my main research question.

8.1 Discussing the statistical findings

The care order field is a fairly small field, with 44 cases stretching over three decades. In terms there has been an average of 1.47 care order cases presented before the ECtHR each year. However, in section 6.1 Statistical findings - the cases I found that the number of care order cases that appeared before the ECtHR is ever-increasing. In 1987 to 1996 there were 10 cases, 1997 to 2006 there were 14, and from 2007 to 2016 there were 20 cases that appeared before the Court. From the first to the second decade there has been a 40% increase in care order cases and from the second- to third decade an increase of near 43%. Meaning that every ten years there has been a 40+% increase in care order cases that have appeared before the ECtHR. What may be potential reason as to why the field has had an exponential growth over the last three decades can be the implementation of Protocol No. 11 and Protocol No. 14.⁶⁹

Protocol No. 11 were implemented to keep up with the vast number of cases that were submitted to the ECtHR (CoE, n.d., Helland, 2012, s.37). Until 1998 when Protocol No. 11 came in to

⁶⁹ See section 2.2.2 Changes in the European Court of Human Rights – Protocol No. 11 and No. 14, for description of the two Protocols.

force, the ECtHR was a part time court. Changing the Court from a part-time Court to a full-time, entailed that the ECtHR had the potential to process more cases. How many cases that have been processed by the ECtHR in the two first decades are not as well documented as in the third decade. In 2006, the ECtHR started publishing an overview of how many cases that were processed by the ECtHR each year.⁷⁰

Viewing at the number of care order cases appearing before the ECtHR, it seems quite stable the first decade (1987 – 1996), with an average of one case each year. In 1987, when the first care order cases appeared before the Court, there were five cases which were heard simultaneously (See i.a. O. v. The UK, 1987, para.4). In 1990, 1991, 1993 and 1994 there were no care order cases brought before the ECtHR.

In the second decade (1997 – 2006), on average, 1,4 care order cases appeared before the ECtHR each year. In 1998 Protocol No. 11 came in to force. Meaning that after the implementation of Protocol No. 11 there was, on average, a 0.4 increase in the number of care order cases that appeared before the ECtHR. In 1997 and 2005 no care order cases were brought before the ECtHR.

Protocol No. 14 came in to force in 2010. The protocol aimed to streamline how the ECtHR handled cases. By letting a single-judge declare a case inadmissible, instead of a three-judge committee, and letting a three-judge committee rule in cases within a well-established area of case law, instead of a seven-judge Chamber, the Protocol aimed to increase the ECtHRs efficiency (Myjer et al., 2010, s.55-56). As in the second decade, there was another increase in care order cases that appeared before the ECtHR in the third decade (2007 – 2016). More specifically, there was a 43% increase since the previous decade and a doubling from the first decade.

Looking past the care order field towards the total number of applications that have been decided, either by judgement or declared inadmissible or struck out, by the ECtHR in the last decade, the number of decisions apparently have increased. See appendix I for overview. From 2006 through 2009, the total number of cases that were deemed inadmissible or struck out were, plus-minus 10%, 30.000. The number of judgements ranged from 1719 in 2006 to 2393 in 2009. In 2010, when Protocol No. 14 came in to force there was an increase in, both, cases deemed inadmissible or struck out and in judgements. In 2010 38.576 cases were deemed inadmissible

⁷⁰ See appendix I for overview.

or struck out and 2607 judgements were delivered. In the following years, after Protocol no.14 came into force there was a massive increase in cases deemed inadmissible or struck out, culminating in 2013 when 89.740 cases were either deemed inadmissible or struck out. After 2013, the number of cases that have been deemed inadmissible or struck out have reduced.

With the implementation of the two protocols, more cases are being processed by Court. However, a larger amount of cases processed does not mean an increase in judgements. On the contrary, the number of judgements delivered by the ECtHR has decreased in the years following the implementation of Protocol No. 14. After Protocol No. 14 came into force, cases that are in an area of well-established case law are speedily processed by the ECtHR. This in turn may free time for the Court to prioritize cases that are in areas that needs special attention, such as care order cases. In other words, the increased number of cases processed by the ECtHR each year may explain the increase of care order cases that have appeared before the Court the last three decades.

Skivenes and Søvig (2016, p.14) found that recent judgements in care order cases bore a more child-centered view than older judgements. The increased focus on the child's best interest and the child's wellbeing may also explain the increased number of care order cases in the prior decades. If the ECtHRs focus is a reflection of our society as a whole, then one could expect that domestic authorities also have an added focus on the child's best interests, which may cause authorities to be more prone to issue care orders and thus potentially create an increase in conflict between authorities and parents.

Viewing the impact the different judgement have had in the care order field, there are some points one should look out for. First, judgements that are not referred to by others have little impact on the generic field of care orders. It may, however, have context-based impact. Context-based impact is dependent on a case having similar merit in order to be visible. Meaning, until a case with similar merits appear before the ECtHR, context-based impact will not be picked up in search for judicial precedent.

Second, if a judgement has a high number of references to other judgements this may indicate that the judgement finds itself in an area of well-established case law. However, as Lupu and Voeten (2018, p.29) point out, when writing the judgements the ECtHR follows domestic traditions. If the domestic courts have a tradition of anchoring their judgements in case-law, the ECtHR do the same when ruling in cases concerning those legal systems. Which, in turn, may

cause some judgements to have a higher number of references to other judgements, than what would be the considered normal if the case had originated in another country.

Third, if a judgement is referred to by few others and has a low number of references to other judgements, it indicates that it is at the periphery of the generic field. If there are no similarities between the judgements, judicial precedent cannot be used.

The three aforesaid points are important to keep in mind when discussing the impact each judgement has had in the field of care orders. Some judgements have arguably made a visible impact in the care order field. The visible impact is found when examining judicial precedent that can be classified as generic. If a judgement creates precedent that influences how the ECtHR assess cases in general, it will be possible to see the change in argumentation. I.a. When discussing whether to sever the biological family ties the ECtHR state in *Johansen* (para.78) that "...the Court will attach particular importance to the best interests of the child...", and in *R. and H. v. The UK* (para.73) "...the best interests of the child is paramount.". By adding the word "paramount" the ECtHR created a visible change in argumentation from *Johansen* to *R. and H. v. The UK*.

Viewing the judgments that have the highest- and lowest referral rate, and the judgements that refer most- and least to others, one can make a qualified guess as to which judgements have had a visible impact on the generic field of care orders. See appendix E and F for tables. However, without looking at each of the references, it is difficult to draw a conclusion as to which judgements have created the biggest impact. The analysis of arguments presented in each paragraph of the references was presented in chapter 7 – Discourse analysis and will be further discussed in sections 8.2 Supportive question – discussion and concluding remarks and 8.3 Main research question – concluding remarks.

Johansen has a referral rate of 68%, which is 7% more than the next judgement on the list, *Olsson*. Both judgements originates from the first decade of care orders cases, which entails that the judgements have a limited number of judgements they could refer to, in order to justify their decisions. The limited number of care order cases that had appeared before the ECtHR at the time would also point to the fact that the judgments are in an area of unproven ground and thus do not alter exiting precedent but rather creates new. This is especially so for *Olsson*, which only had the five judgements from 1987 to use as reference. *Johansen* had nine judgements that it potentially could refer to.

The five cases that arguably created new precedent, are the five cases from 1987. The five cases were heard at the same time by the ECtHR. The cohesion between the five cases is apparent when looking at references to the five cases, i.a. *Gnahoré* (para.52) refers to "...the W., B., and R. v. The United Kingdom judgements...". However, even though the cohesion is apparent, there are differences between the five judgements. Viewing how many times each of the five judgements are referred to one finds that *W. v. The UK* is referred to 22 times, *B. v. The UK* 11, *R. v. The UK* 3, *H. v. The UK* 2 and *O. v. The UK* 1 time. *W. v. The UK* and *B. v. The UK* has a significantly higher referral-rate than the other three judgments. This indicates that the merits in the two judgements are more generic than in the other three judgements. Looking at the ECtHRs ruling, *O. v. The UK* is the only judgement, of the five, where the ECtHR stated with dissenting opinion that there had been no violation on art.8 of the ECHR (*O. v. The UK*, 1987, para.3 and para.4). In *R. v. The UK*, *W. v. The UK* and *B. v. The UK*, it was a unanimous decision stating that there had been a violation against art.8 of the ECHR, and in *H. v. The UK* there was a dissenting decision stating the same. Of the five judgments, *O. v. The UK* and *H. v. The UK* are the only judgements that refer to a care order judgement. Looking at the impact each of the five judgements have had in the care order field, *W. v. The UK* has had the largest impact, due to its high referral-rate. The judgment has a referral-rate of 51%, which is twice as much as the next judgment, *B. v. The UK*. See appendix E for complete table.

From the second decade with care order cases, two judgements stand out, *K. and T. v. Finland* and *Kutzner*. *K. and T. v. Finland* has a referral-rate of 55% and, in turn, refers to two other judgements. *Kutzner* has a referral-rate of 54% but has a high number of references to others, referring to 11 of 17 possible judgements. See appendix E and F for complete tables. There are two care order cases from Germany that are brought before the ECtHR, *Kutzner* and *Haase*. As *Kutzner*, *Haase* has a high number of references to other judgements. It has references to 15 of 20 possible judgements. Since both cases from Germany have a high number of references to other judgements, my initial thought was that it could be a part of practice and tradition from the German legal system. However, speaking to Ingvill Helland Göller, who has done extensive research on German legal methods, and are associate Professor and Head of the Department of Law at the University of Agder (phone conversation, 12.04.19), she could unconfirm that thought. She pointed out that the high number of referrals could mean that the ECtHR wanted to take special care of legitimizing its decisions. This would especially be so, if the ECtHR presented a new interpretation of existing case law. *Haase* has a low referral-rate. With a high number of references to other and a low referral-rate, that indicates that the case is in an area of

well-established case law. *Kutzner* however, has a high referral-rate and refers to a high number of cases, which may indicate that *Kutzner* has brought something new to the field of care orders and thus wants to justify its new interpretations.⁷¹

From the last decade, one judgement stands out, *R. and H. v. The UK*. *R. and H. v. The UK* has a referral-rate of 33% and has the second highest number of references to others. As with *Kutzner*, a high referral-rate and high number of referrals to others may indicate that the judgement breaks new ground and thus the necessity to take special care when justifying its decision.⁷²

Johansen, *Olsson*, *W. v. The UK*, *K. and T. v. Finland*, *Kutzner* and *R. and H. v. The UK* are the six judgements with the highest referral rate. To better assess the impact each judgement has had, I will look at how many paragraphs from each of the six judgement are being referred to, the amount that refers to each of the paragraphs and if the paragraphs are consistently referred to. By the latter, I imply references that are referred to from the time-period when the judgement was finalized until the present date. See appendix G for a complete overview of all cases.

Johansen has the highest referral rate. There are three paragraphs from the judgements that are referred to: para.52 (13x, biological family), para.64 (15x, the Court, pro-child) and para.78 (15x, biological family and pro-child).⁷³ All three references have a high number of referrers, which indicates that they are applicable to a larger field. All three references are consistently referred to in the years following *Johansen*. Meaning that all three references from *Johansen* are as relevant today as they were in 1996. It is worth noting that in *Johansen*, none of the paragraphs are strictly pro-parent.

Olsson is the judgement with the second highest referral-rate. In total, six paragraphs are referred to: para.59 (6x, biological family), para.61 (3x, the Court), para.67 (2x, the Court), para.68 (11x, the Court), para.72 (1x, pro-child) and para.81 (12x, biological family). Unlike *Johansen*, there is a sprawling number of references to each paragraph. Two of the paragraphs are referred to consistently, para.68 and para.81. The first judgements referring to the two paragraphs are *Johansen* (para.68) and *Margareta and Roger Andersson* (para.81). Even though there is a four-year gap between *Margareta and Roger Andersson* and *Johansen*, I would still consider the judgements to come from the same era, due to the fact that in the years between

⁷¹ The paragraphs from *Kutzner* was presented in chapter 7 – Discourse analysis.

⁷² The paragraphs from *R. and H. v. The UK* was presented in chapter 7 – Discourse analysis.

⁷³ (nx, ...) tell how many times each paragraph is cited and how the paragraph is coded in the initial-categories.

the two judgements there is only one other care order which has appeared before the ECtHR. As in *Johansen*, there are no paragraphs which are considered pro-parent. One paragraph, para.72, is coded as pro-child and is referred to only once by *Scozzari and Giunta*. This means that the first time one of the care order cases referred to the paragraph that is considered pro-child is 12 years after judgement was finalized. The last three paragraphs, from *Olsson*, are not consistently referred to. Few referrals to a paragraph indicate that the impact the paragraph has is context-based and therefore must be assessed individually.

In *W. v. The UK*, seven paragraphs are referred to: para.59 (8x, biological family), para.60 (5x, the Court), para.62 (9x, the Court, other), para.63 (3x, pro-parent), para.64 (13x, pro-parent, other), para.65 (2x, the Court) and para.78 (1x, pro-parent). Unlike *Olsson* and *Johansen*, *W. v. The UK* has paragraphs that are pro-parent. However, there are no paragraphs that are pro-child. Three paragraphs are consistently being referred to; para.59, para.62 and para.64. While both, para.59 and para.64, have a fairly even distribution of judgements referring to them thru the three decades, para.62 do not. In para.62 more than half the references derive from judgements in the last decade, meaning that the paragraph has had an upswing the last decade. Para.60, on the other hand, is consistently being referred to until 2004, but after 2004, there are no references to para.60. The last three paragraphs are seemingly context-based, and is presented in chapter 7 – Discourse analysis.

In *K. and T. v. Finland*, seven paragraphs are referred to: para.151 (4x, pro-child), para.154 (8x, pro-child), para.155 (6x, the Court), para.166 (7x, other), para.173 (6x, the Court), para.178 (5x, the Court) and para.179 (4x, the Court). Since *K. and T. v. Finland* was finalized in 2001, the judgements have had no impact on the first decade of care order cases. Out of the seven paragraphs that are referred to in *K. and T. v. Finland*, six are consistently referred to. One, para.151, is not. In total, there are four references to para.151, three originate from cases prior to 2004 and the last from 2013. From the time *K. and T. v. Finland* was finalized in 2001 and to 2004, five care order cases were brought before the ECtHR, three of which all referred to para.151. Since the paragraph was consistently referred to in the beginning of the millennium, it can indicate that there has been a development in how the ECtHR assess the cases, which changed para.151 from having a generic impact on the care order field to a context-based. Viewing the other paragraphs referred to in *K. and T. v. Finland*, four paragraphs focus on how the ECtHR should assess care order cases. None are considered to be pro-parent or in favor of the biological family. In *K. and T. v. Finland*, the main focus is on the child and the Court.

In *Kutzner*, five paragraphs are referred to: para.56 (2x, the Court), para.65 (2x, the Court), para.66 (1x, pro-child, the Court), para.67 (11x, pro-child, the Court) and para.76 (3x, pro-child, pro-parent). One paragraph, para.67, is consistently referred to. The other four paragraphs are seemingly context-based and were discussed in chapter 7 – Discourse analysis. It is, however, worth noting that one paragraph, para.76, is coded as both pro-child and pro-parent and has been referred to in total, three times. The low number of judgements referring to the paragraph indicates that it does not have a generic impact on the care order field.

Lastly, in *R. and H. v. The UK*, four paragraphs are referred to: para.73 (3x, pro-child, pro-parent), para.75 (2x, the Court, pro-parent), para.76 (3x, other), para.81 (2x, pro-child, pro-parent, the Court). Unlike the five previous presented judgements, *R. and H. v. The UK* does not have a paragraph that stands out as more cited than others. The impact the judgements has on the care order field is yet difficult to see. The reason being that the judgement is from 2011, which means that there is a limited number of cases that can refer to the judgement. All paragraphs in the judgement, however, is referred to more than once. Viewing the cases referring to *R. and H. v. The UK*, *Y.C. v. The UK* and *N.P v. the Republic of Moldova* refer to all four paragraphs, which means that there are only two of the four paragraphs are referred to by other cases. This indicates that *R. and H. v. The UK* has a context-based impact on the care order field. However, three of the four paragraphs being cited are coded in more than one initial-category. Reviewing every reference from all 44 care order cases, only three paragraphs are coded in three initial-categories at one time, one of which is from *R. and H. v. The UK* (para.81).⁷⁴ The diversity in the references indicates that *R. and H. v. The UK* has a broad impact on the care order field.

There are significant differences as to how the six judgements are referred to. *Johansen* is the only judgement where all references in the judgment can be considered to have a generic impact on the field of care orders. *K. and T. v. Finland* follow suit, but with one reference having a more context-based impact.

Looking at the impact each of the six judgements has on the care order field, there are differences. Of the six judgements, *Johansen* has the lowest number of paragraphs being referred to. However, while all three paragraphs being referred to in *Johansen* are consistently being referred to and thus have a generic impact, each of the five remaining judgements have

⁷⁴ The other two paragraphs are found in *Scozzari and Giunta v. Italy* (para.138), and *P., C., and S. v. The UK* (para.118). See appendix C.

at least one paragraph that is context based. The judgement with the highest number of paragraphs that are consistently being referred to, are *K. and T. v. Finland*. Meaning that *K. and T. v. Finland* has a broader impact on the care order field than *Johansen*. Even though *K. and T. v. Finland* is consistently referred to, the number of referrals is not as high as the most cited paragraph in four of the five other judgements. The broad impact is also found in *R. and H. v. The UK*. As with *K. and T. v. Finland*, the number of referrals to each paragraph in *R. and H. v. The UK* is not as high as is the case with the other four judgements.

In order to better assess the impact a single reference has had on the care order field, I examined how many percent of all judgements referred to the most cited paragraphs. In *Johansen* the two most cited paragraphs are referred to in 44% of all judgements. In *Olsson* the most cited paragraph is referred to in 31% of the all judgements, in *W. v. The United Kingdom* the same number is 30%, in *K. and T. v. Finland* 28%, in *Kutzner* 42% and in *R. and H. v. The UK* 25%. Meaning that it is para.67 from *Kutzner*, and para.64 and para.78 from *Johansen* that has had the largest, generic, impact on the care order field.

Looking past the single paragraphs and to all the references to a judgement as a whole, *Kutzner* is the judgement with the least paragraphs (one) being consistently referred. This indicates that, of the six judgements, *Kutzner* has the narrowest impact on the care order field. As aforesaid, which impact *R. and H. v. The UK* has is difficult to say. What one can determine is that each of the paragraphs in the judgement is evenly referred to. Viewing *W. v. The UK* and *Olsson*, the two judgements are among the first care order cases to ever be brought before the ECtHR. Meaning that both judgements are ground-breakers and thus should have made huge impact in the care order field. There are paragraphs, from the two judgements, that arguably have had large influence on the care order field, such as *W. v. The UK* para.64 and *Olsson* para.81. However, considering that the two judgements were among the first judgements to be finalized by the ECtHR, the judicial precedent set by the judgements are not as voluminous as one may expect. This shows that the ECtHR develops constantly. If there had been no development in how the ECtHR assess cases, it most likely would have been a higher number of referrals to the first care order cases that appeared before the ECtHR.

To summarize, *Johansen* has had the greatest, generic, impact on the ECtHRs care order field. Paragraph 67 from *Kutzner* has had the same impact as the paragraphs from *Johansen*. While the *Johansen*-judgement has had a broad impact on the care order field, *Kutzner's* impact is narrow. The generic impact from the *Kutzner*-judgement is restricted to one paragraph coded

as pro-child and the Court. *K. and T. v. Finland* has the broadest impact on the care order field, with six paragraphs that can be considered to have had a generic impact. *R. and H. v. The UK* has had a broad, diverse, impact on the care order field. Whether the impact is *generic* or *context-based* is yet to be determined. Both *W. v. The UK* and *Olsson* are among the first care order judgements that appeared before the ECtHR. Both judgements have endured the ravages of time and are still being cited in newer judgements. Which mean that the two judgements have influenced the care order field in the longest timespan.

Turning away from the assessing the impact the judgements has had on the care order field and turning towards the paragraphs being cited, I will now discuss any development surrounding the paragraphs being referred to. I have created three tables showing paragraphs coded as pro-child, pro-parent and biological family, which can be found in appendix H, H1-3. Any development in the ECtHR's role in assessing cases is difficult to spot in a statistical analysis and is therefore omitted from this discussion. However, by looking at the statistics of the development of the pro-child, pro-parent and biological family category one senses in which direction the ECtHR is heading for.

The first two paragraphs that are in favor of the child originate from *B. v. The UK*. However, one of the two paragraphs was first referred to by *McMichael* in 1995, and the second was referred to by *Scozzari and Giunta* in 2000. Hence there were no judicial precedent references in favor of the child prior to 1995. The pro-child category has increased substantially the last two decades. The upswing started with *Johansen*. After the *Johansen*-judgement there is a visible change in the number of references in favor of the child, which is an ever-increasing number. In total 92 of 94 pro-child references have come after year 2000. See appendix H1. The increasing number of references in favor of the child indicates that the ECtHR have a more child-centered focus in later years. This does not mean that there were no arguments in the judgements prior to 2000 in favor of the child, but they had not yet been referred to and thus not created visible precedent on the care order field. In fact, several of the references in favor of the child is referred to many years after the judgements were finalized. I.a. as aforesaid, *B. v. The UK (para.63)* was first referred to eight years after the judgement was finalized and, both, *Scozzari and Giunta (para.149)* and *P., C., and S. v. The UK (para.118)* were first referred to nine years after the judgements were finalized. Reviewing the number of times each of the aforesaid paragraphs are referred to, one thing sets *B. v. The UK* apart from the other two judgements. *B. v. The UK* is consistently referred to after the first referral. The paragraphs from the other two judgements are not. This indicates that while para.63 from *B. v. The UK* has had

a generic impact the two other paragraphs have had a context-based impact. In total there are 24 paragraphs, referred to 94 times in the timespan between 1995 and 2016, that are in favor of the child.

Looking at paragraphs in favor of the parent, it is clear that there are more pro-parent paragraphs than pro-child. In total there are 27 pro-parent paragraphs being referred to. The pro-parent paragraphs are, however, significantly less referred to than pro-child, with 72 referrals. Unlike pro-child, the first references to pro-parent paragraph is seen in 1987, the last reference being from 2016. Meaning that there are judicial precedent references in favor of the parents in the entire timespan there has been care orders. Of the 27 paragraphs being referred to, only two⁷⁵ are referred to more than seven times and thus on the list of most cited paragraphs.⁷⁶ Looking at the most cited paragraphs, the pro-parent category is the only one of the initial-categories that does not have reference that are solely coded in the category. Meaning that the two pro-parent paragraphs in the list of most cited paragraphs are also coded as “other” (*W. v. The UK, para.64*) and “pro-child” (*Gnahoré, para.59*). The low number of pro-parent paragraphs being cited more than a few times indicates that the paragraphs being referred to have a context-based impact. In other words, the pro-parent category has more paragraphs with context-based impact than the pro-child and biological family categories, and less generic. On average each of the paragraphs in the pro-parent category is referred to 2.67 times, the paragraphs in the pro-child category is referred to 3.92 times and the paragraphs in the biological family category, on average 4.53 times. Seemingly, it is the paragraphs coded as biological family that has the most generic impact and pro-parent who has the most context-based.

Viewing the paragraphs coded as biological family there is, in total, 17 paragraphs being referred to 77 times. There are fewer paragraphs coded as biological family than pro-child and pro-parent. The high number of references being consistently referred to⁷⁷ indicates that, seen as a whole, paragraphs coded as biological family have a more generic impact than what was the case with paragraphs coded as pro-parent. The pro-child category also has a high number of paragraphs being consistently referred to, but a lower overall average. This indicates that the impact from the pro-child category is somewhere between the context-based impact from pro-parent category and the generic impact from biological family category. As with the pro-parent category, paragraphs in favor of the biological family is first referred to in 1987 and last referred

⁷⁵ *W. v. The UK, para.64 (1987)* and *Gnahoré v. France, para.59 (2001)*.

⁷⁶ See table 10, section 6.2.

⁷⁷ See appendix H3.

to in 2016. Meaning that paragraphs that are in favor of biological family have been referred to in the entire timespan care order cases have been brought before the ECtHR.

Looking at the judicial precedent it is clear that after a judgement is finalized, if there is a development in the ECtHRs assessments, it is instantly referred to.⁷⁸ If a judgement creates new precedent, that will be immediately noted. There is only one judgement in my material that, for the time being, cannot be referred to by others, *Jovanovic v. Sweden*, as it is the newest judgement in my data material. As pointed out when discussing *R. and H. v. The UK*, it is impossible to see any generic impact judgements have had on the care order field in the statistics before some time has passed. In order to see the impact, and thus the influence, each judgement and paragraph has had on the care order field one must examine the content of each paragraph.

8.2 Supportive questions – discussion and concluding remarks

The first supportive question revolves around how the ECtHR assess cases and secure the rule of law of everyone, when dealing with different judicial systems.

The legal arguments point to the ECtHRs role in assessing the measures implemented by domestic authorities. The measure taken must be “in accordance with the law” or “necessary in a democratic society”. In order 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 a measure. This allows for the ECtHR to unveil any potential infractions on the Convention. The ECtHR does however emphasize that it is not a substitution for domestic authorities.

When it comes to assessing whether a measure was “necessary in a democratic society”, there are two considerations. “First, the Court 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 UK*, 2012, para.133). The legal arguments point to the fact that in order for a measure to be justified, the measure must proportionate for 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”. The second consideration revolves around the decision-making

⁷⁸ I.a. the five judgements from 1987 were heard and finalized on the same date, but still there are references between the judgements, and *Kutzner v. Germany* (26.02.2002) was referred to by *P., C., and S. v. The UK* (16.07.2002).

process. The legal arguments emphasize that the ECtHR will assess whether the decision-making process was fair, and that the interests of all parties involved were respected. The legal arguments also highlight the notion of necessity, in the phrase “necessary in a democratic society”. The ECtHR emphasize that the necessity points to a pressing social need to interfere.

The pragmatic arguments focus mainly on the domestic authorities’ decision-making process. By stating how the domestic authorities should proceed in a decision-making process, the ECtHR has essentially created a guideline for how the domestic authorities should conduct their decision-making process in order for a measure to be justified. As were the case with the legal arguments, the pragmatic arguments emphasize that the ECtHR role is not act as a substitution for domestic authorities, but to ascertain whether the decision reached by the domestic authorities were a result of carefully consideration of the interests and rights of all involved.

Viewing the ethical arguments pertaining to the ECtHRs assessments, their focus is mainly on how the ECtHR should assess, and balance, the interests of the biological parents and their child. The ethical arguments emphasize that the biological parents must be involved in the decision-making process, leading up to a care order, to an extent that ensure that their interests are known. When it comes to the child’s interests, the ethical arguments highlight that they are an overriding requirement. All decision pertaining to the child should be taken with the child’s best interests in mind. That includes decisions made by the domestic authorities, and the ECtHRs assessment of a case.

The moral arguments shed a light on cultural differences between the Contracting States. The ECtHR underlines that the domestic authorities’ decision-making process may be culturally conditioned. Traditions, norms and judicial system may all play a role in how the domestic authorities assess a case. Keeping in line with the cultural differences, the ECtHR acknowledge that the domestic authorities enjoy a certain margin of appreciation in their assessments. However, the ECtHR have created, what is basically guidelines as to what the Court expect the domestic authorities to consider in the assessments. The Court states that the decision made by the domestic authorities must be based on relevant considerations, ensuring that the decision neither is nor appears to be arbitrary. The moral arguments also underline the obligations, both the positive and negative, the domestic authorities have opposite the public.

Viewing arguments pertaining to how the ECtHR assess a case, it is clear that the Court does not consider itself to be a substitute for the domestic authorities. The ECtHR emphasizes that

the Courts role is to assess whether the decision reached by the domestic authorities were “in accordance with the law” or “necessary in a democratic society”.

The phrase “in accordance with the law” points to both the content and quality of domestic law. Meaning that there should be laws in each of the Contracting States that justifies the domestic authorities’ decisions. The ECtHR emphasizes that there should be a measure of protection in domestic law against arbitrary interference, but that is not the Courts role to assess domestic law in abstract. The Court does however underline that the domestic law should be phrased in a way that is reasonably understandable for anyone who may be affected by it. This does not entail that any law that confers discretion is a violation against the ECtHRs requirements, “...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).

Looking at the phrase “necessary in a democratic society” the keyword is necessary. If there is a pressing social need to interfere, the domestic authorities have an obligation to do so. Any concern regarding a child’s health, development or wellbeing constitute a pressing social need. In other words, the child’s best interests will fulfill the requirements of necessity. The ECtHR reiterates that in the Courts assessments, the child’s best interests are an overriding requirement. However, that the child’s best interests are an overriding requirement does not entail that the biological parents’ interests should not be heard. The ECtHR emphasizes 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 assessment of cases revolves around the question of whether an interference was “in accordance with the law” or “necessary in a democratic society”. The ECtHR emphasize that it is not a substitution for domestic authorities. The Courts reviews whether decision-making process leading up to the interference were justified. When looking at a case, the ECtHR examine whether the interests of the biological parents and child has been taken into account by the domestic authorities, in their decision-making process. The child’s interests surpass those of the biological parents, but the biological parents must have had an opportunity to make their interests heard. In the ECtHRs assessments, culture plays a role. Each of the Contracting States has its own national culture that can influence the authorities’ decision-making process. The ECtHR underlines that the domestic authorities enjoy a certain

margin of appreciation in the assessment but emphasize that any decision reached by the authorities must neither be, nor appear to be, arbitrary.

The second supportive question revolves around the child's best interests. Who decides what is in the child's best interests in the decision-making process leading up to a care order being issued?

The legal arguments highlight the fact that the biological parents have a right to be involved in the decision-making process leading up to a care order. If the authorities deem it necessary to remove the child from its biological parents and place the child in public care, the decision must be taken on a sufficient evidentiary base. The ECtHR points out that, statements from professionals, laymen and witnesses supporting the domestic authorities may strengthen the authorities' decision. No one is infallible. Meaning that even though there are professionals stating that the child's best interests is to be placed in public care, that can in retrospect be proven to be an incorrect decision. For these reasons the ECtHR emphasize that the biological parents' standing as biological parents suffice to let them speak on their child's behalf before the Court, even in situations where they otherwise have been deprived of their parental rights.

The pragmatic arguments focus on 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.

As were the case with legal- and pragmatic arguments, the ethical arguments underline the importance of involving the biological parents' in the decision-making process. Involvement is especially essential in situations where the biological parents are in a conflict with the domestic authorities. If there is a conflict of interest between the authorities and biological parents, there may be discrepancies as to what they believe to be in the child's best interests. The ECtHR has created what is essentially a guideline on how one should consider what is in the child's best interests. "...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 UK, 2012, para.134). The ECtHR does, however, leave room for the authorities to use their discretion in assessing if the biological parents are "particularly unfit" or if the child's is in a "safe and secure environment".

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

Arguments pertaining to the biological parents' involvement in deciding what is in the child's best interests are coded in more than one discourse category. Looking at the argumentation used, there is no doubt that a care order is issued with the child's best interests in mind. When assessing the child's best interest in the decision-making process leading up to a care order, the ECtHR must balance both weak and strong assessments. As explained in section 4.1.3 Discourse ethics, each of the discourses can be categorized as a weak or as a strong assessment.⁷⁹ The biological parents' involvement in the decision-making process cannot be categorized as a weak assessment. The biological parents have self-interest in the outcome of the domestic authorities, which entails that the assessment done by the biological parents in deciding what is in the child's best interests, is a strong assessment. Professionals, laymen, and witnesses do not per se have the same vested interests as the biological parents. In their statements, they shall be objective and truthful about what they believe to be in the child's best interests. Or, in other words, they shall have a more pragmatic approach to the decision-making process.

As pointed out by the ECtHR, there may be conflicting interests between biological parents and the authorities, with regards to what is in the child's best interests. Professionals, laymen and witnesses help the authorities to make an educated decision. However, all argumentation pertaining to interests, that be of the authorities, the child or biological parents, have an ethical side. Meaning that all assessments pertaining to interests are to a certain degree strong assessments.

To conclude, 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. The decision must be taken on sufficient evidentiary base, i.a. on statements from professionals, laymen and witnesses, and must include

⁷⁹ See table 4, section 4.1.3.

the views of the parents. Arguments pertaining to the child's interests all have an ethical/moral side, which entails that the assessments done by the authorities are mostly strong assessments.

The third supportive question focuses on the extent of children's human rights under the ECHR and how their rights are adhered to by the ECtHR.

When speaking of children's human rights, the legal arguments point to what is in the child's best interests. Meaning, that it is the child's interests that is emphasized, not the child's rights. The ECtHR states that if the child's wellbeing is at jeopardy, the child's interests trump the parents' rights, and an interference with the parents' rights is justified. There are no legal arguments that state to what extent the child is granted rights under the ECHR.

When speaking of children's rights, the pragmatic arguments focus on what is believed to be in the child's best interests. The majority of the pragmatic arguments revolve around reuniting the biological parents with their child, after a care order has been issued. Even though established case law dictates that a care orders ultimate aim is to reunite biological parents and child, a child's health and development should never be put at risk. The ECtHR states that the child's best interests are an overriding requirement. Meaning, that if it is in the child's best interest to remain in public care, the child's interest trumps the biological parents' right to be reunited with their child. In other words, the parents may never be entitled rights that put a child's health and development at risk.

The ethical arguments highlight the child's best interests as the decisive factor in cases concerning care orders. In order to determine how one should assess what is in the child's best interests, the ECtHR have created guidelines. The ethical arguments also underline the importance of maintaining a relationship between biological parents and children, while the children are in public care. The natural bond between biological parents and children must be allowed to develop while the child is in public care. In order to do so, the ECtHR stress the importance of allowing contact between the child and its biological parents while the child is in public care.

The moral arguments highlight the fact that children have a right for protection of their health, development and wellbeing.

Arguments pertaining to the child's interests can be found in all four discourses. However, one cannot deny that all arguments pertaining to the child's interests have an ethical/moral side.

When one speaks of the child's interests, one speaks about the child's thoughts and feelings, which are subjective. Meaning that the authorities' positive duty to protect the child can feel like paternalistic abuse from the child's side. This will be further discussed in section 8.3 Main research question – concluding remarks. Established case law dictates that a care order's ultimate aim is to reunite biological parents and child, as soon as circumstances permit. This entails that the child has a right to be reunited with its biological parents. The domestic authorities' duty to facilitate a reunion between biological parents and child is an established fact. The arguments pertaining to the reunion between biological parents and child have been coded as pragmatic arguments, due to the domestic authorities' margin of appreciation in assessing how and when the reunion shall take place. The assessments done by the domestic authorities are, however, a combination of strong and weak assessments. How the reunion shall be conducted is a weak assessment, its ramifications, a strong assessment.

To conclude, children's rights 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 its interests to remain with its foster family. The child's interests are an overriding requirement, which seemingly overrides both the parents' and the child's rights. The child's interests can be divided into three categories; health, development and wellbeing. If one of the categories is at risk, the domestic authorities have a positive duty to protect the child.

The last supportive question aims to answer how the CRC influence the ECtHR. There were no references to the CRC in any of the paragraphs I examined. Looking at previous research on the field, Skivenes and Søvig (2016, p.14) found that the CRC are referred to by the ECtHR, but are not a prominent source. Meaning, that in general, the CRC does not influence how the ECtHR assess care order cases.

8.3 Main research question – concluding remarks

This thesis aims to answer how the ECtHR balance biological parents and children's rights in care order cases. To do so, one must have an understanding of what rights biological parents and children have. Children's rights have been a recurring subject thru out the thesis. However, the biological parents' rights have not directly been addressed to the same extent. Since the biological parents are over the age of 18, they are considered adults. Meaning, there is no question as to whether they are entitled to the rights under the ECHR or that they have rights

under domestic law. The question is, what if the children's rights interfere with the parents' rights?

As previously mentioned, children's rights are mainly a question of what is in their interests. However, some rights given to the biological parents is "two-way"-rights. With "two-way"-rights I mean rights given to parents that include children and thus are given indirectly to children. A care orders ultimate aim is to reunite biological parents with their child. Meaning that both, the biological parents and the child, have the right to be reunited. How one weighs the "two-way"-rights are not necessarily in equilibrium between the biological parents and the child. The ECtHR has on several occasions underlined that even though a care orders ultimate aim is to reunite biological parents and children, what is in the child's interests must be considered. The ECtHR has further stated that the child's interests is an overriding requirement and thus surpasses the biological parents' rights. In other words, what the ECtHR believe to be in the child's best interest, weigh more than the biological parents' rights in the Courts assessments. The child's interests as an overriding requirement entails that in situations where one has "two-way"-rights, one runs the risk of depriving the child of its rights, due to its interests. This will be addressed a bit further down in this section.

Over the three decades in which there have been care orders, there has been a change in how the ECtHR assess the cases. Looking at the initial-categories, there were no paragraphs in favor of the children prior to 1995. The bulk of paragraphs in favor of the child, is seen the last 15 years.⁸⁰ This points to the fact that the ECtHR have turned towards a more child-centered approach in their assessments. The wording used by the ECtHR in the judgements with regard to how the Court sees children and biological parents' rights, have also changed. In *Johansen* (para.78) the ECtHR stated that "...the Court will attach particular importance to the best interests of the child...". Para.78 from *Johansen* is tied for first, when looking at which paragraphs are most referred to.⁸¹ In newer judgements, despite still referring to the paragraph from *Johansen*, the ECtHR has changed the wording to "...the best interests of the child is paramount." (see i.a. *R. and H. v. The UK*, 2011, para.73, and *Y.C. v. The UK*, 2012, para.134). By changing how the ECtHR consider children's interests from "particular importance" to "paramount", the Court leaves no room for doubt to what role the child's best interests should play, as it is the strongest formulation, regarding the child's best interests, used in western law

⁸⁰ See appendix H.

⁸¹ See appendix G.

(Parker, 1994, p.27). The child's best interests come before all other considerations. The question is, who decides and how do they decide, what is in the child's best interest?

In care order cases, 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 how one should decide what is in the child's best interest. The key phrase here is "how one should decide". It is not the child who decides (Archard, 2013, p.64). When discussing the child's best interests, one discusses what is best for the child's health, development and wellbeing. The domestic authorities have a positive duty to protect the child's interest. By deciding what they believe to be in the child's best interests, the domestic authorities run the risk of making a decision which the child perceives as paternalistic abuse. In *Johansen* the child ran away from his children's home twice, across the country, to live with his mother. Despite the child's interests of remaining with his mother, the domestic authorities kept the child in public care – to protect its interests (*Johansen v. Norway*, 1996, para.19). As aforesaid, reunite is a "two-way"-right. Meaning, mother and child have a right to be reunited, as soon as circumstances permits. In *Johansen*, mother and child both wanted to live together. Due to the domestic authorities' positive duty to protect the child's interests, both mother and child were not heard and thus deprived of their right to be reunited (Skivenes and Strandbu, 2006, p.15). In other words, what the domestic authorities believed to be in the child's interests surpassed both the mother and child's rights.

Viewing the decision-making process leading up to a care order being issued, the ECtHR have given the domestic authorities what is basically guidelines as to how they should conduct their decision-making process.⁸² Removing a child from its biological parents and depriving the parents of their parental rights is a hard-paternalistic decision and severe interference into the life of, both, the biological parents and child.⁸³ The ECtHR emphasizes that due to its severe nature, a care order must be issued with weighty consideration as to what is in the child's best interests. Statements from professional, laymen and witnesses may all strengthen the decision made by the domestic authorities. However, the domestic authorities must ensure that the biological parents' interests are known, and heard, before reaching a decision.⁸⁴ No one is infallible, which entails that decisions made in good faith may in retrospect prove to be

⁸² See section 8.2 Supportive questions – discussion and concluding remarks.

⁸³ See section 3.2 Paternalism.

⁸⁴ See section 8.2 Supportive questions – discussion and concluding remarks.

misguided. The ECtHR have stated that the domestic authorities cannot be held accountable for actions taken due to genuine and reasonable concern about a child's wellbeing (see i.a. R.K. and A.K. v. The UK, 2008, para.36). By stating that concerns about a child's wellbeing justifies 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.

It is the domestic authorities that issue a care order, and it is the domestic authorities that decide what is in the child's best interests. They do not, however, reach a decision by themselves. When contemplating what is in the child's best interests, the domestic authorities rely on statements from professionals, laymen and witnesses.⁸⁵ The ECtHR have emphasized that in order for a decision pertaining to care orders to be justified, the domestic authorities must have included the biological parents in the decision-making process to an extent that their interest are known (See i.a. McMichael v. The UK, 1995, para.87, and Kutzner v. Germany, 2002, para.56). What is considered to be in the child's best interests varies across Contracting States. Culture, religion and traditions all play a role in deciding what is in the child's best interests (Burman, 2003, Skivenes, 2010, p.2).

The ECtHR reiterates time and again that it is not a substitute for domestic authorities. The Courts role is to review decisions made by domestic authorities in light of the ECHR, to potentially unveil any infractions on the convention (see i.a. Johansen v. Norway, 1996, para.64, and R. and H. v. The UK, 2011, para.81). In other words, whether to issue a care order is up to the domestic authorities' margin of appreciation.⁸⁶

Viewing the argumentation used by the ECtHR in their assessments, the argumentation used to support the biological parents differs from the one used to support the children. When arguing favorably towards the biological parents, the ECtHR use an overweight of legal arguments.⁸⁷ As aforesaid, as adults the biological parents' rights are unquestionable. The biological parents are granted the rights given to them under the ECHR and domestic law. A high number of legal arguments indicate that when the ECtHR argue favorable towards the biological parents, they anchor their argumentation in the law.

⁸⁵ See section 8.2 Supportive question – discussion and concluding remarks.

⁸⁶ See section 3.3.2 Margin of appreciation.

⁸⁷ See section 7.1 Legal discourse – findings and discussion.

The argumentation used to support children, are more diverse. When discussing children's rights, hereunder the "two-way"-rights, the ECtHR rely on arguments pertaining to the legal discourse. When discussing the child's interests, the Court relies mostly on arguments pertaining to the ethical discourse.⁸⁸

The argumentations used to support the child's interests are ethical. The argumentations used to support the parents' rights are legal. This indicates that arguments pertaining to strong assessments are weightier than weak assessments.⁸⁹

In the end, when viewing how the ECtHR weigh children's and biological parents' rights in care order cases, it is clear the child's interests surpass the biological parents' rights. Seemingly it is not a question of who's rights are weightiest, but rather what is considered to be in the child's best interests.

8.4 What may be further explored?

The ECtHR refers to CRC. That is a fact. When looking at the judicial precedent, there were no references to the CRC. When referring to the CRC, do the ECtHR use the reference as an ornamentation to underline its views, or do the ECtHR change their view to show responsiveness towards the CRC? To what extent the CRC influences the ECtHR and, seen in light of the ECtHRs development to a more child-centric approach, has it been a development in the ECtHRs relation to the CRC in latter years?

In my research I have delimited my research to paragraphs that have created judicial precedent. The judicial precedent gives a good indication of the generic development of the care order field. It would be of interests in further studies to examine whether the judgements as a whole give the same indications. If one looks at all judgements as a whole, one will get a clearer view as to which cases have created the largest ripple-effect on the care order field, independent of the impact was generic or context-based.

⁸⁸ See sections 7.1 – 7.3 Legal, pragmatic and ethical discourse – findings and discussions.

⁸⁹ See table 4, section 4.1.3

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Y.C. v. The UK (2012) *No.4547/10 Y.C. v. The United Kingdom*, Hudoc, ECtHR.

Appendices

Introduction - Readers guide to tables

As some judgements have long names, which do not fit in the table. I therefore created a unique ID for each judgement. I took the first letter from the applicant, the country code and year, which left me with a unique, easy identifiable, case ID for each case. I.a., “Johansen v. Norway” 1996. Johansen – J, Norway – NO and 1996 – 96. In other words, “Johansen v. Norway” 1996 is shortened to JNO96.

If a case had more than one applicant, I used the first letter from each applicant in the code e.g. “K. and T. v. Finland” 2001 is KTFI01.

See Appendix B for a complete overview of all 44 judgements and their unique case ID.

Appendix A: Interview guide Dean Karl Harald Søvig⁹⁰

Prior research:

- What has Søvigs previously researched.
- What is Søvigs experience about researching the ECtHR.

ECtHR:

- Who writes the judgements?
- Openness.
- Children's rights in the ECtHR.
- Parents' rights in the ECtHR.
- Age discrimination?
- Who does the ECtHR factor in cultural differences?

Children's rights:

- International v. national – big contrasts?
- Previous research.
- CRC – how is this enforced?
- ECtHR and CRC – does the Court use CRC as reference.
- Development in children's rights – before and now.

Anything else:

- Does Søvig have any preliminary thoughts about my research? Hypotheses?
- Anything Søvig thinks is important that I take into account in my research?

⁹⁰ The interview was conducted in Norwegian. The interview guide is translated from Norwegian to English for the readers convenience.

Appendix B: Presentation of the cases:

The following is a presentation of the 44 cases that constitute the base for my research. The summary of each case is taken from the preparatory work done by Marit Skivenes, Karl Harald Søvig and their assistants in their data gathering.

- 1 1987 – B. v. The United Kingdom (BUK87)
 - Care order and termination of parental access. Child adopted by foster family.
- 2 1987 – H. v. The United Kingdom (HUK87)
 - Interim care order and adoption. Violation of art.8.
- 3 1987 – O. v. The United Kingdom (OUK87)
 - Care orders of four siblings and termination of parental access. No violation of article 8 (fifteen to two votes).
- 4 1987 - R. v. The United Kingdom (RUK87)
 - Voluntary care order. Foster parents applied to adopt the two children but was dismissed. The procedures which were applied in reaching the decisions to terminate the applicant's access to A and J did not respect her family life.
- 5 1987 - W. v. The United Kingdom (WUK87)
 - Voluntary care order, adoption and termination of parents' access. Violation of art. 8.
- 6 1988 - Olsson v. Sweden (OSE88)
 - Violations alleged to have arisen from decision to take children into care, manner of its implementation and refusals to terminate care. Care orders of three children.
- 7 1989 - Eriksson v. Sweden (ESE89)
 - The applicant alleged that the decision to prohibit her for an indefinite period from removing her daughter from the foster home, the maintenance in force of this prohibition for more than six years, the restrictions imposed on her access to the child and the Social Council's failure to reunite the applicants violated Article 8.
- 8 1992 - Margareta and Roger Andersson v. Sweden (MRSE92)
 - Care order case. Restrictions on access between mother and son taken into public care.
- 9 1995 - McMichael v. the United Kingdom (MUK95)
 - Child was placed in care; parental access was terminated, and the child was freed for adoption. The applicants complained about the unfairness of the decision-making

processes in the children's hearing and the lack of transparency in reports and documents submitted before the children's hearing.

10 1996 - Johansen v. Norway (JNO96)

- The applicant alleged that the taking into care of her daughter S., the refusal to terminate the care and the deprivation of her parental rights and access gave rise to violations of Article 8.

11 1998 - Bronda v. Italy (BIT98)

- The applicants complained that their granddaughter had not been returned to her original family, contrary to what the Genoa Court of Appeal had decided.

12 1999 – E.P. v. Italy (EIT99)

- The applicant complained that she had been deprived of her daughter and alleged a violation of Article 8.

13 2000 - Scozzari and Giunta v. Italy (SGIT00)

- Sexual abuse while in public care.

14 2000 - L. v. Finland (LFI00)

- Two children were placed in public care due to the parent incapability to provide the stimulation necessary for growth and development, as well as basic security. No adoption.

15 2001 - Gnahoré v. France (GFR01)

- Son remained in care despite the fact that prosecution against his father had been dropped. No violation of art. 8.

16 2001 - K. and T. v. Finland (KTFI01)

- Emergency care order.

17 2002 - Buchberger v. Austria (BAT02)

- Two children were placed in the care of the Youth Welfare offices. No mention of a care order, but custody was transferred to the Youth Welfare Offices. The applicant alleged that the decision given in proceedings for the transfer of custody of her sons T. and A. to the Youth Welfare Office violated her right to respect for her family life and that the proceedings leading thereto had been unfair.

18 2002 - Kutzner v. Germany (KDE02)

- Violation: two children was placed in unidentified foster homes due to their parents' lack of intellectual capacity. Both the withdrawal of parental rights and deprivation of visiting rights was considered inappropriate.

- 19 2002 - P. C. and S. v. The United Kingdom (PCSUK02)
- Mother suffering from Munchausen Syndrome by Proxy. Child victim of induced-illness abuse. Care order issued. Child put up for adoption.
- 20 2003 - K.A. v. Finland (KFI03)
- The applicant complained under Article 8 of the Convention that his right to respect for his private and family life and home was violated on account of his children's placement in public care, the decision-making procedure and the implementation of that care.
- 21 2004 - Haase v. Germany (HDE04)
- Violation: Withdrawal of parental rights and prohibition on access to children.
- 22 2006 - H.K. v. Finland (HFI06)
- Violations of Art. 8 (care order and access restrictions). The applicant complained that removing his daughter from his care was not in her best interest, and that he had not been heard nor been given access to his child.
- 23 2006 - Moser v. Austria (MAT06)
- The applicants complained that the transfer of custody of the second applicant to the Youth Welfare Office violated their right to respect for family life as guaranteed by Article 8.
- 24 2006 - R. v. Finland (RFI06)
- The applicant contested that there had been any legal basis for maintaining the public care or restricting access. The access restrictions had not been justified nor had the authorities actively sought to reunite the applicant with his child.
- 25 2007 - Berecová v. Slovakia (BSK07)
- The applicant's children were placed in institutional care due to the applicant's ill treatment. The applicant complained that her right to respect for her family life had been violated by the placement of her children in an institution.
- 26 2008 - R.K. and A.K. v. The United Kingdom (RAUK08)
- Temporary placement of a child under public care due to fears of ill-treatment by the parents.
- 27 2008 - X. v. Croatia (XHR08)
- Exclusion of the applicant, who had been divested of her capacity to act, from proceedings resulting in the adoption of her daughter.
- 28 2009 - Saviny v. Ukraine (SUA09)

- The applicants alleged, in particular, that the placement in public care of their three minor children infringed their rights guaranteed by Articles 6 § 1, 8 and 14.
- 29 2010 - A.D. and O.D. v. The United Kingdom (AOUK10)
- A child was placed temporarily in care due to a parental assessment and not a risk assessment. A risk assessment showed that the child suffered from brittle bone disease and the care order was discharged. The case concerns how local authority failed to conduct a risk assessment. Not permanent care order was made.
- 30 2010 - Dolhamre v. Sweden (DSE10)
- Three siblings were taken into public care. The applicants complained under Article 8 of the Convention that their right to family life had been violated by the Swedish authorities and courts by taking the children into public care, and keeping them there, as well as by refusing to allow the parents to have any contact with their children for prolonged periods of time, contrary to the best interest of the children, and to the detriment of the family unity.
- 31 2011 - Aune v. Norway (ANO11)
- Decision to deprive applicant of parental responsibilities and to authorize the adoption of her son by his foster parents. Son was placed in compulsory foster care and adopted.
- 32 2011 - R. and H. v. The United Kingdom (RHUK11)
- Adoption based on a care order. Care orders of three siblings. The applicants complained that the freeing order [for adoption] was a disproportionate interference with their rights guaranteed by Article 8 of the Convention.
- 33 2012 - M.D. and Others v. Malta (MOMT12)
- Automatic and perpetual deprivation of parental rights following criminal conviction for ill-treatment of children. Care order placing two children in an institution.
- 34 2012 - V. v. Slovenia (VSI12)
- The applicants complained under Article 8 of the Convention that the domestic authorities had removed X and Y and placed them in foster care without having a legal basis to do so and without any justified reason. The replacement of the children was provoked by the death of another child, where the authorities found the circumstances “suspicious”
- 35 2012 - X. v. Slovenia (XSI12)

- The applicant complained that his children had been unjustifiably taken into foster care, that he was unable to have contact with them and that there had been undue delays in the related proceedings.
- 36 2012 - Y.C. v. The United Kingdom (YUK12)
- Adoption based on a care order. First an interim care order, then a placement order before finally an adoption.
- 37 2013 - A.K. and L. v. Croatia (AKLHR13)
- The applicant's parental rights were divested due to her mild mental disease. Her child was put up for adoption.
- 38 2013 - Ageyevy v. Russia (ARU13)
- Two adopted children were placed in public care. The adoption was revoked, and they were refused access to their children. The case concerns the revocation of adoption while criminal proceedings for suspected child abuse were still pending.
- 39 2013 - B. v. Romania (BRO13)
- The applicant alleged, in particular, that the procedures by which she had been admitted to psychiatric institutions and her children had been taken into care had been unlawful.
- 40 2013 - Mircea Dumitrescu v. Romania (MRO13)
- The applicant complained about the placement of his minor child in a foster care center and about the refusal of the domestic authorities to release him temporarily from prison for family reasons. The applicant alleged that there had been interference with his family life on the grounds that his son had been placed in the care of social services and that his parental rights and responsibilities had been transferred to public authorities.
- 41 2013 - P. and S. v. Poland (PSPL13)
- Alleged violation of article 8 of the convention as regards the determination of access to lawful abortion. Court, sitting in camera, ordered the first applicant's placement in a juvenile shelter as an interim measure.
- 42 2013 - R.M.S. v. Spain (RES13)
- The applicant alleged that she had been deprived of all contact with her daughter and separated from her without valid reason. She maintained that the administrative authorities had decided to place her daughter in pre-adoption care before the domestic

courts had even ruled on whether she had been abandoned. Adoption based on a care order.

43 2016 - Jovanovic v. Sweden (JSE16)

- The applicant alleged, in particular, that the refusal to terminate the compulsory public care of her son violated her right to family life.

44 2016 - N.P. v. The Republic of Moldova (NMD16)

- The applicant alleged under Article 8 of the Convention that the decision to withdraw her parental authority and the restrictions on her visiting rights had been disproportionate and that the authorities had failed to make efforts to safeguard her right to live with her child.

Appendix C – Judicial references coded in more than one category⁹¹

Judgement	Paragraphs	In favour of?	Judgement	Paragraphs	In favour of?
BUK87			KDE02		
	para.61	Other, court		para.66	Child, court
	para.63	Child, court		para.67	Child, court
WUK87				para.76	Child, parent
	para.62	Court, other	PCSUK02		
	para.64	Parent, other		para.116	Court, other
RUK87				para.117	Child, parent
	para.64	Both, parent		para.118	Child, parent, court
	para.65	Court, other	KFI03		
ESE89				para.139	Other, both
	para.58	Parent, both	RAUK08		
MRSE92				para.36	Court, other
	para.72	Both, other	XHR08		
MUK95				para.47	Court, other
	para.92	Court, other		para.48	Parent, court
JNO96			SUA09		
	para.64	Court, Child		para.49	Child, both
	para.78	Both, Child	AOUK10		
BIT98				para.82	Parent, court
	para.51	Both, other	RHUK11		
EIT99				para.73	Child, parent
	para.62	Child, both		para.75	Court, parent
SGIT00				para.81	Child, parent, court
	para.138	Child, parent, court	MOMT12		
GFR01				para.27	Parent, court
	para.51	Parent, other		para.76	Child, both
	para.59	Child, parent	PSPL13		
				para.128	Parent, other

⁹¹ See Appendices, Introduction – readers guide to tables, for explanation of case ID’s. See also Appendix B for a complete overview of case ID’s.

Appendix E – List of how many judgements refers to each judgement⁹³

Name	Being referred to	Potential refferers	Sum
JNO96	23	34	68 %
OSE88	23	38	61 %
KTFI01	16	29	55 %
KDE02	14	26	54 %
WUK87	22	43	51 %
RHUK11	4	12	33 %
GFR01	9	28	32 %
MUK95	11	35	31 %
SGIT00	9	30	30 %
PCSUK02	7	25	28 %
RAUK08	5	18	28 %
BUK87	11	43	26 %
MOMT12	2	8	25 %
XHR08	4	17	24 %
KFI03	5	24	21 %
YUK12	2	10	20 %
ESE89	7	37	19 %
EIT99	6	32	19 %
MAT06	3	21	14 %
PSPL13	1	7	14 %
MRSE92	5	36	14 %
SUA09	2	16	13 %
BAT02	3	27	11 %
RFI06	2	22	9 %
VSI12	1	11	9 %
HDE04	2	23	9 %
ANO11	1	13	8 %
AOUK10	1	14	7 %
RUK87	3	43	7 %
LFI00	2	31	6 %
BIT98	2	33	6 %
HFI06	1	20	5 %
HUK87	2	43	5 %
OUK87	1	43	2 %
ALHR13	0	6	0 %
ARU13	0	4	0 %
BRO13	0	5	0 %
BSK07	0	19	0 %
DSE10	0	15	0 %
JSE16	0	0	0 %
MRO13	0	2	0 %
NMD16	0	1	0 %
RES13	0	3	0 %
XSI12	0	9	0 %

⁹³ See Appendices, Introduction – readers guide to tables, for explanation of case ID’s. See also Appendix B for a complete overview of case ID’s.

Appendix F – List of how many judgements each judgement refers to⁹⁴

Name	Refers to	Potential judgements	Sum
HDE04	15	20	75 %
GFR01	10	15	67 %
KDE02	11	17	65 %
PCSUK02	9	18	50 %
JNO96	4	9	44 %
HFI06	10	23	43 %
RHUK11	12	31	39 %
MUK95	3	8	38 %
MAT06	8	22	36 %
ESE89	2	6	33 %
LFIO0	4	12	33 %
YUK12	11	33	33 %
DSE10	9	28	32 %
MOMT12	11	35	31 %
SGIT00	4	13	31 %
SUA09	8	27	30 %
MRSE92	2	7	29 %
NMD16	11	42	26 %
HUK87	1	4	25 %
OUK87	1	4	25 %
ALHR13	9	37	24 %
KFI03	4	19	21 %
ARU13	8	39	21 %
BIT98	2	10	20 %
OSE88	1	5	20 %
RES13	8	40	20 %
BAT02	3	16	19 %
EIT99	2	11	18 %
VSI12	5	32	16 %
KTFIO1	2	14	14 %
RFIO1	3	21	14 %
JSE16	6	43	14 %
XHR08	3	26	12 %
ANO11	2	30	7 %
XSI12	2	34	6 %
PSPL13	2	36	6 %
BSK07	1	24	4 %
AOUK10	1	29	3 %
BRO13	1	38	3 %
MRO13	1	41	2 %
BUK87	0	4	0 %
RAUK08	0	25	0 %
RUK87	0	4	0 %
WUK87	0	4	0 %

⁹⁴ See Appendices, Introduction – readers guide to tables, for explanation of case ID’s. See also Appendix B for a complete overview of case ID’s.

Appendix G – list of paragraphs and which judgements refers to them⁹⁵

Judgement	§§	In favour of?	Referrers												Number of referrers			
JNO96																		
	§52	Both	BIT98	LFI00	GFR01	KTFI01	BAT02	KDE02	PCSUK 02 HDE04	HFI06	XHR08	DSE10	AHHR13	JSE16			13	
*	§64	Court, Child	SGIT00	LFI00	KTFI01	GFR01	PCSUK02	KDE02	HDE04	HFI06	DSE10	ANO11	RHUK11	YUK12	MOMT12	NMD16	JSE16	15
*	§78	Both, Child	EIT99	SGIT00	GFR01	PCSUK02	HDE03	HFI06	DSE10	ANO11	RHUK11	YUK12	MOMT12	ARU13	RES13	NMD16	HSE16	15
OSE88																		
	§59	Both	ESE89	GFR01	KDE02	XHR08	MOMT12	AKHR13									6	
	§61	Court	ESE89	BIT98	ARU13												3	
	§67	Court	ESE89	PSPL13													2	
	§68	Court	JNO96	EIT99	SGIT00	LFI00	KTFI01	KDE02	PCSUK02	HFI06	MAT06	DSE10	JSE16				11	
	§72	Child	SGIT00														1	
	§81	Both	MRSE92	JNO96	EIT99	LFI00	SGIT00	KTFI01	PCSUK02	KDE02	RFI06	HFI06	DSE10	JSE16			12	
WUK87																		
	§59	Both	OUK87	OSE88	MUK95	GFR01	KDE02	MOMT12	BRO13	RES13							8	
	§60	Court	OUK87	OSE88	GFR01	KDE02	HDE04										5	
*	§62	Court, other	OUK87	MUK95	PCSUK02	HFI06	DSE10	RHUK11	YUK12	ARU13	PSPL13						9	
	§63	Parent	OUK87	LFI00	ARU13												3	
*	§64	Parent, other	OUK87	OSE88	MUK95	JNO96	PCSUK02	BAT02	HDE04	MAT06	HFI06	DSE10	RHUK11	ARU13	PSPL13		13	
	§65	Court	HUK87	JNO96													2	
	§78	Parent	MUK95														1	
KTFI01																		
	§151	Child	KDE02	KFI03	HDE04	ARU13											4	
	§154	Child	KDE02	KFI03	HDE04	MAT06	RHUK11	VSI12	YUK12	NMD16							8	
	§155	Court	KFI03	RFI06	RHUK11	YUK12	ARU13	JSE16									6	
	§166	Other	PCSUK02	KFI03	HDE04	HFI06	MAT06	SUA09	NMD16								7	
	§173	Court	KDE02	KFI03	HDE04	MAT06	YUK12	NMD16									6	
	§178	Court	KDE02	KFI03	RFI06	XSI12	RES13										5	
	§179	Court	KFI03	RFI06	SUA09	NMD16											4	
KDE02																		
	§56	Court	DSE10	JSE16													2	
	§65	Court	MAT06	SUA09													2	
*	§66	Child, court	HDE04														1	
*	§67	Child, court	PCSUK02	HDE04	HFI06	MAT06	SUA09	DSE10	RHUK11	VSI12	YUK12	JSE16	NMD16				11	
*	§76	Child, parent	SUA09	ARU13	NMD16												3	
BUK87																		
	§60	Both	GFR01	KDE02													2	
*	§61	Other, court	GFR01	KDE02	HDE04												3	
*	§63	Child, court	MUK95	XHR08	RHUK11	YUK12	ALHR13	NMD16									6	
	§64	Parent	MUK95	XHR08	ALHR13												3	
	§65	Court	MUK95	XHR08	ALHR13												3	
	§77	Parent, child	SGIT00														1	
RHUK11																		
*	§73	Child, parent	YUK12	VSI12	NMD16												3	
*	§75	Court, parent	YUK12	NMD16													2	
	§76	Other	YUK12	ALHR13	NMD16												3	
*	§81	Child, parent, court	YUK12	NMD16													2	

⁹⁵ See Appendices, Introduction – readers guide to tables, for explanation of case ID’s. See also Appendix B for a complete overview of case ID’s.

GFR01	§50	Other	KDE02	HDE04								2
*	§51	Parent, other	KDE02	HDE04								2
	§52	Other	KDE02	HDE04								2
*	§59	Child, parent	KDE02	PCSUK02	HFI06	SUA09	DSE10	ANO11	RHUK11	JSE16		8
MUK95	§86	Other	JNO96	GFR01	KDE02	SUA09						3
	§87	Court	JNO96	KDE02	SUA09							3
	§91	Court	BAT02	PCSUK02	MAT06	MOMT12						4
*	§92	Court, other	JNO96	PCSUK02	HFI06	DSE10						4
SGIT00	§138	Child, parent, court	HDE04	MAT06	MOMT12	ALHR13						4
*	§148	Child	SUA09	ARU13	RES13							3
	§249	Court	HDE04	MOMT12								2
	§250	Court	HDE04									1
PCSUK02	§114	Court	MAT06									1
	§115	Court	MAT06									1
*	§116	Court, other	HDE04	MAT06								2
*	§117	Child, parent	MAT06									1
*	§118	Child, parent, court	RHUK11									1
	§119	Court	MAT06									1
	§122	Court	RES13									1
RAUK08	§34	Court	YUK12	NMD16								2
*	§36	Court, other	AOUK10	RHUK11								2
MOMT12	§27	Parent, court	ALHR13									1
*	§76	Child, both	NMD16									1
XHR08	§45	Parent	ALHR13									1
*	§47	Court, other	RHUK11	YUK11	ALHR13	NMD16						4
*	§48	Parent, court	ALHR13									1
ESE89	§58	Parent, both	MRSE92	SGIT00	GFR01	KDE02						4
*	§71	Parent	MRSE92	GFR01	KDE02	HDE04	RES13					5
RFI03	§92	Both	HDE04	SUA09	NMD16							3
	§138	Child	RFI06									1
*	§139	Other, both	NMD16									1
YUK12	§133	Court	MRO13									1
	§134	Child	NMD16									1
	§138	Other	NMD16									1
EIT99	§62	Child, both	GFR01									1
*	§64	Parent	GFR01									1
	§69	Parent	PCSUK02	HDE04	HFI06	DSE10	JSE16					5

RUK87	*	\$64	Both, parent	GFR01	KDE02		2
	*	\$65	Court, other	GFR01	KDE02	HDE04	3
PSPL13	*	\$128	Parent, other	ARU13			1
HUK87		\$90	Parent	HDE04			1
MRS892	*	\$72	Both, other	GFR01	KDE02		2
		\$75	Court	JNO96	LF00		2
		\$91	Both	GFR01	KDE02	RES13	3
		\$95	Parent	JNO96			1
SUAD9	*	\$49	Child, both	YUK12			1
		\$51	Court	NMD16			1
		\$52	Both	NMD16			
HDED8		\$82	Child	ALHR13			1
		\$99	Parent	SUA09			1
AND11		\$66	Child	RHUK11			1
ADUK10	*	\$82	Parent, court	YUK12			1
		\$83	Court	YUK12			1
BIT98	*	\$51	Both, other	GFR01	KDE02		2
		n = 92					312

* \$§ that are coded in more than one category

Appendix H

H1 - List of pro-child references⁹⁶

Pro-child			
Judgement	Paragraphs	Referrals	Timespan
BUK87	para.63	6	1995 - 2016
BUK87	para.77	1	2000
OSE88	para.72	1	2000
JNO96	para.64	15	2000 - 2016
JNO96	para.78	15	1999 - 2016
EIT99	para.62	1	2001
SGIT00	para.138	4	2004 - 2013
SGIT00	para.149	3	2009 - 2013
GFR01	para.59	8	2002 - 2016
KTFI01	para.151	4	2002 - 2013
KTFI01	para.154	8	2002 - 2016
KDE02	para.66	1	2004
KDE02	para.67	11	2002 - 2016
KDE02	para.76	3	2009 - 2016
PCSUK02	para.117	1	2006
PCSUK02	para.118	1	2011
KFI03	para.138	1	2006
HDE04	para.82	1	2013
SUA09	para.49	1	2012
ANO11	para.66	1	2011
RHUK11	para.73	3	2013 - 2016
RHUK11	para.81	2	2012 - 2016
MOMT12	para.76	1	2016
YUK12	para.134	1	2016
SUMMARY	24	94	1995 - 2016

⁹⁶ See Appendices, Introduction – readers guide to tables, for explanation of case ID’s. See also Appendix B for a complete overview of case ID’s.

H2 - List of pro-parent references⁹⁷

Pro-parent			
Judgement	Paragraphs	Referrals	Timespan
BUK87	para.64	3	1995 - 2013
BUK87	para.77	1	2000
HUK87	para.90	1	2004
RUK87	para.64	2	2001 - 2002
WUK87	para.63	3	1987 - 2013
WUK87	para.64	13	1987 - 2013
WUK87	para.78	1	1995
ESE89	para.58	4	1992 - 2002
ESE89	para.71	5	1992 - 2013
MRSE92	para.95	1	1996
EIT99	para.64	1	2001
EIT99	para.69	5	2002 - 2016
SGIT00	para.138	4	2004 - 2013
GFR01	para.51	2	2002 - 2004
GFR01	para.59	8	2002 - 2016
KDE02	para.76	3	2009 - 2016
PCSUK02	para.117	1	2006
PCSUK02	para.118	1	2011
HDE04	para.99	1	2009
XHR08	para.45	1	2013
XHR08	para.48	1	2013
AOUK10	para.82	1	2012
RHUK11	para.73	3	2012 - 2016
RHUK11	para.75	2	2012 - 2016
RHUK11	para.81	2	2012 - 2016
MOMT12	para.27	1	2013
PSPL13	para.128	1	2013
SUMMARY	27	72	1987 - 2016

⁹⁷ See Appendices, Introduction – readers guide to tables, for explanation of case ID’s. See also Appendix B for a complete overview of case ID’s.

H3 – list of biological family references⁹⁸

Biological family			
Judgement	Paragraphs	Referrals	Timespan
BUK87	para.60	2	2001 - 2002
RUK87	para.64	2	2001 - 2002
WUK87	para.59	8	1987 - 2013
OSE88	para.59	6	1989 - 2013
OSE88	para.81	12	1992 - 2016
ESE89	para.58	4	1992 - 2002
MRSE92	para.72	2	2001 - 2002
MRSE92	para.91	3	2001 - 2013
JNO96	para.52	13	1992 - 2016
JNO96	para.78	15	1999 - 2016
BIT98	para.51	2	2001 - 2002
EIT99	para.62	1	2001
KFI03	para.92	3	2004 - 2016
KFI03	para.139	1	2016
SUA09	para.49	1	2012
SUA09	para.52	1	2016
MOMT12	para.76	1	2016
SUMMARY	17	77	1987 - 2016

Appendix I – list of applications decided (2006 – 2016)

Applications decided			
Year	By judgement delivered (total)	By judgement delivered (excluding joined appl.)	By decision (inadmissible or struck out)
2018	2738	1014	40023
2017	15595	1068	70356
2016	1926	993	36579
2015	2441	823	43133
2014	2388	891	83675
2013	3661	916	89740
2012	1678	1093	86201
2011	1511	1157	50677
2010	2607	1499	38576
2009	2393	1625	33067
2008	1880	1543	30163
2007	1735	1498	27059
2006	1719	1560	28159

⁹⁸ See Appendices, Introduction – readers guide to tables, for explanation of case ID's. See also Appendix B for a complete overview of case ID's.