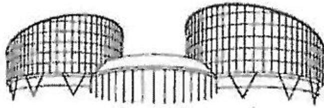

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

ENG - 2014/1

Application Form

About this application form

This application form is a formal legal document and may affect your rights and obligations. Please follow the instructions given in the Notes for filling in the application form. Make sure you fill in all the fields applicable to your situation and provide all relevant documents.

Warning: If your application is incomplete, it will not be accepted (*see Rule 47 of the Rules of Court*). Please note in particular that Rule 47 § 2 (a) provides that:
"All of the information referred to in paragraph 1 (d) to (f) [*statement of facts, alleged violations and information about compliance with the admissibility criteria*] that is set out in the relevant part of the application form should be sufficient to enable the Court to determine the nature and scope of the application without recourse to any other document."

Barcode label

If you have already received a sheet of barcode labels from the European Court of Human Rights, please place one barcode label in the box below.

Reference number

If you already have a reference number from the Court in relation to these complaints, please indicate it in the box below.

A. The applicant (Individual)

This section refers to applicants who are individual persons only. If the applicant is an organisation, please go to Section B.

1. Surname

Wunderlich

2. First name(s)

Dirk

3. Date of birth

e.g. 27/09/2012

D D M M Y Y Y Y

4. Nationality

Germany

5. Address

GERMANY

6. Telephone (including international dialling code)

7. Email (if any)

8. Sex

◉ male

○ female

B. The applicant (Organisation)

This section should only be filled in where the applicant is a company, NGO, association or other legal entity.

9. Name

10. Identification number (if any)

11. Date of registration or incorporation (if any)

e.g. 27/09/2012

D D M M Y Y Y Y

12. Activity

13. Registered address

14. Telephone (including international dialling code)

15. Email

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

ENG - 2014/1

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Barcode label

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Reference number

If you already have a reference number from the Court in relation to these complaints, please indicate it in the box below.

A. The applicant (Individual)

This section refers to applicants who are individual persons only. If the applicant is an organisation, please go to Section B.

1. Surname

Wunderlich

2. First name(s)

Petra

3. Date of birth

D D M M Y Y Y Y e.g. 27/09/2012

4. Nationality

Germany

5. Address

GERMANY

6. Telephone (including international dialling code)

7. Email (if any)

8. Sex

○ male

◉ female

B. The applicant (Organisation)

This section should only be filled in where the applicant is a company, NGO, association or other legal entity.

9. Name

10. Identification number (if any)

11. Date of registration or incorporation (if any)

D D M M Y Y Y Y e.g. 27/09/2012

12. Activity

13. Registered address

14. Telephone (including international dialling code)

15. Email

C. Representative(s) of the applicant

If the applicant is not represented, go to Section D.

Non-lawyer/Organisation official

Please fill in this part of the form if you are representing an applicant but *are not a lawyer*.

In the box below, explain in what capacity you are representing the applicant or state your relationship or official function where you are representing an organisation.

16. Capacity / relationship / function

17. Surname

18. First name(s)

19. Nationality

20. Address

21. Telephone (including international dialling code)

22. Fax

23. Email

Lawyer

Please fill in this part of the form if you are representing the applicant *as a lawyer*.

24. Surname

Kiška

25. First name(s)

Roger

26. Nationality

Slovak Republic

27. Address

ADF International
Landesgerichtsstr. 18/10
1010 Wien
AUSTRIA

28. Telephone (including international dialling code)

(+43-1) 904 95 55

29. Fax

(+43-1) 904 95 54

30. Email

rkiska@adfinternational.org

Authority

The applicant must authorise any representative to act on his or her behalf by signing the authorisation below (see the Notes for filling in the application form).

I hereby authorise the person indicated to represent me in the proceedings before the European Court of Human Rights, concerning my application lodged under Article 34 of the Convention.

31. Signature of applicant

Vunderlich

32. Date

D	D	M	M	Y	Y	Y	Y
1	4	0	4	2	0	1	5

e.g. 27/09/2012

C. Representative(s) of the applicant

If the applicant is not represented, go to Section D.

Non-lawyer/Organisation official

Please fill in this part of the form if you are representing an applicant but *are not a lawyer*.

In the box below, explain in what capacity you are representing the applicant or state your relationship or official function where you are representing an organisation.

16. Capacity / relationship / function

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23. Email

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24. Surname

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Authority

The applicant must authorise any representative to act on his or her behalf by signing the authorisation below (see the Notes for filling in the application form).

I hereby authorise the person indicated to represent me in the proceedings before the European Court of Human Rights, concerning my application lodged under Article 34 of the Convention.

31. Signature of applicant

32. Date

1	4	0	4	2	0	1	5
D	D	M	M	Y	Y	Y	Y

e.g. 27/09/2012

D. State(s) against which the application is directed

33. Tick the name(s) of the State(s) against which the application is directed

- [ ] ALB - Albania
- [ ] AND - Andorra
- [ ] ARM - Armenia
- [ ] AUT - Austria
- [ ] AZE - Azerbaijan
- [ ] BEL - Belgium
- [ ] BGR - Bulgaria
- [ ] BIH - Bosnia and Herzegovina
- [ ] CHE - Switzerland
- [ ] CYP - Cyprus
- [ ] CZE - Czech Republic
- [x] DEU - Germany
- [ ] DNK - Denmark
- [ ] ESP - Spain
- [ ] EST - Estonia
- [ ] FIN - Finland
- [ ] FRA - France
- [ ] GBR - United Kingdom
- [ ] GEO - Georgia
- [ ] GRC - Greece
- [ ] HRV - Croatia
- [ ] HUN - Hungary
- [ ] IRL - Ireland
- [ ] ISL - Iceland
- [ ] ITA - Italy
- [ ] LIE - Liechtenstein
- [ ] LTU - Lithuania
- [ ] LUX - Luxembourg
- [ ] LVA - Latvia
- [ ] MCO - Monaco
- [ ] MDA - Republic of Moldova
- [ ] MKD - "The former Yugoslav Republic of Macedonia"
- [ ] MLT - Malta
- [ ] MNE - Montenegro
- [ ] NLD - Netherlands
- [ ] NOR - Norway
- [ ] POL - Poland
- [ ] PRT - Portugal
- [ ] ROU - Romania
- [ ] RUS - Russian Federation
- [ ] SMR - San Marino
- [ ] SRB - Serbia
- [ ] SVK - Slovak Republic
- [ ] SVN - Slovenia
- [ ] SWE - Sweden
- [ ] TUR - Turkey
- [ ] UKR - Ukraine

Subject matter of the application

All the information concerning the facts, complaints and compliance with the requirements of exhaustion of domestic remedies and the six-month time-limit laid down in Article 35 § 1 of the Convention must be set out in this part of the application form (sections E., F. and G.) (Rule 47 § 2 (a)). The applicant may supplement this information by appending further details to the application form. Such additional explanations must not exceed 20 pages (Rule 47 § 2 (b)); this page limit does not include copies of accompanying documents and decisions.

E. Statement of the facts

34.

Dirk Wunderlich and Petra Wunderlich are the married parents of four children. After home educating their children in a variety of European countries from 2008-2011, the returned to Germany to their home near Darmstadt. Upon returning the family contacted the School Authority asking for a meeting to get permission to home educate but this request to meet was declined. However, the Office of Child and Youth Services (Jugendamt) agreed to meet with the family. Internal e-mail correspondence between the School Authority and the Jugendamt indicated there "was no need for intervention" but the School Authority wrote "there is indeed a case of the children's welfare being in danger". The School Authority filed a "petition to withdraw parental custody" with the Family Court based solely on the fact that the children did not attend school.
The Darmstadt Family Court proceed with case: 53 F 1440/12 SO in mid-July 2012. On 6 September 2012 the court gave custody of the children to the Jugendamt for the purpose of school attendance (but did not give physical custody to the Jugendamt). The parents appealed and requested legal aid to appeal because they could not pay the costs of the trial based on their own economic situation. On April 25, 2013 the Appeal Court in Frankfurt am Main issued a ruling (6 UF 254/12) denying the appeal, ordered the parents to pay the costs of the appeal but did clarify that the custody order was only school related and explicitly gave the custody back to the parents during school holiday times.
The family appealed to the Federal Constitutional Court on 2 June 2013. The Federal Constitutional Court denied the application without reason (1 BvR 1631/13) and served the decision on the parents on October 16, 2013. (see envelope postmarked October 14th and lawyers note of receipt on October 16th).
Frustrated by the parents refusal to send the children to school, the Darmstadt-Dieburg Jugendamt initiated a new custody case mid-June 2013 (53 F 1216/13 SO) requesting physical custody of the children. The court ruled on the merits of this request on 18.12.2013 (see below).
On 27 August 2013, while presiding Judge Markus Malkmus was away, the Darmstadt-Dieburg Jugendamt requested Ex Parte interim orders to take immediate physical custody of the children. Without a hearing, the Darmstadt Family Court issued interim orders on 28 August 2013 authorizing the Jugendamt to do so. The court ruled that the schooling of the four children could only be implemented if the children were removed from their parents' home. The Jugendamt requested full physical and legal custody including for the holidays because there was a "danger [...], that the parents will use the holidays to flee to another country, as they have done before". The court issued order 53 F 1698/13 EAHK giving the Jugendamt authority to use force to take the children. On 29 August 2013 the order was enforced. On this day, without warning, seven Jugendamt staff members and 33 police officers appeared and carried the four children out of the house. The children then taken to a foster home where they were kept until 19 September 2013 with no contact to the outside world and only one family visit on 14 September 2013 for the birthday of the youngest daughter Serajah. No schooling occurred at the foster home.
On 19 September 2013 the four children were returned to the parents' on the condition the children attend school. The interim court orders were rescinded court orders dated 09-24-2013 – 53 F 1697/13 EASO and a court order dated 24 September 2013 – 53 F 1698/13 EAHK. These orders were appealed by the parents and the children seeking a declaration from the Appeal Court in Frankfurt am Main requesting a finding that the decisions made by the Darmstadt had violated their rights. This request was made pursuant to § 62 FamFG "(1) If the substantive part of the challenged court order is no longer relevant, the Appeal Court shall, upon request, find that the trial court's decision violated the appellant's rights if the appellant can show a legitimate interest in such a finding. (2) A legitimate interest usually exists if 1. fundamental rights were severely violated or 2. There is a specific threat that an action will be repeated.
The Frankfurt appeals court took up these appeals as 6 UF 274/13 and 6 UF 273/13. Children and parents argued that the interim orders violated their fundamental rights in particular due process, special protection of the family, parents' fundamental rights, corresponding fundamental rights of the children, free movement, their human rights

Statement of the facts (continued)

35.

as well as the principle of proportionality. The parents argued a legitimate interest in the requested finding because Darmstadt-Dieburg County had asked them to assume the costs for the children's stay at the foster home. In 6 UF 274/13 parents requested legal aid on 21 March 2014.
Applicants requested the Darmstadt Family Court issue a provisional order that custody be returned for Autumn Holidays so the family could vacation in France. This was denied on October 29, 2013. Then, on December 12, 2013 Darmstadt – Family Court held a hearing 53 F 1216/13 SO ruling that legal custody would remain with the Jugendamt. The order was issued on 18 December 2013. Parent's argued that custody should be returned so that applicants could leave the country to go to France where they had arranged for housing and where they could legally educate their children at home. The court reasoned that under German law home education was child endangerment and therefore the court would not return custody. Parents and children appealed this decision to the Higher Regional Court of Frankfurt as a violation of their fundamental human rights and the principle of proportionality.
On 15 August 2014 (6 UF 30/14) the Higher Regional Court in Frankfurt vacated the lower court ruling and returned legal custody back to the parents. Parents submitted this decision to the Federal Constitutional Court as part of the previous appeal submitted in 1 BvR 1631/13 arguing that even though custody was returned parents arguing that their constitutional complaint was still justified the Higher Regional Court in Frankfurt am Main had ordered them to pay the costs of the appeal and had denied their request for legal aid. Applicants argued further that they were entitled to a court evaluating whether the State had violated the fundamental right of parents and the children in order to seek further compensation for the violation of their rights and the rights of the children.
On 15 August 2014 (6 UF 274/13) The Higher Regional Court in Frankfurt am Main dismissed the appeals of the interim orders (53 F 1697/13 EASO and 53 F 1698/13 EAHK) and denied legal aid. The court reasoned that the children had no legitimate interest in the finding that the challenged decision (53 F 1697/13 EASO) had violated their rights. The Court reasoned that the challenged decision had extended the withdrawal of the right to determine the residence to the school holidays, it had been issued when there were no school holidays and it had also been vacated before the holidays had begun. The decision therefore had no "real" effect. The court presumed there was no danger that it would be repeated. Thus, there was no legitimate interest in finding the illegality. The same reasoning applied to the withdrawal of physical custody of the children. The court reasoned that this limitation of parental rights was not particularly severe as it was only an addendum to the decision dated 6 September 2012 – 53 F 1440/12 SO – which had become enforceable. The children's removal and their placement in a foster home although particularly severe were based on the withdrawal of custody rights which had become final and enforceable.
On 15 August 2014 The Higher Regional Court in Frankfurt rejected the appeal in UF 273/13 reasoning that decisions made in family law cases by interim order cannot be appealed (§ 57 FamFG). The court ruled that it is a different matter if the court decides about handing over the child to the other parent (§ 57 sentence 2 no.2 2 FamFG). But the present case is different because the court ordered the children to be handed over to the Jugendamt.
On 15 August 2014 the Higher Regional Court issued a decision in 6 WF 173/14 a proceeding heretofore completely unknown to applicants. In this new case created by the court the Higher Regional Court in Frankfurt ruled that the appeals were not admissible. The court reasoned that although Applicants had a legitimate interest in finding that the court-ordered use of force was a severe intervention against their fundamental rights they considered the urgent request by the Jugendamt had to be considered. Further, the court ruled it could not evaluate whether the order to hand over the children was legal since the order itself was uncontestable. The enforcement of the order to hand over the children led to a separation between children and parents as a legal consequence of the order to hand over the children and does not make the authorization of the use force any different.
Applicants appealed these decision to the Federal Constitutional Court under 1 BvR 2773/14. On November 19, 2014 the Federal Constitutional Court rejected the complaint and served notice on the parents of this rejection on December 1, 2014.
The parents' applications for legal aid filed on 21 March 2014 in all three cases 6 UF 274/13, 6 UF 273/13 and 6 WF 173/14. The court denied legal aid to the applicants reasoning that there was no prospect for success. See rulings of September 24 and September 29 referring to the Appeal decision of the court dated August 15, 2014. Parents appealed the legal aid decisions to the Federal Constitutional Court on 18 October 2014 this case was filed under case no. 1 BvR 3258/14. The Federal Constitutional Court rejected this complaint on 20 January 2015 serving notice on

Statement of the facts (continued)

36.

the parents on 28 January 2015.
From the beginning of the interaction between the Jugendamt and the applicants numerous and ongoing requests for the files held by the Jugendamt have been requested. These requests have been uniformly rejected.
On 15th October 2012 Applicants through their attorney requested that the Jugendamt provide the file about their case. The Jugendamt responded on 28th November that they were not "obliged" to respond to the request for the information. No other reasons were given. On 3rd December 2012, the request was repeated. On 28 December 2012, the Jugendamt responded in writing stating that "we are unwilling to grant inspection of files" claiming they were not required to provide the information.
On 25th March 2014 Applicants appealed formally to the Jugendamt but on 7th April 2014 the Jugendamt rejected the appeal. Applicants appealed this ruling but the Jugendamt rejected the appeal on the 4th of June 2014. On 3rd July 2014, Applicant's brought legal proceedings before the Administrative Court Darmstadt to get the file of the Youth Welfare Office.
The Jugendamt reasoned that because the "custody proceedings are ended. So the parents need no inspection of files any longer." The Jugendamt reasoned that data protection and articles of Social Security Statutes opposed to their request.
On Numerous occasions attorneys for the parents and the children requested the at the court request the file from the Jugendamt. This was done because attorneys have access to all files in the court relating to their cases. However the court ignored these requests from both the applicant's attorneys and the children's attorneys.
A case remains open in the Darmstadt administrative court for the files. The court has noted, without deciding, that the family no longer has a need for the files since the parents have been given back custody.

F. Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments

37. Article invoked	Explanation
A. Article 8	Authorities violated applicant's Article 8 rights by forcefully removing applicant's children, keeping them for three weeks, subjecting them to unwanted evaluations, not providing education or adequate visitation without adequate or proportionate reason.
B. Article 8 and Protocol 4, Article 2	Authorities violated applicant's Article 8 and Protocol 4, Article 2 rights by retaining legal custody for one year preventing applicants from leaving the country without proportionate or sufficient grounds. Family court judge explicitly rejected requests for return of custody so that applicants could leave to go to France where they had secured housing and to home educate which is a legal education in France.
C. Article 6, 8 and 13	Authorities violated applicant's Convention rights by stubbornly refusing to provide documents required by applicants to make their case and seek redress for harms suffered as a result of authorities forcefully removing applicant's children without adequate cause. Jugendamt authorities persistently refused to provide access to applicants and court authorities ignored repeated requests for assistance from applicants on multiple occasions. Applicants still have not been granted access to the files after nearly three years of attempts. Further applicants were denied legal aid in all of these cases. In the removal by force case the authorities sought and still seek to recoup costs of the foster care for the children during the 3 weeks the authorities had physical custody of the children. By refusing legal aid authorities made it virtually impossible but for the generosity of private citizens and NGOs for applicants to contend for their rights.
D. Protocol 1, Article 2	Authorities violated applicant's convention rights by refusing to permit home education as requested by applicants in 2011-2012. The above violations were occasioned by authority's persistent attempts to force applicants to give up their right to ensure the education of their children in conformance with their religious and philosophical views. Applicant's content that the margin of appreciation for Germany has narrowed with respect to home education since the court rejected the Konrad application in 2006. In light of the court's evolutionary interpretation of the convention applicants contend that the right of parents to home educate has become a consensus among contracting states which should result ina narrower margin of appreciation and a stricter scrutiny with respect to proportionality of interferences with this right.

G. For each complaint, please confirm that you have used the available effective remedies in the country concerned, including appeals, and also indicate the date when the final decision at domestic level was delivered and received, to show that you have complied with the six-month time-limit.

38. Complaint	Information about remedies used and the date of the final decision
A. Violation of Article 8: Physical removal and retention of legal custody of the applicants' children was an unjustifiable interference in their right to family life.	School authorities sought and were granted custody of children to enforce school law in 2012. Family appealed this decision which was affirmed but clarified in April 2013 that custody was only for during the school term. In August 2013 unjustified ex parte interim orders were granted and children were removed by force from home on August 29, 2013. Parents requested provisional custody during school holidays in September 2013 and were rejected in October 2013. In December, 2013 full custody was retained by authorities preventing applicants from leaving the country. In August 2014 full custody was restored to applicants. Applicants appealed to Federal Constitutional Court arguing that taking custody of children who are home educated and denying legal aid to parents is a violation of basic rights was denied on October 9 with service to applicants on October 16, 2014.
B. Violation of Article 8 and Protocol 4, Article 2: The State's disproportionate retention of legal custody, preventing the family from leaving the country, violated their freedom of movement.	In August 2013 applicant's four children were removed by force pursuant to interim ex parte orders. In August 2013 unjustified ex parte interim orders were granted and children were removed by force from home on August 29, 2013. Parents requested provisional custody during school holidays in September 2013 and were rejected in October 2013. In December, 2013 full custody was retained by authorities preventing applicants from leaving the country. In August 2014 full custody was restored to applicants. Applicants were effectively prohibited from leaving the country to seek alternative living and educational arrangements for themselves and their children. Applicants sought declaratory judgment that these actions violated their basic rights and to overturn the imposed court fees. The Federal Constitutional Court served its denial of this appeal on applicants on December 1, 2014.
C. Violation of Article 6, Article 8 and Article 13. Violation of Article 13: In continually refusing access to pertinent documents, and denial of legal aid, the State deprived the Applicant family of their ability to access an effective remedy.	Applicants have been persistently and stubbornly refused access to basic information held by Jugendamt regarding their case. Applicants have sought review through administrative means provided by the Jugendamt but have been rejected. In June 2014 applicants filed administrative court appeals. The court has not ruled on the case but has suggested that the case is no longer relevant because parents have been awarded custody. The stubbornness and amount of time of authorities in refusing access they are required to provide is a clear violation of the applicants convention rights. Although a hearing at the Federal Constitutional Court has not be perfected with respect to the files, an action by the ECHR is needed to help applicants achieve their legitimate goals and convention rights. Applicants were denied legal aid throughout the various applications with appeals denied by the Federal Constitutional Court in 3 cases dated October 16, 2014, December 1, 2014 and January 28, 2015.
D. Violation of Protocol 1, Article 2: By assuming and enforcing a de facto "prior right", the State has violated a proper understanding of the right to education guaranteed by the First Additional Protocol to the Convention.	Applicants sought permission to home educate and were refused. Authorities took the above actions in response to applicants educating their children at home. Applicants appealed in three instances the actions taken by the authorities regarding their decision. All three were rejected dating October 16, 2014, December 1, 2014 and January 28, 2015.

39. Is or was there an appeal or remedy available to you which you have not used?

- ○ Yes
- ◉ No

40. If you answered Yes above, please state which appeal or remedy you have not used and explain why not.

H. Information concerning other international proceedings (if any)

41. Have you raised any of these complaints in another procedure of international investigation or settlement?

- ○ Yes
- ◉ No

42. If you answered Yes above, please give a concise summary of the procedure (complaints submitted, name of the international body and date and nature of any decisions given).

43. Do you (the applicant) currently have, or have you previously had, any other applications before the Court?

- ○ Yes
- ◉ No

44. If you answered Yes above, please write the relevant application number(s) in the box below.

I. List of accompanying documents

You should enclose full and legible *copies* of all documents.

No documents will be returned to you. It is thus in your interests to submit copies, not originals.

You MUST:

- **arrange the documents in order by date and by procedure;**
- **number the pages consecutively;**
- **NOT staple, bind or tape the documents.**

45. In the box below, please list the documents in chronological order with a concise description.

1. Please see table of documents attached.
2.
3.
4.
5.
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25.

Any other comments

Do you have any other comments about your application?

46. Comments

Please see Additional Submissions attached.
First Applicant - Dirk Wunderlich
Second Applicant - Petra Wunderlich

Declaration and signature

I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.

47. Date

1	6	0	4	2	0	1	5
D	D	M	M	Y	Y	Y	Y

e.g. 27/09/2012

The applicant(s) or the applicant's representative(s) must sign in the box below.

48. Signature(s) ○ Applicant(s) ◉ Representative(s) - tick as appropriate

Roger Kiska

Confirmation of correspondent

If there is more than one applicant or more than one representative, please give the name and address of the one person with whom the Court will correspond.

49. Name and address of ○ Applicant ◉ Representative - tick as appropriate

Mr. Roger Kiska
ADF International
Landesgerichtsstrasse 18/10
1010 Wien
AUSTRIA

The completed application form should be signed and sent by post to:

The Registrar
European Court of Human Rights
Council of Europe
67075 STRASBOURG CEDEX
FRANCE

Additional Submissions

A. Violation of Article 8: Physical removal and retention of legal custody of applicants' children was unjustifiable interference in right to family life.

1. Article 8 protects family life and provides that any interference can only be justified if it is in accordance with the law and necessary. In regards to the interests to be protected, this Court has noted that "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life."[1]

2. In the instant case it is unassailable that the State, in initially taking physical custody of the Applicants' children and, after their return, retaining legal custody, has interfered with their rights under Article 8.

3. A contracting party may only interfere with an Article 8 right if the interference is prescribed by law, has a legitimate aim, and is necessary in a democratic society. Prescribed by law means that the law or action in question must be accessible, foreseeable, clear, and precise.[2] *Metropolitan Church of Bessarabia* holds that domestic law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention.[3]

4. Restrictions on rights guaranteed by the Convention must also be necessary in a democratic society. This means that such restrictions must be narrowly tailored and adopted in the interests of public and social life, as well as the rights of others.[4] For an interference to be necessary in a democratic society it must also meet a pressing social need while at the same time remaining proportionate to the legitimate aim pursued.[5]

5. On August 28th, 2013, the Applicants experienced every parent's worst nightmare, the forcible taking of their children in a violent and disproportionate use of force by police and social welfare authorities with no credible threat to the childrens' welfare to justify the removal.

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[1] *Elsholz v. Germany*, judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, § 43. See also *W v. UK* A.121-A (1987) para. 59.

[2], *Ezelin v. France*, 26 April 1991 Series A, No. 152, § 56.

[3] *Metropolitan Church of Bessarabia and Others v. Moldova*, 13 December 2001, Reports 2001-XII, § 109.

[4] *See*: F. Sudre, *Droit International et Européen des droits de l'homme*, PUF, Droit fundamental, 1999, p. 108.

[5] *Sunday Times v. the United Kingdom* (Series A, No. 30), European Court of Human Rights (1979-1980) 2 EHRR 245, 26 April 1979, § 63 *et seq*.

6. In *K and T v. Finland*, this Court has stated that in removal proceedings there must be a fair balance struck between the interests of parents and children.[6] In its balancing of the rights of the individual and the interests of the State, the Court refrains from substituting its opinion on the merits of an individual case over the judgments of a national court. "Inherent in the whole Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[7] The Court's role is to determine, when taken as a whole, whether the authorities had "relevant and sufficient reasons" for taking the contentious measures.[8]

7. Although it may be necessary for the state to intervene in instances where children are at risk of being harmed or neglected by parents, this was not the case here. The sole dispute in this case between the Applicants and the local authorities was the choice of education of the children. There was no credible contention that the children were in any danger of harm, neglect or abuse from the applicants to justify the seizure of the Applicants' children. This is clear given that for over a year authorities had made no effort to seek a court order to remove the children from the home. During that time, the authorities had access to the children and knew that they were in no danger of abuse. The family was cooperative in interacting with the authorities and, except for the dispute over the venue of the children's education, the authorities had no reason to believe that the Applicants would refuse to interact with authorities about any concerns. Thus, the raid on August 29th was unforeseeable and arbitrary and was executed to facilitate the authorities' desire to gain control of the children in light of the family's ongoing dispute over the chosen method of education.

8. The removal was demonstrably the consequence of the authorities' frustration with the Applicants, who asserted the right to home educate their children. The Applicants contend that the timing of the action in the context of the ongoing dispute shows the action was pretext for gaining physical control of the children in order to place them in a state-run home and to require that they attend a state school in violation

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[6] *K. and T. v. Finland*, 25702/94, July 12, 2001. Para.194.
[7] *Soering v. the United Kingdom*, 14038/88 [1989] ECHR 14 (7 July 1989).
[8] *Olsson v. Sweden* [1988] Series A No. 130, 10465/83, (1988) 11 ECHR 259.

of their parents' convention rights. However, this Court has held that the state has a duty to remain impartial and neutral even when the State or judiciary may find some views irksome.[9]

9. Judge Malkmus, presiding over the case, returned the Applicants' children after three weeks on the condition that they be enrolled in and attend public school. When the Applicants' children were returned, evidence from the evaluations by the authorities demonstrated that the children were in good physical, mental, and emotional health and that they had been educated. Given that they were returned with such a positive report and that the only condition imposed by Judge Malkmus was that the children enroll in and attend public school demonstrates the pretext of the August 29th seizure of the children, its lack of necessity, the absence of any *legitimate* aim and, alternatively, the disproportionality.

10. This is made even more clear given that the authorities only acted in the absence of the usual judge who had previously refused to grant the order sought during the course of this long dispute over educational methodology. The emotional and mental trauma inflicted by this unjustified seizure of the children inflicted great distress on both the parents as well as the children.

B. Violation of Article 8 and Protocol 4, Article 2: The State's disproportionate retention of legal custody, preventing the family from leaving the country on the sole basis that they would be engaging in an educational activity legal in the destination country which was not legal in the originating country, violated their freedom of movement and ability to legally access educational rights.

11. On December 12th, 2013, Judge Malkmus refused to return legal custody of the children to the parents so that the family could move to France.[10] The interference was based on the judge's interpretation of several German court decisions that classify the failure to send a child to school as endangering a child's welfare.[11] Judge Malkmus

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[9] *United Communist Party of Turkey and Others v. Turkey*, Reports 1998-I, p. 25, § 57. 30 January 1998.

[10] Beschluss, Amtsgericht Darmstadt Familien Gericht, 53 F 1216/13 SO, December 18, 2013.

[11] Plett, Bundesgerichtshof [BGH] [Federal Court of Justice] October 17, 2007, 173 Entscheidungen des Bundesgerichtschofes in Zivilsachen [BGHZ] 277 (F.R.G.).

reasoned that he could not return custody of the children in light of the parents' stated intention to leave Germany in order to home educate the children in France, where it is legal.[12]

12. Article 2 § 2 of Protocol No. 4 guarantees to any person the right to leave any country for any other country of that person's choice to which he or she may be admitted. The judge's interference with this right was a violation of the Applicants' rights under the Protocol independently and in conjunction with Article 8. The interference was prescribed by law as it occurred in the course of court proceedings and was ostensibly intended to protect the rights of others. The judge was clearly motivated by German law which categorises home education as a "danger" to children's welfare, and thus his order was motivated by an attempt to protect the health and rights of the children. However, this action was disproportionate and not "necessary in a democratic society."

13. Freedom of movement is a most fundamental freedom. A person who is unjustly prevented from leaving his country to go to another country where he has a legal right to live is essentially being held prisoner. This Court has found that restrictions on this freedom are sometimes necessary in a democratic society such as in order to enforce criminal penalties, to prevent flight from bankruptcy proceedings, because of refusal to pay customs penalties, because of mental illness without arrangements for care in destination country and to prohibit minor children from being removed contrary to court orders. In *Stamose v. Bulgaria*, the Court held that the principles of freedom of movement should be applied even in a novel cases.

14. In the present case, the only possible justification for such an interference was the ongoing dispute over the education modality for the children. This motivation is apparent, given the fact Judge Malkmus expressly warned the Applicants that if they took the children out of the country without legal custody that he would make sure that European-level criminal sanctions were pursued. However, by this stage, the court, by returning the children to the physical care of the parents, had clearly deemed that the

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[12] See French Education Code, Article L. 131.

family was competent to care for the children with the reports demonstrating no prior harm and indicative of no future risk.

15. The question remaining for this Court is whether it is a violation of the Convention's guarantee of the freedom of movement to prevent parents from leaving a country in order to pursue a legitimate form of education in the destination country, even if it is disfavoured or forbidden in the originating country. Regrettably, Germany is one of just a few nations who prohibit home education. This compels many families to emigrate to escape such harsh measures.[13] However, in the present case, the Applicants were prevented from resorting even to this extraordinary remedy.

16. Eight months after Judge Malkmus' ruling, the Higher Regional Court in Frankfurt overturned the decision and ordered that complete custody of the children be returned to the Applicants. The length of separation was a violation of the Applicants' Convention rights, especially so since the appellate[14] court, in returning custody, explicitly noted that the separation of the children from their parents over the issue of education was disproportionate in light of the totality of the circumstances. The Applicants and their children suffered significant harm as a result of the long lack of custody and were prevented from moving to France where they had arranged for a home and had planned to continue homeschooling their children as many thousands of French families do also. This sustained interference harmed the family by preventing them from realizing their determined course of action and actualizing their own desires for their family life.

C. Violation of Article 13: By continually refusing access to pertinent documents, the State deprived the Applicant family of their ability to access an effective remedy.

17. Following the forced removal of the children, the Applicants requested their family file from the youth welfare authorities in order to defend themselves as well as to

[13] Thomas Spiegler, *Why State Sanctions Fail to Deter Home Education: An Analysis of Home Education in Germany and Its Implications for Home Education Policies*, Theory and Research in Education, 297 – 309 (2009) at 300.

[14] Beschluss, OberlandesGericht, Frankfurt Am Main, 6 UF 30/14, 53 F 1216/13 SO Amstgericht Darmstadt, August 15, 2014.

seek a remedy for the removal of the children and the retention of the legal custody after the children were physically returned. The local youth welfare authorities repeatedly refused to turn over documentation needed by the Applicants. The files were needed to understand what reason the youth welfare authorities had applied to the new judge for an *ex parte* emergency order. The Applicants still do not have the file since their original lawyer was not permitted by court rules to copy and send the family a copy of its contents and had returned the file to the court.

18. In finding a breach of Article 8, this Court held in *TP and KM v. UK* that the "positive obligation on the Contracting State to protect the interests of the family requires that this material be made available to the parent concerned, *even in the absence of any request by the parent*"[15] (emphasis added). The Court reasoned that being able to have access to basic information held by authorities in the context of public care is particularly important because many parents are stressed by the shock of such proceedings and are often unrepresented and unaware of their right to such information. Even when the authorities may be justified in taking a child into care, they have the obligation to disclose relevant information to lessen the burden on parents and perhaps give them better insight into the circumstances. In the instant case, Applicants made numerous requests. The withholding of relevant documents made it difficult for the Applicants to understand what evidence the youth authorities had so that they could refute the evidence in their attempt to regain custody of their children and seek a further remedy.

D. Violation of Protocol 1, Article 2: By assuming and enforcing a de facto "prior right," the State has violated a proper understanding of the right to education guaranteed by the First Additional Protocol to the Convention.

19. Each of the previous claims stands on its own as a disproportionate interference with the Applicants' Convention rights even if this Court finds that there has been no violation of Protocol 1, Article 2 as discussed below. Nevertheless, in addition, the Applicants contend that home education is a right that ought to be protected by the

[15] *T.P. and K.M. v. The United Kingdom*, 28945/95, May 10, 2001. Para. 82.

Convention and that the contracting party has violated this right by preventing the Applicants from educating their children at home in accordance with their religious and philosophical convictions.

20. The Convention is a human rights treaty and, as such, its principal purpose is the protection of the human rights of individual human beings and not the interests of the States.[16] The Convention is also a "living instrument which…must be interpreted in the light of present-day conditions."[17] In light of present-day circumstances and the underlying purposes of the treaty, the court, and the nearly 800 million citizens of Council of Europe Member States would benefit from a re-evaluation of the *Konrad* inadmissibility decision.

21. This Court has held that Article 2 Protocol 1, is the *lex specialis* in the area of education.[18] Article 2 Protocol 1 explicitly specifies that the State shall respect the right of parents to ensure education and teaching in conformity with their own philosophical convictions. The scope of this clause is broad and encompasses all methods of knowledge transmission and every type of educational structure including, moreover, those outside the school system.[19]

22. Article 2 Protocol 1 is further distinct in that it does not repeat the qualifications which appear in Articles 8 through 11 of the Convention. This suggests that the Court should apply a more rigorous scrutiny to the State's interest as well as apply greater weight to the asserted right of the parent. Protocol 1 Article 2 enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire education programme of a child.[20] As noted, that duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of

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[16] Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights,* E.J.I.L (2003), volume 14 number three, 529-568, at 531.

[17] *Tyrer v. United Kingdom,* judgment of 25 April 1978, Series A. No. 26, at 15-16, para. 31.

[18] *Folgero and Others v. Norway*, App. No. 15472/02, judgment of 29 June 2007, § 54.

[19] P.-M Dupuy and L. Boisson de Charzounes, "Article 2", in L.E. Pettiti, E. Decaux and P.H. Imbert (eds.), *La Convention Européenne des Droites de l'Homme*, Economica, 2nd ed., 1999, p. 999.

[20] *Kjeldsen, Busk Madsen and Pederson v. Denmark,* judgment of 7 December 1976, Application No. 5095/71, 5920/72, 5926/72, § 52.

all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account."[21]

i. Reviewing the *Konrad* decision

23. The Court's primary examination of home education under Article 2 of Protocol 1 is the 2006 Konrad Application[22] deemed inadmissible. In *Konrad*, the Applicants claimed their Convention rights had been violated after they were fined for not enrolling their children in school. The parents in Konrad home educated the children. This Court determined that the interferences with the Applicants' Article 8 § 2 and Article 9 § 2 rights were within Germany's margin of appreciation due to a lack of consensus within the contracting states on the subject and also as justified "by law and necessary in a democratic society in view of the public interest in ensuring the children's education."[23] The Court likewise dismissed claims under Article 14 holding the State had a margin of appreciation in determining what "differences in otherwise similar situations justified different treatment."[24]

24. However, a closer historical analysis of the cases relied upon by the Commission and the Court show that the Court's reliance on these authorities is misplaced. Applicants contend further that the margin of appreciation has narrowed regarding the right of parents to choose home education in the years since *Konrad*, such that it should now be revisited "in light of present day circumstances" which suggest that any margin of appreciation should be narrower and a more searching scrutiny applied in light of the weight of the right asserted and the narrower margin of appreciation.

ii. The margin of appreciation

25. In *Handyside,* the Court recognized that a legitimate interest must be a "pressing social need" and that the State's action must be proportionate and reasonably related thereto.[25] It appears that when the Court identifies the lack of a broad consensus, a

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[21] *Folgero,* cited above.
[22] *Konrad v. Germany,* no. 35504/03, decision on admissibility of 11 September 2006.
[23] *Konrad* para. 2.
[24] *Konrad* para. 3, citing *Camp and Bourini v. the Netherlands*, no. 28 369/95,§ 37, DC HR 2000-X.
[25] *Handyside v The United Kingdom*, no. 5493/72, December 7, 1976.

broader margin of appreciation is often recognized, indicating greater deference to the Member State.[26] Some commentators have explained the margin of appreciation as a way for the Court to determine what level of scrutiny it will apply by way of proportionality analysis.[27] Where the margin of appreciation is narrow, the Court will exert a more intense scrutiny, often imposing a searching factual analysis and evaluating very closely the legitimacy of the State's interest and the weight and strength of the asserted right.[28] In light of emerging consensus, this interference can no longer be viewed as pursuing a legitimate aim. The complete prohibition of home education is disproportionate.

26. In light of the evolutionary approach to rights applied by the Court, present-day conditions reveal that the margin of appreciation regarding the rights of parents to choose home education has narrowed to the point of consensus. Among the majority of contracting states that recognize the right of parents to home education there are a variety of regulatory frameworks that can address any legitimate concerns of the state regarding the education of children and the interests of preserving a democracy. These regulatory frameworks range from virtually no state involvement such as in the United Kingdom, to a more intrusive oversight at the national level, as in the case of France. However, in all of these States the right of parents to choose home education is recognized by law. Among the Contracting States only Germany has an active national policy that is enforced in all of its federal states aggressively. Applicants contend that 43 of the 47 contracting states either explicitly (between 36-40) or implicitly (4-8) recognize the right of parents to educate their children at home.

iii. The decisions preceding *Konrad*

27. Looking back over the Court's jurisprudence on home education, one finds three cases decided by the Commission later relied on by the *Konrad* Court: *B.N. and S.N. v.*

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[26] See for example, *VGT v. Switzerland* no. 24699/94 June 28, 2001 and *Murphy v. Ireland* no. 44179/98 July 10, 2003. But contrast *Animal Defenders v. UK,* no. 48876/08, April 22, 2013.

[27] Kavanagh, Aileen. *Constitutional Review under the UK Human Rights Act*. Cambridge, UK: Cambridge University Press, 2009.

[28] *Smith v. Grady*, nos. 33985/96 and 33986/96, December 12, 1999.

Sweden,[29] *Leuffen v. Germany,*[30] and *Family H v. the United Kingdom.*[31] These cases themselves primarily rest on two earlier cases: *the Belgian Linguistics Cases*[32] and *Kjeldsen, Busk Madsen and Pedersen v. Denmark.*[33]

28. Although the Court acknowledges the existence and role of home education explicitly in both the *Belgian Linguistics Case* as well as *Kjeldsen,* the first specific home education case before the Commission was *Family H* in which a family was prosecuted in the United Kingdom for truancy when they did not provide evidence that their children were being taught to the satisfaction of the authorities. The United Kingdom's legal basis for home education is clear, thus, in *Family H,* there was no question as to the right of the Applicants to educate their children at home. The sole issue or the Commission was whether the prosecution, for refusing to provide satisfactory evidence as to the suitability of home education, violated their Article 2 Protocol 1 right to respect for their philosophical convictions.

29. The Commission determined the case to be inadmissible noting that the Applicant's Convention rights under Article 1 Protocol 2 had not been violated. The Commission stated that "it is clear that Article 2 Protocol 1 implies a *right* for the State to establish compulsory schooling, be it in state schools or private tuition of a satisfactory standard, and the verification and enforcement of educational standards is an integral part of that *right*" (emphasis added).

30. This language has been repeated in both *B.N.*, and *Leuffen* and was also used in *Konrad,* except that in *Konrad* the word "right" was replaced with the word "possibility": "Therefore, Article 2 of Protocol No. 1 implies the possibility for the State to establish compulsory schooling, be it in State schools or through private tuition of a satisfactory standard of the state to establish compulsory schooling."[34]

31. Although the Court misquoted *Family H,* it is understandable why the Court would replace the word "possibility" for "right." This idea of the State having a "right"

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[29] *B.N. and S.N. v. Sweden,* Application No. 17678/91, June 30, 1993.
[30] *Leuffen v. Germany,* Application No. 19844/92, July 9, 1992.
[31] *Family H. v. The United Kingdom*, Application No. 10233/83, March 6, 1984.
[32] *Case "Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium" V. Belgium*, Application No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, July 23, 1968.
[33] *Kjeldsen,* cited above.
[34] *Konrad*, page 7.

fundamentally misconstrues the Convention and also human rights law in general. *Individual human beings* have rights, states do not. States' have an obligation to secure human rights for individuals.

32. As a matter of law and practice, there is a significant difference between compulsory *education* and compulsory *attendance* (e.g. "compulsory schooling" as used in *Family H, B.N., Leuffen* and *Konrad*). Germany has signed and ratified the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Article 13 of the ICESCR, which it has not placed reservations against, dictates: "The States Parties … undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions."[35] Understanding this parental right insight from the Universal Declaration on Human Rights ("UDHR") is essential; Article 26(3) states that parents have a prior right to decide the kind of education that shall be given to their children. Regrettably, as this court noted in *Konrad,* the German state asserts a contrary understanding: "The State's constitutional obligation to provide the children with an education was on an *equal footing* with the parents' right"[36] (emphasis added).

33. This guarantee requires that the State respect the right of parents to educate their children according to their own religious or philosophical beliefs, which includes their pedagogical beliefs. The right to education and respect for parental authority over their children assumes a level of freedom for parents to choose schools not established by the State and rejects the attempt by the State, exercised in the past by totalitarian regimes, from imposing a monopoly in education.

34. It is further instructive that the UN Special Rapporteur on the right to education has written that home education is a right recognized by the international human rights framework. The Rapporteur wrote in his report on his Mission to Germany that "[I am] a

[35] United Nations, *International Covenant on Economic, Social and Cultural Rights*, *at* Art. 13.
[36] *Konrad*, page 2.

strong advocate of public, free and compulsory education, [but] it should be noted that education may not be reduced to mere school attendance … Distance learning methods and home schooling represent valid options which could be developed in certain circumstances, bearing in mind that parents have the right to choose the appropriate type of education for their children, as stipulated in article 13 of the International Covenant on Economic, Social and Cultural Rights. The promotion and development of a system of public, government-funded education should not entail the suppression of forms of education that do not require attendance at a school."[37]

35. In recommendations specific to Germany in the context of the right of home education, the UN Special Rapporteur on the right to education asked Germany to take "necessary measures…to ensure that the home schooling system is properly supervised by the State, thereby upholding the right of parents to employ this form of education when necessary and appropriate, bearing in mind the best interests of the child."[38]

36. Although this Court has appropriately recognized that the State has an interest in "safeguarding pluralism in education, which is essential for the preservation of the "democratic society" as conceived by the Convention,"[39] the Court's reliance on this premise as it emerges in the context of education from the *Belgian Linguistics* and *Kjeldsen* cases should not be directly applied to home education because these cases were primarily regarding the rights of parents of children enrolled in *public education*, not those accessing private education or its subset, home education.

37. In *Kjeldsen*, the dispute was not over whether home education should be permitted. Rather, the issue was whether or not parents should be permitted to opt their children out of mandatory sexual education classes in public schools. In this case, the Court held that Article 2 Protocol 1 was broad and "enjoins the state to respect parents' convictions, be they religious or philosophical, throughout the entire state education program." The Court stated in paragraph 53 that although the State had the authority as a matter of expediency to plan the curriculum in its public schools, in order to secure the

[37] Muñoz, V. Report of the Special Rapporteur on the right to education, Addendum: Mission to Germany. U.N. Human Rights Council, Fourth Session, A/HRC/4/29/Add.3 (03/09/07), Para. 62.
[38] *Id.*, § 93(g).
[39] *Kjeldsen,* cited above, pp. 24-25, para. 50.

rights of parents recognized in Article 2 Protocol 1, the state "must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner."

38. What was missing from the analysis of this case in the context of home education is that these preceding concepts were exclusively for the purposes of State conduct towards those children whose parents chose to enroll them in *public education.* Admitting that the State had competence to establish public school curriculum, the Court still held that the rights of parents to have their religious and philosophical convictions respected survived, even in that public school context, and was entitled to respect. The court appears to have been unwilling to impose excessive "opt-out" requirements on the State which could interfere with its planning of curriculum. However, the Court still held that States were required to refrain from violating the religious or philosophical convictions of parents by taking care to present information that could violate religious or philosophical convictions of parents in a manner that was neutral and respectful of pluralism.

39. Of critical importance is the Court's acknowledgement, in paragraph 54 of *Kjeldsen,* that parents had the opportunity to exempt their children from the state-integrated sexual education program *by homeschooling them*: "Besides, the Danish state preserves an important expedient for parents who, in the name of their creed or opinions, wish to disassociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily subsidized by the state ... or to educate them or have them *educated at home*, subject to suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions" (emphasis added.)

40. *Kjeldsen* presupposes that availability of home education was one of the final guardians of the protections of the Convention against an unwanted state-imposed pedagogy. A lawyer involved in the drafting process of the Convention explains that the object of the prohibition on indoctrination was to "meet what we all know was a terrible aspect of totalitarianism, namely, that the youth of the country were brought up so much under the dogmatic teaching of totalitarianism by the agencies...of the state that it was

impossible to bring them up in their own religious and philosophic beliefs."[40] To that end, the Court has developed, through its case law, requirements that teaching in public schools be objective, pluralistic and free of indoctrination. It would be incompatible with the basis for these protections to permit a total ban on home education given any government's ability to assert the objectivity and "neutrality" of its curriculum. In short, the requirement that public teaching be performed in a certain way does not extinguish the parents' prior right to raise their children in the manner of their choosing.

41. In spite of these facts, *B.N*, *Leuffen* and *Konrad* use *Kjeldsen* to stand for the proposition that home education can be banned because public education is or ought to be the primary means of preserving a "democratic society." *Kjeldsen* stands for no such proposition. Of further note, in *Konrad* the Court uses *Kjeldsen* for the proposition that "in view of the power of the modern state, it is above all through state teaching that this aim must be realized."[41] This is a problematic contention, especially when used to completely ban home education and to repress the rights of parents in education.

42. The UDHR recognizes in Article 16(3), "The family is the natural and fundamental group unit of society and is entitled to protection by society in the state." Article 8 of the Convention acknowledges the central and fundamental role of the family in the Council of Europe. Article 2 Protocol 1 operationalizes this importance by enjoining the State to respect the rights of parents in education.

43. Both the German Federal Constitutional Court and this Court in their respective *Konrad* decisions observe that the children were too young to see problems if they were home educated.[42] But this presupposes problems without evidence and presupposes a conclusion in tautologically circular reasoning. The overly broad presupposition that children cannot foresee the presumed consequences of home education inappropriately interferes without justification on the prior right of parents to decide how their children will be educated. This pedagogical right is also contained explicitly in Article 14 of the Charter of Fundamental Rights of the European Union: "The freedom to found

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[40] Council of Europe, *Collected Edition of the travaux préparatoires of the European Convention* (Martinus Nijhoff Publishers, Dordrecht 1985), p. 162.
[41] *Kjeldsen*, cited above.
[42] *Konrad*, page 2, 7.

educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with the religious, philosophical and pedagogical convictions shall be respected."

44. Unfortunately, *B.N.*, *Leuffen* and *Konrad* draw on a further misunderstanding from the *Belgian Linguistic case*. In *Konrad*, the Court quotes the *Belgian Linguistic Case* as standing for the idea that "the right of education is enshrined in article 2 protocol number one [and] by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals." The Court uses this language to assert that "article 2 protocol number one implies the possibility for the state to establish compulsory schooling." In *B.N. and S.N. v. Sweden*, the Commission also quotes this language from the *Belgian Linguistics Case* to imply that "it is clear that the state has a right to establish compulsory schooling."

45. Because the *Belgian Linguistic Case* was the first Court decision in the area of Article 2 Protocol 1 it is important to understand its context. The essence of this case was a dispute over the regulation of *access* to public education in the multilingual state of Belgium. The Court found a violation of Article 14 read in conjunction with Protocol 1 and the first sentence of Article 2, specifically that it was a violation of the guarantee against discrimination and the right to education to prevent certain children from attending French-speaking schools simply because of their place of residence.

46. Clearly if the State may establish public education programs it has the authority and, the court notes, the duty to regulate in accordance with respect for the Convention rights. The issue in the *Belgian Linguistics Case* was about whether the State's regulations of those *public school* programs, as it related to *access*, were consistent with the Convention.

47. Paragraph 5 of the *Belgian Linguistics Case*, quoted by the commission in *Leuffen*, reads, "The right to … by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never

injure the substance of the right to education nor conflict with other rights enshrined in the Convention."

48. The court went on to use this formulation of the right of education "calling for regulation" in *Family H, B.N., Leuffen* and *Konrad* to stand for the general proposition that Article 2 Protocol 1 calls for all- encompassing state regulation to the extent that such regulation may interfere, in this case to the extent of proscribing home education completely, with the rights of parents to choose home education. The *Belgian Linguistics Case* stands for no such broad proposition and was exclusively about access to *public* school programs. It should not be construed, and was most likely not intended to be construed, so broadly. The paragraph goes on in its entirety to read "The general aim set for themselves by the Contracting Parties through the medium of the [ECHR], was to provide effective protection of fundamental human rights, and this, without doubt not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter."

49. In *Leuffen*, and then a year later in *B.N.*, the Commission combined the ideas from the *Belgian Linguistics Case,* that education "calls for regulation", with an idea from *Campbell v. Cosans* that "the convictions of parents must not conflict with the fundamental right of the child to education because "the whole of article [2] being dominated by its first sentence."[43] The court used this articulation to support Sweden and Germany's policy of prohibiting home education. In *Leuffen* and *B.N.*, the court interpreted these to "mean that parents may not refuse the right to education of a child on the basis of their convictions" and therefore could be prohibited from home education without violating Article 2 of Protocol 1.

50. Again, context is important; just as the *Belgian Linguistics Case* was about access to public education, so *Campbell v. Cosans* was about public education and

[43] See *Leuffen* quoting *Campbell v. Cosans* judgement of 25 February 1982, Series A no. 48, p 16, para. 36.

whether the use of corporal punishment pursuant to state policy was a violation of the philosophical convictions of the parents. The case was not about the right of parents to choose home education or even whether they could choose private education. In the UK, both were options for parents.

51. In *Konrad* the Court quotes paragraph 36 of *Campbell* to stand for the proposition that "respect is only due to convictions on the part of the parents which do not conflict with the fundamental right of the child to education, the whole of article 2 of protocol number one being dominated by its first sentence. This means that parents may not refuse a child's right to education on the basis of their convictions." However, paragraph 36 of *Campbell* in its entirety should be understood more broadly.

52. Paragraph 36 is a substantial and helpful analysis as to what philosophical convictions are worthy of respect in a democratic society, where the court analyzes the Convention relating to the expression "philosophical convictions." In holding that corporal punishment was a legitimate reason not to send the child to school and to observe that corporal punishment was not appropriate in school, the Court stated with approval the parental convictions in the case and that "such convictions as are worthy of respect in a democratic society and are not incompatible with human dignity must not conflict with the fundamental right of the child to education."

53. In the present case, the Applicants have convictions that are both religious and philosophical, "which are not incompatible with human dignity and do not conflict with the fundamental right of the child education." The Applicants' views, like those of the parents in *Campbell* also "relate to a weighty and substantial aspect of human life and behavior." As such, they ought to be worthy of respect in a democratic society.

54. In paragraph 41 of *Campbell*, the court noted that "the suspension of Jeffrey Cosans-which remained in force for nearly a whole school year-was motivated by his parents' refusal to accept that he receive or be liable to corporal chastisement. His return to school could have been secured only if his parents had acted contrary to their convictions, convictions which the United Kingdom is obliged to respect under the second sentence of article 2. A condition of access to educational establishment that

conflicts in this way with another right enshrined in protocol number one cannot be described as reasonable and in any event falls outside the regulation under article 2."

55. In the present case, Applicants' philosophical convictions compel them to provide an education that is more child-centred and non-institutional than that which can be provided in the publicly regulated, institutional setting of the public school system. Furthermore, as education is evolving, as the Special Rapporteur notes above, technology and society are evolving and education must evolve also.

56. In addition to philosophical convictions, the Applicants also have religious convictions that compel them to teach their children in accordance with their own worldview. Although this court in *Konrad*, and the German constitutional court in *Konrad* and in a more recent similar court decision, have articulated that pluralism and democracy require that a state-regulated education be imposed on all children with limited exception in order to preserve democracy, this view conflicts with the underlying nature of both the Convention and a proper understanding of pluralism and democracy. This view also conflicts with the consensus that has emerged among the contracting parties that home education is and ought to be a right protected by contracting parties.

57. Finally, the argument that home education "conflicts with the child's right to education" is inapposite. This idea emerges from a false premise that home education conflicts with a child's right to education. Home education is a form of education, not "no education." There is no argument that the State has no ability to regulate home education as a form of education, given the successful regulation in place in the majority of other contracting parties. Neither the German Court nor this Court have conducted any serious enquiry into home education as a pedagogical alternative that is better for children and does not actually produce the feared outcome of parallel societies, discussed below.

iv. Response to State concern about "parallel societies"

58. In *Konrad*, the Court notes that the German authorities and courts have carefully reasoned their decision and mainly stressed the fact that not only the acquisition of

knowledge but also integration into and first experiences of society are important goals of primary-school education.

59. Without examination, the German courts in *Konrad* ruled that those objectives could not be met to the same extent by home education, even if it allowed children to acquire the same standard of knowledge as provided by primary-school education. This Court considered that this presumption was not erroneous and fell within the contracting State's margin of appreciation for interpreting rules for the education system. The Federal Constitutional Court stressed the general interest of society in avoiding the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities and society. The Court regards this as being in accordance with its own case law on the importance of pluralism for democracy.

60. As noted, Article 2 of Protocol 1 does not contain qualifications on the right as in Articles 8-11. Therefore the parental right, even in juxtaposition with the child's right to education, ought to be given greater weight and construed in a way that is more restrictive in relation to State interference. Whether the objectives can be met to the "same extent" is an insufficient standard when weighed against the other interests asserted in this case.

61. The State ought to be made to *prove* that this is so, not simply assert that such a method of education cannot achieve the same objectives to the "same extent." Evidence to the contrary from other countries with large home-educated populations show that home education does not contribute to the creation of parallel societies and that home educated pupils are integrated into society.

62. In light of a narrower margin of appreciation, the asserted objectives of the contracting party that education ensure "integration into and first experiences with society" should be subject to more exacting scrutiny. The weight of the parental interest in education has been held to be primary by this Court: "It is in the discharge of a natural duty towards their children – parents being primarily responsible for the 'education and teaching' of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely

linked to the enjoyment and the exercise of the right to education."[44] The Court has also said that "although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."[45]

63. Although the State has a proper role in preserving democracy and pluralism, aggressive and constraining regulation of education by the State risks both violating individual rights of children and parents and undermining democracy and pluralism.

Conclusion

64. In the instant case, the harsh measures used against the Applicants because of their efforts to home educate were unquestionably disproportionate, as the national authorities eventually admitted themselves. Applicants further contend that their freedom of movement was violated in that they were prevented from relocating to France where they could legally home educate on the sole basis that they were forbidden from home educating in Germany. Finally, the applicants argue that in light of an emerging consensus in favour of home education, the decision in *Konrad* should be re-visited. We therefore beg the court to review this application and grant relief.

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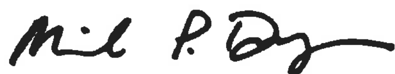

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[44] *Folgero*, cited above, at § 84(e).
[45] *Ibid.*, at § 84(f).