

IN THE EUROPEAN COURT OF HUMAN RIGHTS

(APPLICATION NO 16899/13)

KOCHEROV AND SERGEYEVA

APPLICANTS

AGAINST

RUSSIA

RESPONDENT

WRITTEN COMMENTS SUBMITTED JOINTLY

BY

EUROPEAN DISABILITY FORUM

INCLUSION EUROPE

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I. Introduction

1. These written comments are jointly submitted by the European Disability Forum (EDF), Inclusion Europe, Inclusion International and the International Disability Alliance (IDA) pursuant to leave granted by the President of the First Section on 4 April 2014 in accordance with Rule 44(3)(a) of the Rules of Court.¹
2. The present case raises important issues concerning the fundamental rights of persons with disabilities, in particular their right to family and the right to enjoy and exercise parental rights and the laws and practices which continue to violate these rights and perpetuate their marginalisation in society. The outcome of this case will have a significant impact on how States view their obligations towards persons with disabilities, including regarding the right to respect for private and family life both from the perspective of a parent as well as that of a child, the right to live in the community and non-discrimination, and will be key to ensuring a harmonised approach by the European Court of Human Rights (hereinafter the 'Court') and the UN Committee on the Rights of Persons with Disabilities (hereinafter the 'CRPD Committee') in an important effort to uphold the coherence of international human rights law.
3. These written comments draw upon international human rights standards and comparative law and practice concerning the rights of persons with disabilities which demonstrate a growing European and universal consensus to adopt the social and human rights model approach to disability, including the need to ensure positive measures to ensure that parents with disabilities and their children have equal opportunities to enjoy their right to family, private life and home. The comments will first address the right to family of parents with disabilities and then the right of their children to be raised by and live with their families in the community. In addition, the prohibition of disability based discrimination will be addressed with respect to persons with disabilities in the enjoyment and exercise of their rights, as well as the enjoyment and exercise of rights of children of persons with disabilities who may be subject to discrimination by association.
4. It has been established that in interpreting the provisions of the European Convention on Human Rights (hereinafter the 'Convention') and the scope of the States' obligations in specific cases, the Court will look "*for any consensus and common values emerging from the practices of European States and specialised international instruments... as well as giving heed to the evolution of norms and principles in international law.*"² It is respectfully submitted that international and comparative standards should inform the Court's interpretation in this case.

II. Right of parents with disabilities to private life and family and non-discrimination

i. Background: the denial of parental rights to persons with disabilities

5. The recognition of the human rights of persons with disabilities has been impeded by a history plagued by the eugenics movement aimed at eliminating disability by preventing the reproduction of persons with disabilities through forced sterilisation, forced abortion, forced contraception.³ Inherent to this ideology and the medical model approach to disability is the view that persons with disabilities are unfit or incapable of being parents on account of their disability. The continued dominance of the medical model manifests itself in discriminatory laws, policies, administrative practices, court decisions, and attitudes which exercise unprecedented control over the individual's right to parent. The result is the over-representation of parents with disabilities, in particular parents with intellectual disability, in

¹ For Interest of Interveners, see Annex to the written comments

² *Opuz v Turkey*, Application no 33401/02, judgment of 9 June 2009, para 164

³ See *Buck v Bell*, 274 U.S. 200 (1927); the majority opinion stated: "it is better for all the world, if instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind... Three generations of imbeciles are enough."

child protection and legal proceedings.⁴ A 2012 study into the rights of parents with disabilities by the National Council on Disability of the United States highlighted that parents with disabilities are the only distinct community of Americans who must struggle to retain custody of their children, and that removal rates where the parent has an intellectual disability is between 40-80%.⁵ One UK study investigated how social services and the courts handle child protection cases involving parents with intellectual disabilities. It found that only 10.2 % of children of parents with intellectual disabilities in the court sample returned home. Difficulties identified in family proceedings could be traced back to the parent's disability, yet no accounts were taken of parents' special needs for support.⁶

6. While there is a lack of information generally on the prevalence of parents with disabilities and legal and administrative proceedings relating to their children, a growing body of international research on parenting by persons with disabilities demonstrate that parents with disabilities, especially persons with intellectual disabilities, are subjected to an "over zealous approach to the assessment of risks and an underinvestment in the kind of services and supports that might enable them to bring up their children."⁷ Studies have shown that parents with intellectual disabilities are particularly vulnerable to losing custody of their children in child welfare adjudications due to prejudicial attitudes, unfounded assumptions about inadequate parenting, and lack of appropriate support services, and that "law and policy governing the rights of disabled parents is so laden with stereotypes about their abilities and potential so as to prejudice decision makers and lead to judicial bias against these families".⁸ For example, information provided to service professionals on conducting assessments for parents with an intellectual disability is usually limited;⁹ there is evidence of inappropriate use of assessment tools, an over reliance on IQ testing (instead of directly assessing parenting skills/knowledge), a preoccupation with the parents' intellectual disability as the reason for any difficulty in parenting;¹⁰ and assessments heavy focus on risks that tend to categorise, diagnose and label parents without identifying strengths or protective factors.¹¹

⁴ Lamont & Bromfield, "Parental intellectual disability and child protection: Key issues" (2009) Australian Institute of Family Studies, National Child Protection Clearing House, p 3; "Parents with disabilities", *International Encyclopaedia of Rehabilitation*, Center for International Rehabilitation Research Information and Exchange, NIDRR Research and Training Center on Families of Adults with Disabilities Grant No. H133A050008, 2010; Booth, "Parents with learning difficulties, child protection and the courts", *Representing Children*, vol 13 (2000) no 3, p175-188; <http://disability-studies.leeds.ac.uk/files/library/Booth-parents-with-lea-diff.pdf>. In one study, the over-representation of parents with intellectual disability in care proceedings was found to be due to enduring beliefs about parental incapacity, poorly resourced legal representatives, lack of suitable support services and the diagnostic-prognostic rationality of decision making, see Llewellyn, McConnell & Ferronato, "Prevalence and outcomes for parents with disabilities and their children in an Australian court sample" *Child Abuse and Neglect* 27(3) (2003) 235-251

⁵ US National Council on Disability, "Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children", 27 September 2012, p 14; see also McConnell, Llewellyn & Ferronato, "Disability and decision making in Australian care proceedings", *International Journal of Law, Policy and the Family* 16 (2002) 270-99. In an English national survey, it was found that 48% of parents interviewed were not looking after their own children, Emerson, Mala, Davies & Spencer, *Adults with Learning Difficulties in England 2003/4*, 2005

⁶ Booth, Booth & McConnell, "Parents with learning difficulties, care proceedings and the family courts: threshold decision and the moral matrix", *Child and Family Law Quarterly*, 16 (2004) 409-422

⁷ Lamont & Bromfield, "Parental intellectual disability and child protection: Key issues" (2009) Australian Institute of Family Studies, National Child Protection Clearing House, p 3; Preston, "Parents with disabilities", *International Encyclopedia of Rehabilitation*, Center for International Rehabilitation Research Information and Exchange, NIDRR Research and Training Center on Families of Adults with Disabilities Grant No. H133A050008, 2010; Booth, "Parents with learning difficulties, child protection and the courts", *Representing Children*, vol 13 (2000) no 3; Dimopoulos, "Intellectually disabled parents before the European Court of Human Right and English courts", *European Human Rights Law Review* (2009)

⁸ Czukar, "Legal aspects of parenthood for mentally retarded persons", *Canadian Journal of Community Mental Handicap*, 2 (1983) 57; Gilhool & Gran, "Legal rights of disabled parents" in Thurman (Ed.), *Children of Handicapped Parents: Research and clinical perspectives*, New York: Academic Press, 1985; Hayman, "Presumptions of justice: law, politics and the mentally retarded parent" *Harvard Law Review* 103 (1990) 120; Booth, "Parents with learning difficulties, child protection and the courts", *Representing Children*, vol 13 (2000) no 3; Booth, Booth & McConnell, "Parents with learning difficulties, care proceedings and the family courts: threshold decision and the moral matrix", *Child and Family Law Quarterly*, 16 (2004) 409-422; Llewellyn, McConnell & Ferronato, "Prevalence and outcomes for parents with disabilities and their children in an Australian court sample" *Child Abuse and Neglect* 27(3) (2003) 235-251

⁹ McConnell & Llewellyn, "Parental disability and the threat of child removal" *Family Matters*, 51 (1998) 33

¹⁰ Australian Family and Disability Studies Research Collaboration, "Parents with intellectual disability" In practise: Assessment, 2008, see <http://www.afdsr.org/parents/practice/assessment.php>

¹¹ Mildon, Matthews & Gavidia-Payne, *Understanding and supporting parents with learning difficulties*, Melbourne: Victorian Parenting Centre, 2003

7. Today it is confirmed that disability, including intellectual disability, is a poor indicator of risk for abuse and neglect, and thus for parental competence,¹² and despite evidence for more effective support practices,¹³ the entrenched attitudes and practices of presumption of incapacity and focus on deficiencies continue to subject parents with intellectual disabilities to discrimination and exclusion from enjoying and exercising their parental rights on an equal basis with others.¹⁴

ii. International standards on the right to family: prohibition of disability-based discrimination and the right to support in parenting

United Nations Convention on the Rights of Persons with Disabilities

8. In considering the responsibility of member States to uphold the rights of persons with disabilities, the Court is encouraged to have regard for the latest international standards on the human rights of persons with disabilities, namely the provisions of the United Nations Convention on the Right of Persons with Disabilities (hereinafter 'CRPD') and its guiding principles and values, which include respect for inherent dignity, autonomy, including the freedom to make one's own choices, non-discrimination, full and effective participation in society, respect for difference, equality of opportunity, and accessibility¹⁵
9. To date, the CRPD counts 147 States Parties, including the Russian Federation which ratified the CRPD on 25 September 2012. Within the Council of Europe, 42 of the 47 members are States Parties to the CRPD,¹⁶ and it is the first international human rights instrument to which an inter-governmental body is a party, i.e. the European Union, which acceded to it on 23 December 2010. In 2009, in *Glor v Switzerland*, the Court recognised that the CRPD reflects "a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment."¹⁷ This continues to be reflected by the growing number of States Parties to the CRPD within Europe and globally.
10. The CRPD presents a significant paradigm shift in disability rights discourse, moving from a medical and charity based approach on disability in which persons with disabilities were considered as objects of treatment or charity, to a social and human rights approach which recognises persons with disabilities as subjects of their own rights. The CRPD is explicit in shifting understanding of the disabling factors which hinder full and effective participation from within the individual (medical model) to within society (social model) - be they attitudinal, environmental or physical barriers. As such, it obliges States to take concerted steps and specific measures to accelerate or achieve de facto equality of persons with disabilities in society.¹⁸ In particular, support must be provided in order to remove and surmount those barriers for the enjoyment and exercise of rights on an equal basis with others,¹⁹ including for respect for home and the family.²⁰

¹² Lamont & Bromfield, "Parental intellectual disability and child protection: Key issues" (2009) Australian Institute of Family Studies, National Child Protection Clearing House

¹³ Research suggests that to improve service delivery for parents with intellectual disability, interventions should be family-centred and focused on family and parental strengths: "in a family-centred approach, the family's needs and wants determine aspects of service delivery, as opposed to a professional-centred approach, in which professionals make decisions about the needs of the family." Positive practices in delivering family-centred services document the importance of practitioners working with parents with intellectual disability to demonstrate respect for families, reinforce positive qualities, work toward parent-driven goals, teach skills in the setting in which they will be needed, and provide services for the long-term. See Wade, Mildon & Matthews, "Service delivery to parents with an intellectual disability: Family-centred or professionally centred?" *Journal of Applied Research in Intellectual Disabilities* 20(2) (2007) 87-98; NSW Department of Community Services, "Parental intellectual disability/Learning difficulties vulnerability", Brighter Futures Practice Resource, 2007, www.community.nsw.gov.au/DOCSWR/assets/main/documents/BRIGHTERFUTURES_DISABILITY.PDF

¹⁴ Booth, Booth & McConnell, "Parents with learning difficulties, care proceedings and the family courts: Threshold decisions and the moral matrix" *Child and Family Law Quarterly*, 16 (2004) 409-422

¹⁵ Convention on the Rights of Persons with Disabilities (CRPD) adopted on 24 January 2007, GA Resolution 61/106, A/RES/61/106, entered into force on 3 May 2008

¹⁶ The remaining Council of Europe member states yet to become State Parties to the CRPD are Ireland, Finland, Netherlands, Monaco and Liechtenstein. With the exception of Liechtenstein, all are signatories to the CRPD.

¹⁷ *Glor v Switzerland*, Application no 13444/04, 30 April 2009, para 53; the Court made explicit reference to the CRPD in the *Glor* case even though Switzerland was not a party to the CRPD at the time.

¹⁸ See Article 5(4), CRPD

¹⁹ The provision of information about support services and facilities (Article 4(h)), forms of assistance and support to persons with disabilities to ensure their access to information (Article 9(f)), support to exercise legal capacity (Article 12(3)), appropriate forms of

11. Concerning parental rights, Article 23 of the CRPD stipulates that States Parties shall render appropriate assistance to persons with disabilities in the performance of their child rearing responsibilities. In addition, Article 23(4) confirms that in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents. In order to promote non-discrimination in matters of parenting and the right to family, the CRPD Committee has called on States to amend/repeal laws which deny persons with disabilities the right to family²¹ as well as to review procedures that declare parents unfit. Further, the Committee has recommended to States to create legislative frameworks which prescribe the provision of necessary supports to uphold the right to respect for home and family, in particular access to support services to assist in parenting.²²

United Nations Convention on the Rights of the Child

12. Article 3(1) of the Convention on the Rights of the Child (hereinafter 'CRC') establishes the child's right to have his or her best interest assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. The Committee on the Rights of the Child recently adopted General Comment no 14 which elaborates upon its interpretation of the child's best interests.²³ Concerning separation from parents, it highlights that, given the gravity of the impact on the child, such separation should only occur as a last resort measure and separation should not take place if less intrusive measures could protect the child. In particular, the State should provide support to the parents in assuming their parental responsibilities, and restore or enhance the family's capacity to take care of the child, before resorting to separation measures.²⁴ Likewise, a child may not be separated from his or her parents on the grounds of a disability of either the child or his or her parents, and separation may be considered only in cases where the necessary assistance to the family to preserve the family unit is not effective enough to avoid a risk of neglect or abandonment of the child or a risk to the child's safety.²⁵ In addition, the General comment sets out that economic reasons, financial and material poverty should never be the only justification for the removal of a child from parental care but should be seen as a signal for the need to provide appropriate support to the family.²⁶

Council of Europe Committee of Ministers Recommendation on positive parenting: right to support for parents

13. In recognition of the value of support in parenting, the Council of Europe Committee of Ministers adopted a recommendation to member states on policy to support positive parenting which includes measures to afford and improve support for parents with targeted attention to families with particular needs, by among others, providing long term support for

gender- and age-sensitive assistance and support to prevent all forms of exploitation, violence and abuse (Article 16(2)), access to a range of in-, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community (Article 19(b), CRPD); support for education (Article 24), personal mobility (Article 20), rehabilitation (Article 26), employment (Article 27), to attain an adequate standard of living (Article 28), political participation (Article 29), Participation in cultural life, recreation, leisure and sport (Article 30)

²⁰ Article 23, CRPD

²¹ CRPD Committee Concluding Observations on Argentina, CRPD/C/ARG/CO/1, September 2012, para 36; CRPD Committee Concluding Observations on Costa Rica, CRPD/C/CRI/CO/1, April 2014, para 44; CRPD Committee Concluding Observations on Azerbaijan, CRPD/C/AZE/CO/1, April 2014, para 37

²² CRPD Committee Concluding Observations on Costa Rica, CRPD/C/CRI/CO/1, para 44; Concluding Observations on El Salvador, El Salvador, CRPD/C/SLV/CO/1, September 2013, para 48

²³ General comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013

²⁴ General comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, para 61

²⁵ General comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, para 62

²⁶ General comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, para 62, see also UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, 2009, para 15

parenting in situations of social exclusion, giving sufficient means to support parents and to allow them to acquire the necessary competence to fulfil their responsibilities towards their children, and avoiding measures and administrative practice that stigmatise children and parents by treating them differently because their families are less well-off than others.²⁷

Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015

14. In addition to the former Recommendation, the Council of Europe Action Plan also stipulates that “the needs of children with disabilities and their families must be carefully assessed by responsible authorities with a view to providing measures of support which enable children to grow up with their families, to be included in the community and local children’s life and activities. Quality service provision and family support structures can ensure a rich and developing childhood and lay the foundation for a participative and independent adult life. It is important therefore that policy makers take into account the needs of children with disabilities and their families when designing disability policies and mainstream policies for children and families.”²⁸

Court’s jurisprudence on right to family in child welfare proceedings and non-discrimination

15. With respect to child welfare proceedings, this Court has confirmed that positive obligations weigh on the State to uphold family ties between parents and children as a component of the right to family under Article 8 of the Convention.²⁹
16. In *Kutzner v Germany*, concerning the decision to separate children from their parents with intellectual disabilities, the Court recognised that the State exercises a wide margin of appreciation in assessing the necessity of taking a child into care, it specified that the margin of appreciation afforded to States to fulfil this positive obligation is subject to stricter scrutiny where further limitations to rights entail a risk that family relations between the parents and young child could be effectively curtailed.³⁰ The Court concluded that the reasons in favour of the care order and the manner in which it was implemented were unsatisfactory and insufficient to justify such serious interference in the family life of the Applicants culminating in a violation of Article 8. In particular, the care order was based on opinions that the parents lacked intellectual capacity and emotional development which were not linked to their parenting competence; there were no allegations of neglect nor ill-treatment of the children; and sufficient consideration had not been given to additional *measures of support for the parents* as an alternative to the extreme measure of separating their children from them.³¹
17. Similarly, in *Saviny v Ukraine*,³² concerning the separation of children from their blind parents, the Court noted that the domestic courts and authorities did not take steps to investigate whether the purported inadequacies of the children’s upbringing were attributable to the parents’ capacity to provide care, nor did the domestic courts make efforts to look into the parents’ attempts to improve their situation, on the contrary the courts appear to have taken on trust the submissions by municipal authorities that the parents had failed to improve their living conditions. The Court found a violation of Article 8 based on the failure of the State to discharge its duty to promote family unity and to explore the effectiveness of less-far reaching alternatives before seeking separation, such as

²⁷ Recommendation Rec (2006)19 of the Committee of Ministers to member states on policy to support positive parenting, see also Appendix to Rec (2006)19, paras 6.1, 7, 8

²⁸ Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, Chapter 4.4. Children and young people with disabilities

²⁹ *Kutzner v Germany*, Application no 46544/99, judgment of 26 February 2002

³⁰ *Kutzner v Germany*, Application no 46544/99, judgment of 26 February 2002, para 67

³¹ *Kutzner v Germany*, Application no 46544/99, judgment of 26 February 2002, para 75

³² *Saviny v Ukraine*, Application no 39948/06, judgment of 18 December 2008

providing support to the parents in the form of targeted financial and social assistance and effective counselling.

18. From this case law and others relating to child welfare proceedings, it is possible to resume the Court's consideration as follows:
- a. The Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the public care of children and the rights of the parents whose children have been taken into care, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation.³³
 - b. While there is a positive duty to take measures to facilitate family reunification subject always to its being balanced against the duty to consider the best interests of the child;³⁴ ..
 - c. ..the fact that a child could be placed in a more beneficial environment for their upbringing will not on its own justify a compulsory measure of removal from care of their parents. There must exist other circumstances pointing to the "necessity" for such an interference with the parents' right under Article 8 of the Convention to enjoy a family life with their child.³⁵
 - d. A care order should in principle be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child.³⁶
 - e. The Court will exercise a stricter scrutiny of the State's margin of appreciation where further limitations to rights entail a risk that family relations between the parents and young child could be effectively curtailed.³⁷
 - f. Should parental competence be raised, the domestic administrative and judicial authorities need to analyse the extent to which purported inadequacies relating to a child's upbringing are attributable to the parents' irremediable incapacity to provide requisite care,³⁸ and in coming to such decisions, the authorities must weigh up the possibility that *concrete measures of support and assistance to parents, in the form of targeted financial and social assistance, effective counselling, social housing, benefits, as well as information, guidance and advice on these benefits and supports,*³⁹ have or could have a positive impact on parents to overcome their difficulties and to preserve family relationships and foster their development.
 - g. Further, in the case of vulnerable persons, the authorities must demonstrate particular attention and must afford them increased protection.⁴⁰
19. According to the Court's established jurisprudence, a "difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised." It is recognised that the State enjoys a certain margin of appreciation in assessing whether a difference of treatment is justified. However, the scope of this margin depends on the circumstances, the subject-

³³ *Kutzner v Germany*, Application no 46544/99, judgment of 26 February 2002, para 66, see also *Krasicki v Poland*, Application no 17254/11, judgment of 15 April 2014, para 84, *Olsson v Sweden*, 24 March 1988, para 68; *Wojciech Nowak v Poland*, Application no 11118/06, judgment of 8 June 2010, para 45

³⁴ *Kutzner v Germany*, Application no 46544/99, judgment of 26 February 2002, para 76, see also *Saviny v Ukraine*, Application no 39948/06, judgment of 18 December 2008

³⁵ *Kutzner v Germany*, Application no 46544/99, judgment of 26 February 2002, para 69, see also *Saviny v Ukraine*, Application no 39948/06, judgment of 18 December 2008; *Krasicki v Poland*, Application no 17254/11, judgment of 15 April 2014

³⁶ *Kutzner v Germany*, Application no 46544/99, judgment of 26 February 2002, para 76, see also *Saviny v Ukraine*, Application no 39948/06, judgment of 18 December 2008

³⁷ *Kutzner v Germany*, Application no 46544/99, judgment of 26 February 2002, para 67

³⁸ *Saviny v Ukraine*, Application no 39948/06, judgment of 18 December 2008, para 57; *Kutzner*, paras 70-75

³⁹ *Kutzner v Germany*, Application no 46544/99, judgment of 26 February 2002, para 75; *Saviny v Ukraine*, Application no 39948/06, judgment of 18 December 2008 para 57; *Zhou v Italy*, Application no 33773/11, judgment of 21 January 2014, paras 58-59; *RMS v Spain*, Application no 28775/12, Judgment of 18 June 2013, para 86

⁴⁰ *Zhou v Italy*, Application no 33773/11, judgment of 21 January 2014, paras 58, *B v Romania* (no 2), no1285/03, paras 86 et 114, 19 February 2013; *Todorova v Italy*, no 33932/06, 13 January 2009, para 75.

matter and the background of a case. With respect to persons with disabilities, the Court has recognised that, given that they were historically subject to prejudice with lasting consequences resulting in their social exclusion, any interference with their rights is required to be subject to strict scrutiny, and only very weighty reasons could justify any restriction of their rights.⁴¹ Moreover, where the State act or omission “may prove to be contradictory to the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced”.⁴²

20. There is no doubt that protection of the child and upholding his/her best interest constitutes a legitimate aim within child welfare proceedings. The child’s best interest will necessarily be served by each child’s case being individually scrutinised, and by avoiding presumption and stereotype based upon the parent’s status.⁴³ It is the Court’s task to review decisions to remove/restrict parental rights and to assess their necessity in light of the child’s best interest, and to be vigilant about the objective and reasonable justification for differential treatment that could have ensued compared to non-disabled parents. The Court must be wary that disability does not constitute a prima facie exclusionary factor, whether explicitly or implicitly, and must ensure that any assessment of parents’ rights should also take into account the provision of measures of support in parenting where needed and that these considerations should not negatively weigh on one’s parenting competence. Indeed, denying the consideration of such measures or diminishing parenting competence on that basis would amount to treating similarly those who are in different situations,⁴⁴ i.e. those parents who may need support in fulfilling their parenting role compared to those who do not. Further, the Court would need to have regard to the State’s reduced margin of appreciation in light of the greater aim of fostering the full participation and inclusion of persons with disabilities in society, including their right to family life.

iii. Comparative law and practices

21. National laws, policies and practices concerning the right to family of persons with disabilities are developing across the world with growing recognition of the enjoyment and exercise of parental rights by persons with disabilities on an equal basis with others, as well as of the obligation on States to ensure the provision of measures of support in parenting where needed. An increasing number of States are addressing this important issue and reaching out to persons with disabilities and their representative organisations in order to consult and involve them in legal reform processes and to identify and improve shortfalls in both law and practice.

22. The UK Department of Health and Department for Education and Skills published the “Good Practice Guidance on working with parents with a learning disability” following consultation with parents with intellectual disabilities by officials from the Department of Health, Department for Education and Skills and other government departments.⁴⁵ The Good practice guidance provides a compilation of good practices as well as information on how adult and children’s services should work together to improve support to parents with intellectual disabilities and their children. Also concerning consultation, the German Federal Government Commissioner for Matters relating to Disabled Persons set up an Inclusion Advisory Board including persons with disabilities. Upon the initiative of a self-advocate, person with intellectual disabilities, the group published a position paper on the

⁴¹ *Alajos Kiss v Hungary*, no 38832/06, judgment of 20 May 2010, para 42, *ZH v Hungary*, Application no. 28973/11, judgment of 8 November 2012, para 29

⁴² *Glor v Switzerland*, Application no 13444/04, 30 April 2009, para 84

⁴³ Watkins, “Beyond Status: the Americans with Disabilities Act and the Parental Rights of People labelled Developmentally Disabled or Mentally Retarded” *California Law Review* 83 (1995) 1458; US National Council on Disability, “Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children”, 27 September 2012, p 128

⁴⁴ *Thlimmenos v Greece*, Application no 34369/97, Grand Chamber judgment of 6 April 2000, para 44

⁴⁵ UK Department of Health & Department for Education and Skills, The Good Practice Guidance on working with parents with a learning disability, June 2007, <http://www.bristol.ac.uk/wtwpn/resources/good-practice-guidance.pdf>

parental rights of persons with intellectual disabilities which sets out the human rights standards to be upheld.⁴⁶

23. Regarding legislation, the Danish Social Services Act has a number of provisions concerning assistance to persons with disabilities.⁴⁷ While support for parents is not specifically mentioned, linked to the Act are notes of guidance which set out the obligations of the municipalities to provide assistance to persons with disabilities and prescribe that social services rules and the law must be administered in accordance with the CRPD.⁴⁸ In addition, Guidance note no 3 stipulates that in the examination of parenting skills:⁴⁹

The fact that parents with disabilities and are in need of e.g. practical help to fulfil their parenthood, is not in itself an indication that parents are without parenting skills. If parents with disabilities are undergoing an examination of their parenting skills, it must be ensured that the parents have received appropriate support prior to the examination, especially regarding parenting, cf. Article 23 of the CRPD.

24. A 2010 amendment to the California Family Code⁵⁰ codified a 1979 state California Supreme Court decision⁵¹ which prescribes that the disability of a parent may not form the basis for an order granting custody or visitation to another party or for an order for imposing any condition or limitation on an award of custody to or visitation by the disabled parent. The state Supreme Court stated that with respect to a person's disability "it is impermissible for the court simply to rely on that condition as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child." The Supreme Court called on the trial courts to avoid impairing or defeating foregoing public policy by which both the state and federal governments now pursue – "the commendable goal of total integration of handicapped [*sic*] persons into the mainstream of society... thus far these efforts have focused primarily on such critical areas of employment, housing, education, transportation and public access... No less important to this policy is the integration of the handicapped [*sic*] into the responsibilities and satisfactions of family life, cornerstone of our social system."⁵²
25. Authoritative opinions from the Danish Social Appeals Board also established that the Social Services Act authorises the authorities to grant assistance to parents with disabilities in the care for their child.⁵³ Another Appeals Board decision required that a person should receive support to compensate for the effects of their disability in order to care for their child, on the basis of a specific assessment of the individual's need for assistance, including socio-educational support.
26. National courts are also recognising the right to support in parenting of parents with disabilities. A German Administrative Court decision of 2010 granted the petition of social welfare legal integration assistance to a mother with disabilities to ensure she was able to access the support necessary to care for her son.⁵⁴ Relying on related legislation, the court stressed that the purposes of the integration assistance included, *inter alia*, to ensure the integration of people with disabilities in society and to enable them to participate in the life of the community,⁵⁵ and thus to ensure that an infant is cared for by their parents in the family home.⁵⁶ UK courts have also stated that "the court's assessment of the parents'

⁴⁶ Consultation with Inclusion International and Bundesvereinigung Lebenshilfe

⁴⁷ See Danish Institute for Human Rights, "The Right to be Parents" (*Ret Til At Vaere Forældre*), April 2014, <http://menneskeret.dk/udgivelser/ret-vaere-foraeldre>

⁴⁸ Vejledning 2014-01-07 nr 9007 om særlig støtte til børn og unge og deres familier, section 9

⁴⁹ Vejledning 2014-01-07 nr 9007 om særlig støtte til børn og unge og deres familier, section 711

⁵⁰ California Family Code, s 3049, amended in 2010, effective as of 1 January 2011

⁵¹ *In re Marriage of Carney*, 24 Cal.3d 725 [L.A. No. 31064. Supreme Court of California, 7 August 1979]

⁵² *In re Marriage of Carney*, 24 Cal.3d 725 [L.A. No. 31064. Supreme Court of California, 7 August 1979]

⁵³ Social Appeals Board A-6-03 and C-17-01

⁵⁴ Administrative Court of Minden ("VG Minden"), Judgment Az 6 K 1776/09, 25 June 2010, para 25

⁵⁵ *Id* para 25

⁵⁶ Notably, further decisions within this case did not challenge this premise. They related to the competencies and responsibilities of the public agencies at different levels of governance for welfare allocations and reimbursements. See, for example, Social Court of Detmold judgment of 8 December 2010- Az. S 2 SO 104/10; Regional Social Court of North Rhine-Westphalia judgment of 23 February 2012, L 9 SO 26/11; Federal Social Court judgment of 25 April 2013, B 8 SO 12/12 R

ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities would offer.”⁵⁷

27. In recognition of the discrimination facing persons with disabilities in their role as parents, a judgment from the Danish Supreme Court stipulated that a parent with a disability should not be treated less favourably than the other parent without disabilities.⁵⁸ Similarly, a recent decision by a Swedish Court of Appeal concluded violations of the law against discrimination based on Articles 8 and 14 of the Convention on account of the removal of a child at birth from a couple of which the mother has intellectual disabilities.⁵⁹ The District Court decision⁶⁰ (which was subsequently upheld by the Court of Appeal) criticised social services for not undertaking an investigation which looked at capacity as a parent and rather for basing their decisions on stereotypes and assumptions about the parenting skills of persons with disabilities. While the prospective parents were proactive in seeking out information and support prior to the birth, the Council welfare officer only provided information about different placement options for the coming baby and ignored the will of the parents to find out how they could get support in the home or other assistance to be able to take care of their baby themselves. As a result of the social services poor investigation, the newborn was removed at birth without giving the parents an opportunity to show how they could take care of their child. Further, the mother-child bond was broken and was recognised to have long term implications on both parent and child. The Court of Appeal found that the social services’ heavy focus on the mother’s disability rendered their investigation biased and one-sided from the start and that this continued throughout the entirety of the investigation. For these reasons, the Swedish courts found that not only the mother, but also the father and the child had been mistreated by the municipality and each had suffered discrimination on the basis of disability. The mother had been treated unfavourably compared to any other prospective mother; the father’s parental incapacity was questioned based on his relationship and association with the mother; and the child’s rights were severely violated given that his parents had been discriminated against which led to his forced removal from them. The Court of Appeal recognised the severe nature of interferences with the rights of the parents and the child to family and private life and also recommended that their compensation reflect the grave nature of these violations.

III. The right of the child to private life and family and non-discrimination

28. While parents with disabilities may fall victim to discriminatory laws, processes and presumptions, and the denial of accommodations and support in child welfare proceedings, they are not alone. When parents’ rights are curtailed without basis, children also suffer the consequences of being denied their family life. In no community is “the welfare of children.. served by breaking up families based on fear and stereotype. If we are truly concerned about the welfare of children, we should invest more money and energy in preventive services for families rather than in parental rights termination and foster care. Our conception of the parent or parents as individuals, standing alone, without help from the broader community, does children no service.”⁶¹
29. It is important to recognise that the best interest of the child, as a right, principle and rule of procedure, need not create a conflict with the rights and interest of parents. Most often, it is not just out of the parents’ interest, but also that of the child, that support is provided in order for them to better fulfil their role as parents and to ensure family union. Support to parents also amounts to support for children; with the provision of support it is more likely that the interests of the child and parents coincide as the interest of the family.⁶²

⁵⁷ *Re B-S (Children)* [2013] EWCA Civ 1146; *Re B (A Child)* [2013] UKSC 33

⁵⁸ Ugeskrift for Retsvæsen, U.1994.837H- the judgment stated that a parent’s aphasia could not lead to the denial of the custody of the child.

⁵⁹ Swedish Court of Appeal, T5095-13, 11 April 2014

⁶⁰ Swedish District Court, T5508-12, 24 April 2013

⁶¹ Watkins, “Beyond Status: the Americans with Disabilities Act and the Parental Rights of People labelled Developmentally Disabled or Mentally Retarded” *California Law Review* 83 (1995) 1458

⁶² Danish Institute for Human Rights, “The Right to be Parents” (*Ret Til At Vaere Forældre*), April 2014,

30. The best interest of the child will not be served through separation from their parents and placement in institutions. International standards reflect the recognition that institutionalisation is a violation of the right to live in the community and is particularly harmful for the child's healthy development.

i. Background

Prevalence of children in institutional care in Europe

31. Several studies conducted during the last decade shows the large extent to which children are put in institutional care in Europe. A 2003 project funded by the European Commission shows that 11 children in every 10 000 children under the age of three are living in institutional care. This number however differs significantly between countries: Iceland, Norway, Slovenia and UK only have one child in 10 000 in institutional care, whereas Belgium, Bulgaria, Czech Republic and Latvia have 50 children in 10 000 living in institutional care.⁶³
32. A 2010 Eurochild national survey⁶⁴ funded by the European Commission confirms that there are big differences in placement of children in institutional care across Europe. It also shows that the highest number of children in institutional care is to be found in Eastern and Central Europe. The survey estimates that there are approximately one million children in state or public care in 30 European countries. A 2010 UNICEF report even calculates that the proportion of children in institutions is increasing in Eastern Europe and former Soviet Union.⁶⁵

Harmful effects of institutional care on children's healthy development and enjoyment of human rights

33. The harmful and sometimes irreversible effects of institutional care on the healthy development of children have been researched extensively in the past decades. Evidence shows that institutional care is detrimental to all areas of child development, including physical development and motor skills, psychological development, formation of emotional attachment, intellect and language and brain development.⁶⁶ As a result, children face intellectual, behavioural and social problems at a later stage in life.⁶⁷ These detrimental effects put children under the age of three, as well as children who stay in institutional care for longer than three months in an even more vulnerable place.⁶⁸
34. Children also face numerous serious human rights violations in institutional care across Europe. First, violence and abuse are prevalent in institutions and the UN Committee on the Rights of the Child raised on several occasions concerns about the inhuman and degrading living conditions for children in institutions.⁶⁹ These poor living conditions are often accompanied by cruel and inhuman behaviour of the staff working in the institutions,

<http://menneskeret.dk/udgivelser/ret-vaere-foraeldre>

⁶³ Browne, K. et al. (2004). Mapping the Number and Characteristics of Children Under Three in Institutions Across Europe at Risk of Harm. European Union Daphne Programme. Final Project Report No. 2002/017/C, University of Birmingham; UN Office of the High Commissioner for Human Rights, The rights of vulnerable children under the age of three: ending their placement in institutional care, 2011, p 25

⁶⁴ Eurochild, Children in Alternative care, 2010

⁶⁵ European Expert Group on the Transition from Institutional to Community-based Care (2012), *Common European Guidelines on the Transition from Institutional to Community-based Care*, p.33; UNICEF (2010) At Home or in a Home? Formal Care and Adoption of Children in Eastern Europe and Central Asia, p 5

⁶⁶ European Expert Group on the Transition from Institutional to Community-based Care (2012), *Common European Guidelines on the Transition from Institutional to Community-based Care*, p 47-48

⁶⁷ Browne (2009) The Risk of Harm to Young Children in Institutional Care. Save the Children, p16-17

⁶⁸ UN Office of the High Commissioner for Human Rights, The rights of vulnerable children under the age of three: ending their placement in institutional care, 2011, p 17; Rutter, English and Romanian Adoptees Study Team, "Developmental catch-up, and deficit, following adoption after severe global early privation", *Journal of Child Psychology and Psychiatry* 39 (1997) 465-476; Marcovitch, Goldberg, Gold, Washington, Wasson, Krekewich, Handley-Derry, Determinants of behavioural problems in Romanian children adopted in Ontario, *International Journal of Behavioural Development*, 20 (1997) 17-31.

⁶⁹ OHCHR (2010) Forgotten Europeans, Forgotten rights: the human rights of persons placed in institutions, p 25-37

which amounted in some situations to torture in 1990 and early 2000.⁷⁰ A 2006 UN World Study on Violence against Children found that children in institutions were at significantly higher risk of all forms of abuse than their peers raised in families.⁷¹

35. Children in institutional care also face a lack of access to nutritious food, health care⁷² and quality education.⁷³ Children are also often moved from one institution to another and thereby live too far away to have a regular contact with their parents, wider family and community. In Romania, for example, 83% of children are not visited monthly by their parents.⁷⁴
36. However, it needs to be stressed that even if governments would improve the living conditions and eradicate violence and abuse in institutions, that the failure to provide a child with a consistent connection with a carer still leads to detrimental effects on the development of children as mentioned above.⁷⁵ Moreover, this failure in social and emotional development creates difficulties in the integration of the child in society and building a social network at a later stage in life.⁷⁶ In Russia, one in three children who leave institutional care becomes homeless, one in five commits a crime and one child in ten commits suicide.⁷⁷
37. Research has shown that children who are raised in their birth families or alternative forms of family care develop cognitively and physically in better ways and have better results in school, which in its turn leads to increased integration in the community afterwards during the adult life. This has been the basis upon which recommendations have been made for all institutions for children under five to be closed and for the formulation of policies that invest in community based care and support to families to take care of their children.⁷⁸

International standards

38. The CRC stipulates that the child should “grow up in a family environment, in an atmosphere of happiness, love and understanding” (Preamble). Furthermore, Article 7 and 9 of the CRC highlight that children should live with and be cared for by their birth families. Parents have the primary responsibility for the upbringing and development of the child and the State shall render appropriate assistance to parents in order that they can fulfil this responsibility (Article 18).⁷⁹ The CRC Committee’s child rights approach places emphasis on supporting the strengths and resources of the child him/herself and the family and community to which he/she belongs and is reflected in its guidance to States to develop child protection services in such a way as to ensure that as many children as possible are able to live in families and not in institutions.⁸⁰

⁷⁰ UN Office of the High Commissioner for Human Rights, The rights of vulnerable children under the age of three: ending their placement in institutional care, 2011, p 19

⁷¹ Pinheiro, World Report on the Violence against Children, 2006; European Expert Group on the Transition from Institutional to Community-based Care (2012), *Common European Guidelines on the Transition from Institutional to Community-based Care*, p 44

⁷² See *Nencheva and Others v Bulgaria*, Application no 48609/06, judgment of 18 June 2013; World Health Organisation (2010a), Better health, better lives: children and young people with intellectual disabilities and their families. The case for change, p 11

⁷³ See *MDAC v Bulgaria*, European Committee of Social Rights, collective complaint no 41/2007, 3 June 2008

⁷⁴ ARK and Hope and Homes for Children (2012), the audit of social services for children in Romania

⁷⁵ Enabling reform, why supporting children with disabilities must be at the heart of successful child care reform, Every Child and Better Care Network, 2012, p 14

⁷⁶ UN Office of the High Commissioner for Human Rights, The rights of vulnerable children under the age of three: ending their placement in institutional care, 2011, p 20

⁷⁷ Tobis, “Moving from Residential Institutions to Community-Based Social Services in Central and Eastern Europe and the Former Soviet Union” (2000), The World Bank, p 33

⁷⁸ European Expert Group on the Transition from Institutional to Community-based Care (2012), *The Common European Guidelines on the Transition from Institutional to Community-based Care*, p47; Mulheir & Browne (2007) *De-institutionalizing and Transforming Children’s Services. A Guide to Good Practice*, p 18

⁷⁹ In case the family is not able to raise the child, despite state assistance, the child has the right to alternative family care (Article 20, CRC). European Expert Group on the Transition from Institutional to Community-based Care (2012), *Common European Guidelines on the Transition from Institutional to Community-based Care*; Mulheir & Browne (2007) *De-institutionalizing and Transforming Children’s Services. A Guide to Good Practice*. University of Birmingham

⁸⁰ Articles 7, 9, 18, 19, 27 of the CRC highlight the crucial role of the family and support to the family to uphold protection and the rights of the child. See UN Office of the High Commissioner for Human Rights, The rights of vulnerable children under the age of three: ending their placement in institutional care, 2011, p 9

39. The 2009 UN Guidelines for Alternative Care⁸¹ strengthen the trend towards the elimination of institutionalisation of children. They highlight the importance of prioritising prevention of family separation and provision of support to the family,⁸² including by considering disability as a factor when providing support.⁸³ Only very exceptional and temporary residential care remains acceptable only if “specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests”,⁸⁴ and its facilities are required to be “*small and organized around the rights and needs of the child, in a setting as close as possible to a family or small group situation*”.⁸⁵ In addition, the placement must be conceived as a *temporary* measure toward family reintegration or an alternative *family setting*.⁸⁶ Such residential care, accepted as a suboptimum alternative,⁸⁷ differs clearly from “large residential care facilities (institutions)”⁸⁸ [that] are rejected and, hence, States must develop alternatives “in the context of an overall deinstitutionalization strategy... which will allow for their progressive elimination”.⁸⁹
40. The CRPD stipulates that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents. Further, where the immediate family is unable to care for a child, the CRPD requires States Parties to undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting (Article 23); the CRPD thus goes further by not contemplating any form of residential care for children. Article 19 sets out the right of people with disabilities to live in the community with choices equal to others and requires that states provide a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community and to prevent isolation or segregation from the community.
41. The Revised European Social Charter contains the same rights as stipulated in CRC and CRPD. In its Article 15, it sets out “the right of persons with disabilities to independence, social integration and participation on in the life of the community” and requires states to develop the necessary measures to achieve this right. Articles 16 and 17 holds the rights of the child, highlighting the importance of family life and the child’s right to grow up in an “environment which encourages the full development of their personality and of their physical and mental capacities”.
42. This Court has previously held that private life includes a person’s physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.⁹⁰ Given the nature of confinement in social care institutions and separation from society, individuals are denied the right to participate in community life, interacting with people of their choosing and establishing and maintaining relations with other human beings and the outside world.⁹¹ The lack of alternative care in the community hinders one’s ability to pursue, enrich and fulfil their

⁸¹ This document came “to enhance the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so”, UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, 2009, paras 1 and 31

⁸² UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, 2009, para 3

⁸³ UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, 2009, para 8(a)

⁸⁴ UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, 2009, para 20

⁸⁵ UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, 2009, para 122 (emphasis added)

⁸⁶ UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, 2009, para 122 (emphasis added)

⁸⁷ The Guidelines recall that “[i]n accordance with the predominant opinion of experts, alternative care for young children, especially those under the age of 3 years, should be provided in family-based settings”. UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, 2009, para 21

⁸⁸ UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, 2009

⁸⁹ UN Guidelines for the Alternative Care of Children, General Assembly resolution 64/142, 2009

⁹⁰ *Niemietz v Germany*, Application no 13710/88, judgment of 16 December 1992, para 29

⁹¹ *Niemietz v Germany*, Application no 13710/88, judgment of 16 December 1992, para 29; *Sidabras and Dziautas v Lithuania*, Applications nos 55480/00 and 59330/00, judgment of 27 April 2004, para 43

personality and personal development through participation and membership in the life of the community. The negative effects of institutionalisation- the lack of activities, stimulation, interaction with the wider community, self-determination, self-actualisation - have been broadly recognised as accelerating the loss of one's social skills and individuality. Individuality itself is acquired in relation to other human beings and through the appropriation of the culture of the community as a whole. Therefore, the denial of one's right to live in the community and institutionalisation constitutes a violation of the right to private life as inscribed in Article 8 of the ECHR.

Prohibition of discrimination by association

43. International human rights law has developed to ensure that the prohibition of discrimination also protects against discrimination by association, i.e. where an individual is discriminated against not on the grounds of their own characteristic but due to their relation to someone else. The CRPD Committee has elaborated its interpretation of non-discrimination to include protection of discrimination by association,⁹² and the CESCR Committee's General Comment no 20 on non-discrimination also explicitly includes as a prohibited ground "association with a group characterised by one of the prohibited grounds (e.g. the parent of a child with a disability)."⁹³
44. Several jurisdictions, including Austria⁹⁴, Belgium⁹⁵, Bulgaria⁹⁶, Ireland⁹⁷ and the United Kingdom⁹⁸ have recognised the need to protect against discrimination by association on the grounds of disability. In Croatia, Article 1, 2 of the Anti-discrimination Act affirms that "placing any person, or a person related to that person by kinship or other relationship, in a less favourable position on the ground [of disability] shall be, within the meaning of this Act, deemed to be discrimination".⁹⁹
45. Prohibition of discrimination by association has been incorporated into the case law of the European Court of Justice (ECJ); in *Coleman*,¹⁰⁰ the applicant who was directly discriminated against on the ground of disability was not herself disabled, but it was the fact of the disability (of her child) that led to her being treated less favourably than other employees in the workplace. The ECJ held that the general prohibition of discrimination on the basis of disability under the EU Framework directive¹⁰¹ applies not only to persons with disabilities but also to persons who are discriminated against because of their association with a disabled person. The ECJ recognised that the "purpose of the directive... is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1."¹⁰²
46. Similarly, children of parents with disabilities are placed in less favourable positions through the association with their parents. The negative effects of the discrimination to which

⁹² CRPD Committee Concluding Observations on Peru, CRPD/C/PER/CO/1, 2012, para 7(b): Define discrimination by association as a form of disability-based discrimination; Spain, CRPD/C/ESP/CO/1, 2011, para 20: The Committee urges the State party to expand the protection of discrimination on the grounds of disability to explicitly cover multiple disability, perceived disability and association with a person with a disability, and to ensure the protection from denial of reasonable accommodation, as a form of discrimination, regardless of the level of disability.

⁹³ CESCR Committee, General Comment no 20 on non-discrimination, E/C.12/GC/20, 2 July 2009, para 16

⁹⁴ Austrian Federal-Equal Treatment Act, Federal Law Gazette I Nr 66/2004 last amended by BGBl I Nr 7/2011 and Federal Disability Act, Federal Law Gazette I Nr. 65/2004, last amended by BGBl I Nr 120/2012

⁹⁵ The Framework Decree for the Flemish equal opportunities and equal treatment policy of 10 July 2008, Moniteur belge, 23 September 2008, pp. 49410-49424

⁹⁶ Protection against Discrimination Act, 1 January 2004, Prom. SG. 86/30 Sep 2003

⁹⁷ Section 6(1)(b), Employment Equality Act 1998-2004

⁹⁸ UK Equality Act 2010

⁹⁹ Anti-discrimination Act, Official Gazette 85/2008, 112/2012

¹⁰⁰ Case C-303/06, *S Coleman v Attridge Law and Steve Law*, Grand Chamber judgment of the European Court of Justice, 17 July 2008

¹⁰¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16)

¹⁰² Case C-303/06, *S Coleman v Attridge Law and Steve Law*, Grand Chamber judgment of the European Court of Justice, 17 July 2008, para 38

parents with disabilities are subjected have a direct impact upon their children and the enjoyment and exercise of their individual rights. The assessments and decisions concluding parental incompetence based on disability infringe on the right of the child to live with and be raised by their parents; i.e. those children are discriminated against based on the disability of their parents. Parents with disabilities disproportionately face child welfare proceedings;¹⁰³ concurrently, their children disproportionately¹⁰⁴ face separation from their parents and placement into care institutions or alternative family settings, against their best interests and in violation of their right to home and family and the right to live in the community. These children are thus discriminated against through association with their disabled parents.¹⁰⁵ The Swedish courts have recognised this in a case (see above para 26) in which it was concluded that a child who had been removed from his parents at birth had been subjected to discrimination by association with his disabled mother with respect to his right to family based on Swedish discrimination law and Articles 8 and 14 of the Convention.¹⁰⁶

IV. Conclusion

47. Decisions to remove a child from their parents with disabilities, or to deny reunion with their parents with disabilities, represent serious interferences with the right to family on the part of the parents, as well as on the part of the child. Practice shows that where there is no objective indication of neglect or abuse, disability-based discrimination has frequently been exercised by the authorities in their investigation and/or decision-making process, by a presumption of parental incompetence, employing a deficiency perspective, and/or through system abuse whereby the policies and practices which are meant to provide support and protection are in fact destructive of family life and undermine parenting by persons with disabilities on an equal basis with others.¹⁰⁷
48. Developments in international and comparative national law and practice reflect that States have positive obligations in the context of child welfare and the right to family of persons with disabilities which require examination of the provision of measures of support and assistance to parents with disabilities in order to facilitate fulfilment of their role as parents. There is also stricter scrutiny and a narrowed margin of appreciation on the part of States concerning both the process and substance of child welfare decisions concerning parents with disabilities, failing which will constitute violations of the right to family, the principle, right and rule of procedure of the best interest of the child, and discrimination on the basis of disability, representing violations of Articles 8 and 14 of the Convention. Further, separation of a child from their parents with disabilities and placement in an institutional setting is not only a violation of the right of the child to family, home, the right to live in the community, and protection of physical and mental integrity given the lasting effects on the child's healthy development, but it also constitutes discrimination by association with their disabled parents.

¹⁰³ Parents with disabilities, in particular parents with intellectual disabilities, are over-represented in child protection and legal proceedings; Lamont & Bromfield, "Parental intellectual disability and child protection: Key issues" (2009) Australian Institute of Family Studies, National Child Protection Clearing House, p 3; "Parents with disabilities", *International Encyclopaedia of Rehabilitation*, Center for International Rehabilitation Research Information and Exchange, NIDRR Research and Training Center on Families of Adults with Disabilities Grant No. H133A050008, 2010; Booth, "Parents with learning difficulties, child protection and the courts", *Representing Children*, vol 13 (2000) no 3, p175-188; <http://disability-studies.leeds.ac.uk/files/library/Booth-parents-with-lea-diff.pdf>

¹⁰⁴ A UK study investigating how social services and the courts handle child protection cases involving parents with intellectual disabilities found that only 10.2 % of children of parents with intellectual disabilities in the court sample returned home, see Booth, Booth & McConnell, "Parents with learning difficulties, care proceedings and the family courts: threshold decision and the moral matrix", *Child and Family Law Quarterly*, 16 (2004) 409-422

¹⁰⁵ By virtue of the *jura novit curia* principle, the Court has previously considered on its own motion complaints under Articles not relied on by those appearing before it on the basis that a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *B v Romania (no 2)*, Application no 1285/03, judgment of 19 February 2013, para 71; *Guerra and Others v Italy*, Application no 14967/89, judgment of 19 February 1998, para 44). It is suggested that discrimination of the Second Applicant's right to home and family could also be considered in the examination of the present case.

¹⁰⁶ Swedish Court of Appeal, T5095-13, 11 April 2014

¹⁰⁷ Booth, "Parents with learning difficulties, child protection and the courts", *Representing Children*, vol 13 (2000) no 3; Lamont & Bromfield, "Parental intellectual disability and child protection: Key issues" (2009) Australian Institute of Family Studies, National Child Protection Clearing House

ANNEX - INTEREST OF INTERVENERS

The **European Disability Forum (EDF)** is an independent non-governmental organisation which represents the interests and defends the rights of 80 million people with disabilities in the European Union, and is a member of IDA. EDF is the only European pan-disability platform run by persons with disabilities and their families. Created in 1996 by its member organisations, EDF ensures that decisions concerning persons with disabilities are taken with and by persons with disabilities.

Inclusion Europe (IE) is an association of people with intellectual disabilities and their families in Europe which fights for equal rights and full inclusion of people with intellectual disabilities and their families in all aspects of life. IE members include the organisations of people with intellectual disabilities and their families at national, regional and local level. IE is a member of the European Disability Forum and Inclusion International.

Inclusion International (II) is a global federation of family-based organizations advocating for the human rights of people with intellectual disabilities worldwide. For over forty years Inclusion International has been committed to the promotion of these human rights and our organization now represents over 200 member federations in 115 countries throughout five regions including the Middle East and North Africa, Europe, Africa and the Indian Ocean, the Americas, and Asia Pacific. II is a member of the International Disability Alliance.

The **International Disability Alliance (IDA)** is a unique, international network of global and regional organisations of persons with disabilities. Established in 1999, each IDA member represents a large number of national disabled persons' organisations (DPOs) from around the globe, covering the whole range of disability constituencies. IDA thus represents the collective global voice of persons with disabilities counting among the more than one billion persons with disabilities worldwide, the world's largest – and most frequently overlooked – minority group. Currently comprising eight global and four regional DPOs,¹⁰⁸ IDA's mission is to advance the human rights of persons with disabilities as a united voice of organisations of persons with disabilities utilising the Convention on the Rights of Persons with Disabilities and other human rights instruments.

IDA and EDF have previously submitted together third party interventions to the Court with other members in *Gauer and Others v France* (Application no 61521/08), *Mihailovs v Latvia* (Application no 35939/10), *DG v Poland* (Application no 45705/07, judgment of 12 February 2013), *Semikhvostov v Russia* (Application no 2689/12, judgment of 6 February 2014), *Guberina v Croatia* (Application no 23682/13) and *HP v Denmark* (Application no 55607/09). EDF has previously also submitted a third party intervention to the Court in *Dordevic v Croatia* (Application No 41526/10). EDF and IDA's participation in third party interventions is aimed at raising the Court's attention to the latest international human rights standards concerning persons with disabilities.

¹⁰⁸ IDA members are: Disabled Peoples' International, Down Syndrome International, Inclusion International, International Federation of Hard of Hearing People, World Blind Union, World Federation of the Deaf, World Federation of the DeafBlind, World Network of Users and Survivors of Psychiatry, Arab Organization of People with Disabilities, Pacific Disability Forum, Red Latinoamericana de Organizaciones no Gubernamentales de Personas con Discapacidad y sus familias (RIADIS), and the European Disability Forum.