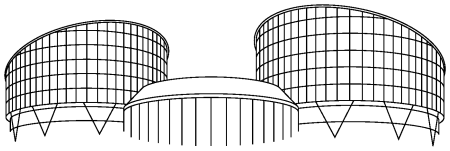

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF S.J.P. AND E.S. v. SWEDEN

(Application no. 8610/11)

JUDGMENT

STRASBOURG

28 August 2018

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of S.J.P. and E.S. v. Sweden,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Branko Lubarda, *President*,
Helena Jäderblom,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
María Elósegui, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 3 July 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 8610/11) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish national, Ms S.J.P., and an Iranian national, Mr E.S. ("the applicants"), on 15 October 2010. The Chamber decided to grant the applicants anonymity (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Ms J. Beltran, a lawyer practising in Gothenburg. The Swedish Government ("the Government") were represented by their Agents, Ms H. Lindquist and Mr O. Widgren, of the Ministry for Foreign Affairs.

3. The applicants alleged that their right to family life under Article 8 of the Convention had been violated by the authorities' decisions to take their children into public care and restrict their contact rights.

4. On 16 December 2014, the Court declared the application partly admissible and the remainder inadmissible. It further decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*),

5. The applicants and the Government each filed further written observations (Rule 59 § 1) on the merits. The parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1969 and 1964 respectively and live in Sandnes, Norway.

A. Background

7. The second applicant went to Sweden in the 1980s and met the first applicant in 1993. They have three children, A (born in December 2002), B (born in December 2003) and C (born in February 2007). The second applicant also has a son, D (born in 1989), from a previous relationship, who has lived with the applicants. The applicants lived in the city of Linköping until May 2007 when the first applicant travelled to Iran with the children.

8. In February 2007, staff at the Neonatal Unit at the University Hospital in Linköping, where C was treated after her birth, contacted the Linköping Social Council (*socialnämnden*) due to concerns about the family. The staff had observed that the first applicant had difficulties in understanding C's needs and lacked ability to read her signals. Moreover, she was very withdrawn and took no initiative to feed C or change her nappy. The staff had suggested that she consult a psychiatrist, but the first applicant had refused. Furthermore, when the second applicant had visited the hospital with A and B, the children had been noisy and unruly and staff had had to intervene to calm them. When the staff had informed the applicants about their concern for the children and their intention to contact the social services, the second applicant had responded aggressively.

9. On the basis of the information from the hospital, the Social Council started an investigation into the family's situation in accordance with Chapter 11, Section 1, of the Social Services Act (*socialtjänstlagen*, 2001:453). They contacted persons from the Neonatal Unit, the primary health care clinic for children and the women's clinic, as well as A and B's child-minder, all of whom expressed great concern about how the applicants were coping with their family situation and described how they had failed to provide A and B with the necessary structure and rules. The Social Council repeatedly offered the applicants placement in an investigation home, but the applicants refused. Instead, they agreed to have a team from the Social Council visit their home on a number of occasions. It was further decided that the whole family should undergo psychiatric examinations.

10. However, it would appear that the applicants repeatedly refused to let the Social Council team enter their home and, from mid-April, before the investigation was completed, the applicants stopped all contact with the team and informed them that they did not intend to undergo psychiatric

examinations. The Social Council unsuccessfully tried to re-establish contact with the applicants. In late May 2007, the first applicant and the children left their home, allegedly to spend time with friends. Several persons who were normally in contact with the applicants expressed concern about the children's situation and the fact that their whereabouts were unknown to them.

11. On 11 September 2007, the Social Council decided to take all three children into public care immediately, on a provisional basis, by virtue of Section 6 of the Special Provisions on the Care of Young Persons Act (*lagen med särskilda bestämmelser om vård av unga*, 1990:52; hereafter "the 1990 Act"). On 21 September 2007, the Administrative Court (*länsrätten*, as of 15 February 2010 *förvaltningsrätten*) confirmed the decision of the Social Council, as did the Administrative Court of Appeal (*kammarrätten*) and the Supreme Administrative Court (*Högsta förvaltningsdomstolen*) upon further appeal. However, the decision was never enforced since it turned out that the first applicant and the children were in Iran. Friends of the applicants informed the Social Council that the first applicant was afraid to return to Sweden since she feared that her children would be taken into public care. Thus, on 13 February 2008 the Social Council cancelled the care order since it could not be enforced. The first applicant and the children stayed in Iran until October 2008 when the whole family moved to Sandnes in Norway.

B. Taking the children into public care

12. In May 2009, the local Norwegian Social Council was contacted by A's school because he had told the school that both he and B had been beaten by the second applicant. The applicants denied the accusations. The Norwegian Social Council decided to initiate an investigation during which it was agreed that the second applicant would live away from the home and that a Social Council Unit would visit the family daily. On 16 May 2009, the applicants and their children disappeared. Subsequently, the second applicant telephoned, from a Swedish telephone number, the Norwegian Social Council, which in turn contacted the Swedish authorities as it suspected that the family might be in Sweden. Moreover, an anonymous person had telephoned the Swedish Social Council to express serious concerns about the children who, according to this person, were at an address in Linköping. When the Social Council staff went to the address given, the family was not there but their luggage was in the apartment. Consequently, on 25 May 2009, the Social Council decided to take A, B and C into immediate public care on the basis of its previous investigation and since it feared that the family would again leave for Iran.

13. On 28 May 2009, the applicants and their children were stopped at Stockholm Airport on their way to Iran and a team from a Social Council

close to the airport assisted in the enforcement of the care order. The report made by the Social Council team which picked up the children at the airport described a chaotic situation. The first applicant and B and C had been apathetic while A had been hyperactive. The second applicant had mostly been on the telephone. Neither the first nor the second applicants had reacted when the team had taken the children away with them. A, B and C were all placed in a foster home (*familjehem*) together, but later A was moved to a separate foster home since he was hyperactive and required special attention.

14. On 10 June 2009, after holding an oral hearing, the Administrative Court confirmed the Social Council's decision to take the children into immediate public care.

15. The applicants appealed against the judgment to the Administrative Court of Appeal which, on 6 August 2009, struck the case out since, in the meantime, the children had been taken into public care (see paragraph 20 below) and the immediate public care order thereby had lapsed.

16. On 25 June 2009, the Social Council applied to the Administrative Court for a public care order in respect of all three children, in accordance with Section 2 of the 1990 Act. The Council maintained that the applicants had shown a serious lack of ability to care for their children, that there was a clear risk of impairment of their health and development if they were not protected and that the applicants opposed the planned necessary care. It submitted a comprehensive investigation report into the family's situation in support of its request. The report was based, *inter alia*, on submissions from the children's temporary foster homes, the local health care service, reports based on psychiatric examinations of the children, notes from the Child and Youth Psychiatric Clinic (*Barn- och ungdomspsykiatrin*; hereafter "BUP") and information from relatives and the Norwegian Social Council.

17. According to the report, none of the children had been accustomed to structure or routines. A maintained that he had been beaten by the second applicant and B had told her foster home that she, A and the first applicant had all been beaten by the second applicant. It was mainly the first applicant who had cared for the children. Hospital and Social Council staff, as well as relatives, had for a long time been worried about her psychological health and encouraged her to seek help. She had denied that she needed help and had refused all treatment. All of the children had lacked communication and emotional response from their parents, which had affected their psychosocial development and their ability to interact socially with other children as well as adults. A was hyperactive and had difficulties following rules and functioning in social situations. His behaviour corresponded to several of the symptoms of Attention Deficit Hyperactivity Disorder (ADHD). B was remarkably silent and withdrawn. Psychiatrists had assessed that she was traumatised and had recommended therapeutic treatment combined with a safe environment where she did not have to deny

her experiences. Both she and C were behind in their language development and lacked the ability to express their emotions. Several instances had, over the years, emphasised the children's need for emotional contact with the applicants. The second applicant had failed to compensate for the first applicant's inability in this regard and neither of the applicants had managed to establish routines for the children's basic needs such as food, hygiene, clothes and necessary medical care. Thus, the applicants' ability to care for their children properly was questioned. The applicants' impulsive behaviour had led to an unstable and insecure living situation for the children, such as when they had suddenly decided to move to Iran. There was an imminent risk that the applicants would again travel to Iran with their children. All of the children were in need of stability and an environment with clear rules and structure, including stable adults who could compensate for their previous lack of emotional care.

18. The applicants disputed that public care was needed. They submitted that they were capable parents who cared for and loved their children. They had cooperated with the Social Council in 2007 but had been treated inappropriately and disrespectfully by the authorities. They had not fled to Iran but had gone there to visit family, as they did every year. They submitted documentary evidence including medical certificates. According to a Chief Physician at Linköping University Hospital Women's Clinic, the first applicant had accepted special assistance offered to her after the birth of all three children and had kept to this commitment. It had been noted that she felt great affection for her children. Moreover, according to a physician at the applicants' local health centre, all the children had demonstrated the ability to make emotional contact and had behaved in a way appropriate for their age.

19. The legal representative assigned to defend the children's best interests supported the Social Council's stance. He had met all three children and, according to him, the information contained in the investigation gave reason for grave concern for the children's situation. The parents' lack of ability to understand their children's needs, as well as the information about abuse, meant that it was necessary to take the children into public care to ensure that they received proper care.

20. On 20 July 2009, after holding an oral hearing where the applicants and several witnesses were heard, the Administrative Court granted a public care order in respect of each of the three children. It found that, on the basis of all the material in the case, it had been shown that the applicants lacked the ability to care for their children and to understand their needs. This inability had already impaired the children's health and development in important areas. In the court's view, there was a real risk of further damage unless the children were given proper care to meet their special needs. Since the applicants did not agree to voluntary care, it was necessary to take the children into public care.

21. The applicants appealed against the judgment to the Administrative Court of Appeal, maintaining that public care was not necessary for any of their children. They denied that either of them had ever hurt the children and stressed that the public prosecutor, in July 2009, had decided to discontinue a preliminary investigation against the second applicant concerning child abuse. Moreover, there was no medical evidence substantiating any accusations of physical violence. They emphasised that all three children were healthy and behaved in a manner appropriate for their age. They welcomed the fact that A's condition had been diagnosed and were willing to accept appropriate help from the Social Council. The reasons for their decision to travel to Iran in May 2009 were that the second applicant's father had fallen seriously ill and to spend their holidays there. They submitted, *inter alia*, further medical certificates and an assessment of the Social Council's investigation issued by an associate professor.

22. The Social Council contested the appeal. It stated that A had been diagnosed with ADHD and Oppositional Defiant Disorder and emphasised that he was in need of a structured environment and appropriate help in order to develop in a positive way. B was still traumatised and communicated only by nodding or shaking her head. C was physically active, had become more independent and no longer feared daily sounds, such as the vacuum cleaner. The Council submitted a psychosocial investigation report from November 2009, a neuropsychological investigation report dated 26 October 2009 and a medical certificate dated 8 September 2009, all concerning A.

23. The children's legal representative supported the Social Council's stance. During a meeting with the children, A had declared that he wanted to live with his parents and siblings and that there were too many rules where he now lived. He had stated that the second applicant had sometimes beaten him and had sometimes been kind. B had told her foster home parents that the second applicant had beaten her. The representative emphasised the children's need to see their parents but referred to the extensive material in the case-file which showed that the children had special needs. The investigations had also highlighted clear warning signals that the children had suffered at home. Moreover, the representative found it questionable whether the applicants would agree to voluntary care, since they had refused to cooperate with the Social Council on previous occasions.

24. On 11 December 2009, after holding an oral hearing where several witnesses were heard at the applicants' request, the Administrative Court of Appeal upheld the lower court's judgment in full. It found that the signs of lack of proper care which had appeared during the investigation in 2007 now appeared even more clearly. The investigations carried out after the decision on public care in June 2009 indicated that all of the children had special needs which had been neglected. Additionally, the court noted that

both A and B had told various persons, in different situations, that they had been beaten by the second applicant. Although these accusations had not led to any charges against the second applicant, the court stressed that this information had to be taken seriously, since the main purpose of the 1990 Act was to protect the child. Moreover, the court observed that the Social Council had had difficulties carrying out the investigation correctly, mainly due to the applicants' unwillingness or inability to cooperate with the authorities. The applicants' unwillingness to cooperate had also manifested itself in their decision to move twice to another country, which had also jeopardised the security and stability of the children's environment. Making an overall assessment, the appellate court found that the investigations strongly indicated that the applicants had failed to care for their children properly and that they lacked understanding of the children's special needs and their own inability to care for them. Thus, there was a real risk of damage to the children's health and development. Lastly, the court noted that both of the applicants had declared that they were willing to receive help from the Social Council while, at the same time, they had refuted the accuracy of the investigation and claimed that the information was fabricated or much exaggerated. They also opposed the care plan developed for the children. Accordingly, there were valid grounds to take the children into public care.

25. The applicants appealed to the Supreme Administrative Court which, on 15 April 2010, refused leave to appeal.

C. Decision to keep the children in public care

26. On 22 September 2010, the Social Council decided that the children should remain in public care.

27. The applicants appealed against the decision to the Administrative Court. They stated that they were settled in Norway, both of them holding full-time jobs, and that they were in contact with the Norwegian Social Council. They insisted that they had fully cooperated with the Swedish Social Council and had done all that had been required of them, including travelling to Linköping for meetings with the Social Council and allowing the Norwegian authorities to visit them at home. Moreover, they were actively involved in an ADHD association and were attending courses to understand the condition better and be able to help A. With assistance from the Norwegian authorities and the school, they could take care of A and meet all of his needs. The applicants further questioned whether the Social Council really had a clear plan for how, in due time, to reunite them with their children and contested the Council's view that they opposed the plan for visits with the children. In fact, the first applicant's visit with the children had gone very well and the children had also reacted positively to photographs and letters from their parents. Taking into consideration the

children's very young age, they emphasised the importance of not waiting too long before starting the reunion process, and including more frequent visits, in order to avoid a sudden removal from the foster homes which could cause the children emotional harm. Furthermore, the applicants categorically denied that any violence had occurred in their home and they alleged that if any of the children showed signs of trauma, it was most likely due to the traumatic separation from their parents. They submitted, *inter alia*, medical and other certificates to substantiate their good psychological health.

28. The Social Council contested the appeal. It confirmed that the applicants had cooperated with the authorities and had come to planned meetings with the Council. It attached much importance to the fact that this cooperation needed to continue over time. However, it maintained its view that the applicants opposed the visiting plan since they had requested that the public care of their children be lifted and the children be returned home and since they opposed further care under the provisions of the Social Services Act. Although both of the applicants had demonstrated improvements in their capacity to assess the children's needs, they still lacked basic understanding of how to care properly for their children. The Council stressed that A had been taken into care due to lack of care at home, not because he had been diagnosed with ADHD. Moreover, A repeatedly spoke about how he had been beaten by the second applicant and he had had to be reassured before the meeting with the first applicant that he would return to the foster home after the meeting. Thus, the decision on public care was partly based on the need to protect him, as well as B and C. The Council further observed that, as concerned B, a psychologist had stated that there were reasons to believe that she had been neglected or traumatised at a preverbal stage of her life and that, consequently, her problems were not linked to being taken into care. Lastly, turning to C, it was asserted that she needed to be protected from neglect in order to develop positively and have her needs met. The Council repeated that there had been concern for the children for a long time and that its findings were based on an overall evaluation of the children's situation and their parents' ability to care for them. It submitted various investigation and evaluation reports about the children which it had used as a basis for its decision to keep them in public care.

29. The children's legal representative supported the Social Council's stance.

30. On 20 January 2011, after having held an oral hearing, the Administrative Court rejected the applicants' appeal and upheld the public care order. It first noted that the applicants demonstrated great affection for their children and wanted them to be well and that they were engaged in activities and receiving assistance to understand the problems. The visit between the first applicant and her children had gone well. However, the

court observed that the applicants still denied that they had failed in the care of their children and it found that they continued to lack understanding of the children's problems and their own ability to meet the children's special needs. Thus, it found no basis for lifting the care order. Moreover, since the applicants had not agreed to the care plan developed for each child, which included their living in a foster home over a longer period of time, there was no basis for voluntary care.

31. The applicants appealed to the Administrative Court of Appeal, maintaining their claims and adding that they had never tried to intervene in the public care of their children but fully cooperated with the authorities in every way possible. They had fully understood that reunion with their children would have to be a gradual process, but it was important that their parent-child links did not disappear. In their view, there was no evidence of any risk that they would flee abroad with their children. Moreover, they considered that the Social Council had based its assessment on old investigations which were no longer relevant. They also questioned for how long the public care would continue, since that might jeopardise the connection between them and their children. They submitted, *inter alia*, medical certificates and a written observation dated 12 October 2009 and issued by an associate professor concerning the investigations carried out by the Social Council.

32. Both the Social Council and the children's legal representative contested the appeal. They stressed that all three children had developed positively but that they were still in need of a stable environment. They were undergoing treatment at the BUP due to their special needs. The commitment shown by the applicants was positive for the future, but the deficiencies in care which had been evident when the children were taken into public care still existed.

33. On 15 April 2011, after holding an oral hearing, the Administrative Court of Appeal upheld the lower court's judgment in full. It first found that the material in the case indicated that the children still had special needs but that they had developed well since being taken into public care. The court further considered that, although the applicants had participated in activities and improved their understanding of A's special needs relating to his ADHD, they still lacked a more profound understanding of their daughters' special needs and of their own shortcomings in caring properly for their children. Thus, it concluded that the applicants were not currently in a position to meet their children's special needs and provide the care they required, for which reason the children had to remain in the foster homes. Since the applicants opposed such care, it was necessary to maintain the public care.

34. Upon further appeal by the applicants, the Supreme Administrative Court refused leave to appeal on 15 June 2011.

D. Contact restrictions

35. On 25 May 2009, when the Social Council decided to take A, B and C into immediate public care, it also decided to keep secret the address of the children's foster homes and not to grant the applicants contact rights to visit their children. These decisions were confirmed on 10 June 2009 by the Administrative Court. Upon appeal by the applicants, the Administrative Court of Appeal decided, on 6 August 2009, to strike the case out of its list of cases (see paragraph 15 above).

36. On 26 August 2009, the Social Council decided to continue to keep secret the address of the children's foster homes and to limit the applicants' contact rights by not allowing any visits. The applicants appealed to the Administrative Court, which quashed the Social Council's decision and, as concerned the contact rights, referred the case back. Consequently, on 16 October 2009, the Social Council issued a new decision denying the applicants any contact rights. In accordance with Section 14, paragraph 3, of the 1990 Act, this decision was reassessed by the Social Council on 23 November 2009 but it found no reason to change the previous decision since it considered that there was still a risk that the applicants would intervene in the care of the children if granted contact rights.

37. The applicants appealed against the decision, demanding that it be reversed. They also requested that at least the first applicant be allowed to visit the children. The applicants pointed to the fact that the children had said that they missed them and they stressed that all allegations concerning any sort of abuse were groundless. They denied that they had previously tried to evade the social authorities and emphasised that, even if the authorities believed that there was such a risk, this should not prevent them from being granted contact rights in the presence of representatives of the Social Council. They were also willing to hand over their passports to the authorities.

38. The Social Council contested the appeal. It stated that there were strong reasons to believe that the applicants would intervene in the care of the children and stressed that it was necessary to decide on total restrictions in order to keep the children's residences secret. If the children's location was revealed, they would have to be moved to new foster homes. It submitted a document issued by the director of the treatment centre where A had been observed which, among other things, stated that A had said that he missed his mother but had also expressed a wish to be like other children and live in a family where he could feel safe. To the staff at the treatment centre, he had described occasions when he had felt unsafe, such as when he and his siblings had lived alone with the first applicant and when he had been beaten by the second applicant. Since A had been placed at the treatment centre, he had developed and his ability to follow routines had greatly improved. It was of utmost importance that this positive

development continue. If A were to meet the applicants, the negative consequences would significantly outweigh the positive. A would suffer from a conflict of loyalty which would seriously impede his positive development.

39. On 10 December 2009, after holding an oral hearing, the Administrative Court upheld the Social Council's decision. It noted that the applicants had been prohibited from visiting their children for six months and stressed that such extensive restrictions required exceptionally strong grounds. In the court's view, the applicants were not willing to cooperate with the authorities and had repeatedly demonstrated a tendency to evade the Social Council's investigations into their family situation. It further noted that all of the children were in need of special care and stability in order for their development to progress positively. On the basis of the investigation the court found that if the applicants were granted contact rights to visit the children, there was a real risk that the second applicant, in particular, would intervene in the public care of the children. Moreover, the court considered that since there was a risk that the children's residence addresses would be disclosed even if the first applicant were to visit the children alone, she could not be allowed any contact rights alone either. In reaching this conclusion, the court had regard to the best interests of the children and Article 8 of the Convention.

40. The applicants appealed against the judgment to the Administrative Court of Appeal, maintaining their claims. They stressed that the allegation of violence at home was completely unsubstantiated and that the Social Council's investigation was insufficient and could not form the basis for the complete prohibition of any contact between them and their children. All three children had said that they missed their parents, in particular their mother, for which reason a supervised visit of the first applicant with her children should be authorised. They had not seen their children for ten months and not even been allowed to talk to them on the telephone or write to them. Moreover, they were ready to hand in their passports and meet the children in a neutral location to eliminate any concerns that the authorities had about them "fleeing" with their children. In the applicants' view, the prohibition on seeing their children violated Article 8 of the Convention.

41. The Social Council maintained that its decision was justified under the Convention and should be upheld. It was true that A and B had expressed the wish to meet their parents. C had not done so, but this was probably because of her late language development. Still, due to the risk that the applicants might escape with the children or obstruct their current care, and since the children had extensive care needs into which the applicants lacked insight, there was a need to prohibit contact rights. Moreover, currently there was no dialogue between the Social Council and the applicants and this would have to be re-established before contact rights could be granted.

42. On 8 April 2010, after holding an oral hearing, the Administrative Court of Appeal rejected the appeal. It first noted that, despite the applicants' submissions, it did not appear that the second applicant had altered his negative attitude towards the Social Council and was prepared to cooperate. The appellate court further observed that Article 8 of the Convention did not contain a general prohibition on complete contact restrictions. Still, it shared the applicants' concern that the complete contact restriction could harm the children and noted that the Social Council had a great responsibility to ensure that the children's need for contact with their parents was met. However, for this to be possible, the parents had to cooperate. Moreover, the court had to evaluate whether the combined risks that contact rights would entail for the children's health and development outweighed the corresponding risks if there were no contact. In the present case, the court considered that the only way to find suitable solutions to avoid the risks involved in contact rights between the applicants and the children was for the Social Council to plan the visits carefully together with the applicants and for the applicants to be willing to receive the help and support that they needed. As long as these conditions were not fulfilled, it would not be possible to arrange the contact. Furthermore, the appellate court had carefully considered the possibility of granting only the first applicant contact rights with the children. However, in view of its findings, and the first applicant's passive attitude, it did not consider this a viable option. Thus, a complete prohibition on contact remained the sole solution in the current situation.

43. Upon further appeal, the Supreme Administrative Court refused leave to appeal on 4 June 2010.

44. On 22 September 2010 the Social Council decided that the first applicant should be allowed to meet the children on one occasion during the autumn of 2010 while the second applicant should not be allowed to meet them. Following an appeal by the applicants, the Administrative Court and the Administrative Court of Appeal upheld the decision in judgments delivered on 20 January 2011 and 15 May 2011 respectively. On 15 June 2011, the Supreme Administrative Court refused leave to appeal.

45. On 22 December 2010 the Social Council decided that the first applicant should be allowed contact rights with the children on two occasions between January and June 2011 and that, during the same period, the second applicant should be allowed to meet the children on one occasion.

46. On 29 June 2011 the Social Council decided that the applicants should be allowed contact rights with their children according to a contact plan. The plan specified that the applicants should meet with their children once every third month, for two hours each time, in a place decided by the Social Council and where staff from the Social Council would be present, as well as a counsellor and interpreter (to translate if the second applicant

spoke Persian with the children). Moreover, telephone contact was allowed twice a year, for no more than 20 minutes, in a controlled setting.

47. The applicants appealed against the decision to the Administrative Court, requesting that the contact restrictions be lifted. They stressed that their meetings with their children had gone very well and that they had followed carefully all of the Social Council's instructions. The children had been happy to see them and hugged them. The fact that they had later had a reaction in their foster home was normal since the meetings had been short and had taken place in an unnatural environment. Moreover, the children had been given negative information about their parents which had affected them and they probably felt a conflict of loyalty between their parents and their foster home. The applicants questioned how a reunion of the family would be possible if they were only allowed to meet their children so rarely and for a short time. They also repeated that they had never escaped with their children to Iran but that they had travelled there once every year to visit relatives. In fact, they had never tried to intervene or obstruct the public care of their children. Instead, they had cooperated and done all they had been asked to do. Both applicants had sessions with psychologists and the second applicant attended a programme called "alternatives to violence". In this respect, he underlined that he had never been aggressive or violent toward his children.

48. The Social Council maintained its decision. It noted that reunion could only take place once the children's need for care had ceased. So far the meetings between the parents and children had gone well. B and C had had no negative reactions to the last meeting with the applicants but A had had nightmares. The next meeting would take place in an apartment, to give a more natural environment. The children would also meet with their older half-brother. Moreover, the children saw each other on a regular basis, at least every third week, to play and be together. The Social Council also submitted reports of its investigations into the children's current situation and development.

49. On 27 September 2011, after an oral hearing, the Administrative Court rejected the appeal. It noted from the outset that only contact restrictions which were necessary for the purpose of the care order were allowed, and that the best interests of the children should be paramount when making this evaluation. The court then observed that all three children were receiving extra help and assistance to develop and function in their social settings. They were developing well in their foster homes. It further noted that the applicants' meetings with their children had gone well and that their contact rights had been extended. However, in the court's view, the applicants had accepted various measures because the Social Council had told them to do so, not because they felt that they were necessary. Thus, having regard to all the circumstances of the case, the court found that the contact restrictions decided by the Social Council were necessary for the

time being. It noted that the Council regularly had to re-evaluate the need for contact restrictions, which opened the way for fewer restrictions in time to come.

50. The applicants appealed against the judgment to the Administrative Court of Appeal and requested that their contact restrictions be eased to allow them to meet their children once every other month. They maintained their submissions as presented before the lower court. Moreover, the second applicant stated that he had realised during his therapy sessions that he had been "hard" towards the first applicant, which he realised must have affected the children negatively. However, he maintained that he had never been violent towards his children.

51. The Social Council opposed any changes to the contact restrictions. In its view, the current restrictions were necessary to ensure the children's continued positive development. It acknowledged that the last two meetings between the applicants and their children had gone well, but stated that the telephone conversation had not been satisfactory since the second applicant had asked questions to try to find out where the children were living and A had felt pressured and sad afterwards.

52. On 20 March 2012 the Administrative Court of Appeal granted the appeal and ordered that the applicants should have contact rights with their children once every other month. In all other parts the contact plan was maintained. The court noted that the second applicant had begun to have better insight into his behaviour and could acknowledge that the way he had sometimes treated his wife could be considered as violence. This was a first step in a process of change with the goal of the children returning home. A part of this process was the contact between the parents and their children. The appellate court found that contact restrictions had been necessary in the instant case but considered that, having regard to the current situation, it should be possible to extend the contact rights as requested by the applicants.

53. Neither the applicants nor the Social Council appealed against this judgment to the Supreme Administrative Court.

E. Further proceedings

54. The decisions to keep the children in public care and to limit the applicants' contact rights have continued to be reconsidered on a regular basis as stipulated by domestic law (see the part on relevant domestic law, paragraph 68 below). Most of these decisions have not been submitted to the Court, but it appears from the parties' submissions that, on 27 March 2013, the Social Council decided to keep the children in public care and rejected a request by the applicants to extend their contact rights. The Administrative Court rejected the applicants' appeals against these decisions.

55. However, on 4 September 2013, the Social Council granted the applicants extended contact rights, allowing them to meet with the children for three hours every two months and to have telephone contact with them twice a year.

56. The applicants appealed against the decision to the Administrative Court which, on 20 January 2014, increased the applicants' contact rights by one hour, that is to four hours in total, every other month. It considered that this was in the best interests of the children.

57. Upon further appeal by the applicants, the Administrative Court of Appeal upheld the lower court's judgment on 23 April 2014.

58. On 10 December 2014 the Social Council decided to maintain the public care order and not to alter the contact rights.

59. The applicants appealed to the Administrative Court, demanding that the public care order be lifted or, at least, that they be granted increased contact rights.

60. The children's legal representative supported the Social Council's decisions as she considered that it was in the best interests of the children. They had expressed the wish to stay in their foster homes and, while they said that the meetings with their parents went well, they did not wish them to be increased.

61. On 24 February 2015, after having held an oral hearing, the court rejected the appeal. It noted that the second applicant had continued to show aggressive behaviour towards social workers and that he had been convicted, *inter alia*, of making unlawful threats (14 counts), threatening a public official (15 counts), slander and abusive conduct against a public official (5 counts) and sentenced to one year and six months in prison. Moreover, the first applicant had been unable to take an active part and be available to her children during their meetings. The applicants had also intervened in the public care of their children, in breach of the contact restrictions. They had, for example, waited outside B and C's school and followed them to their foster homes, and they had also gone to A's foster home, making the children afraid and anxious. They had also sent letters and cards directly to the foster homes, despite an agreement that such items should be sent via the social authorities, in order to avoid upsetting the children. The court found that there was therefore no possibility to terminate the public care or transform it into voluntary care. Furthermore, all the children wanted to stay in their foster homes and the current level of visits was working well for the children. Thus, there were no reasons, according to the court, to depart from the well-functioning scale of contact, which was also in line with the will of the children.

62. The applicants appealed against the judgment to the Administrative Court of Appeal. On 22 April 2015, after having held an oral hearing, the appellate court upheld the lower court's judgment in so far as it concerned the continuation of the public care. It considered that the applicants still

lacked insight into their inability to care of their children, which had led to the public care at the outset, since they continued to blame the social authorities. However, the court extended the contact rights to six hours every other month. It noted that there was nothing to indicate that the scale of contact could not be moderately extended without negatively affecting the children's care. It was important for the well-being of the children that the time spent with their parents provided rewarding moments and had potential to develop their relationship. They should therefore be given enough time during each meeting to share activities and be together.

63. The Court has not been informed of further developments in the case at the domestic level.

II. RELEVANT DOMESTIC LAW

64. According to Section 1 § 2 and Section 2 of the 1990 Act, compulsory public care is to be provided if there is a clear risk of impairment of the health and development of a person under 18 years of age due to ill-treatment, exploitation, lack of care or any other condition in the home, and if the necessary care cannot be provided with the consent of the young person's guardian. The decision to place a young person in public care is made by the Administrative Court, following an application from the Social Council (Section 4).

65. Under Section 6 of the 1990 Act, the Social Council may order the immediate taking into care of a young person ("provisional care order") if it is likely that he or she needs to be provided with care under this Act and a court decision in the matter cannot be awaited owing to the risks to the young person's health or development or because the continuing investigation could be seriously impeded or further measures prevented. Section 7 provides that a provisional care order shall be put before the Administrative Court which shall rule on whether the order shall be upheld pending the court's judgment regarding the application for public care.

66. Section 1, paragraph 5, of the 1990 Act states that the best interests of the young person shall be decisive when decisions are taken under the Act. Paragraph 5 was introduced in 2003 to strengthen the child perspective in the Act and to adapt the legislation to the Convention on the Rights of the Child.

67. According to Section 11 of the 1990 Act, the Social Council decides on the details of the care, in particular, how the care is to be arranged and where the young person is to live. Moreover, under Section 14, the council shall ensure that the young person's need for contact with his or her parents or other guardians is met to the utmost possible extent. If necessary, the council may decide how this contact is to be arranged. In the preparatory works to the 1990 Act (Government Bill 1979/80:1, p. 602), it is noted that the provisions on access restrictions are to be applied restrictively. The

Social Council must have strong reasons to decide on access restrictions between a young person and his or her parents. However, it can happen that the parents intervene in the care in an inappropriate manner. Their personal situation, for instance serious abuse or a grave mental illness, may be such that they should not see their child for a limited period of time. Moreover, Section 14 gives the Social Council the possibility to decide to keep a young person's place of residence secret from his or her parents. This should only be done in very exceptional cases (Government Bill 1989/90:28, p. 74).

68. The care order shall be reviewed by the Social Council at least every six months and the access restrictions and secrecy of the child's location at least every three months, pursuant to Sections 13 and 14 of the 1990 Act. Appeal against the council's decisions lies to the administrative courts (Section 41).

69. Section 21 of the 1990 Act states that when public care is no longer needed, the Social Council shall order its termination and make careful preparations for the young person's reunification with his or her custodians.

70. According to Chapter 6, Section 1, of the Social Services Act, care outside a young person's home shall be provided either in a foster home or in a home for care or residence. Moreover, the care should be designed to promote the affinity between the young person and his or her relatives and others closely connected to him or her, as well as contact with his or her home surroundings.

III. RELEVANT INTERNATIONAL LAW

71. The Convention on the Rights of the Child contains, in so far as relevant, the following provisions:

> Article 3
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> Article 12
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

THE LAW

I. SCOPE OF THE CASE

72. The Court notes that, in its decision on admissibility of 16 December 2014 (*S.J.P. and E.S v. Sweden*, (dec.), no. 8610/11) it declared admissible the complaints concerning the proceedings taking the children into public care, the proceedings to keep the children in public care and the proceedings relating to the continued complete prohibition on contact for the applicants with their children. The Court further declared the remainder of the application inadmissible for non-exhaustion of domestic remedies. In particular, it found that the applicants had failed to exhaust domestic remedies in relation to the Administrative Court's judgment of 10 June 2009 concerning the immediate public care order (paragraph 75 of the decision) and the Social Council's decision of 22 September 2009 to maintain public care (paragraph 76 of the decision).

73. However, in their observations on the merits, the Government pointed out that the applicants had in fact exhausted domestic remedies as regards these two sets of proceedings. Thus, they had appealed against the Administrative Court's judgment to the Administrative Court of Appeal which struck the case out on 6 August 2009. They had also appealed against the Social Council's decision to the administrative courts, where the Supreme Administrative Court, as a last instance, had refused leave to appeal on 15 June 2011. The applicants, in their comments on the Government's observations, asked for these proceedings to be included in the Court's consideration of the case on the merits.

74. The Court observes that the applicants failed to submit to the Court copies of the relevant domestic decisions and judgments mentioned above, despite having been informed by letter dated 21 March 2011 that they must inform the Court about any major developments regarding their case and submit any further relevant decisions of the domestic authorities. They were further requested, in a letter from the Court dated 5 September 2012, to inform the Court of any developments in their case at the domestic level since 2 December 2010, when the Court last received a letter from them, and submit copies of all decisions and judgments rendered during this period. While the applicants replied to the letter, they did not mention the above decisions or submit copies of them. The applicants also had the opportunity to furnish the relevant documents when the application was communicated to the Government and the parties were invited to submit their observations.

75. In these circumstances the Court considers that the applicants, who were represented by a lawyer, have to bear the consequences of their failure to submit the necessary documents to the Court, thereby hindering it from carrying out its work properly. It will therefore continue its consideration of

the application on the basis of the parts that were declared admissible on 16 December 2014. Still, in order to consider correctly the proceedings which have been declared admissible the Court has to put them into their context, which inevitably means to some extent having regard to the related proceedings.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

76. The applicants complained under Article 8 of the Convention that their right to family life had been violated through the Swedish authorities' decision to take their children into public care and to keep them there, as well as through the authorities' decisions to restrict their contact rights with their children. Article 8 reads insofar as relevant:

> "1. Everyone has the right to respect for his private and family life ... .
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

77. The Government contested that argument.

A. The parties' submissions

1. The applicants

78. The applicants maintained that there had been no need to take their children into public care as they were, and always had been, capable of caring for their children. They stressed that they had never tried to flee to Iran, they had simply visited the second applicant's father, as they did every year. Moreover, the social authorities' investigations and reports contained incorrect information about them and were not objective. Thus, the national courts had reached their conclusions on incomplete and incorrect information.

79. Moreover, according to the applicants, it was the social authorities' intervention at the airport to take the children from them which had created shock and chaos at the airport and caused the children great trauma, resulting in insecurity and anxiety. Thus, in their view, it was the authorities, not them, that had caused the children to show symptoms of post-traumatic stress disorder.

80. The applicants further argued that the social authorities had made no efforts to work towards reuniting the family. This continued to be the case, despite efforts by the applicants and positive changes, such as good cooperation with the social services, the applicants seeing a psychiatrist according to the programme requested by the Social Council, attending

ADHD courses in order to better understand A's needs, and positive feedback from the visits with the children.

81. Concerning their restricted contact rights, the applicants emphasised that it took two years from the immediate public care decision before they were both allowed to meet with their children. During this time, the Social Council based its decisions on the assumption that the applicants would intervene in the care of their children. However, they had no evidence to support that assumption and the applicants had cooperated in every way with the social authorities. Moreover, the continued contact restrictions were kept in place despite the fact that the visits went well and the social authorities are supposed to work towards a reunion of the family. In their case, the authorities had instead obstructed the possibilities for the family to reunite. Their right to family life had thus been violated.

2. The Government

82. The Government argued that the domestic decisions and judgments, while interfering with the applicant's family life, were in accordance with the law, pursued a legitimate aim – the protection of the health and development of the children – and had been proportionate to the aim pursued. There had thus been no violation of the applicants' rights under Article 8 of the Convention.

83. They emphasised the deficiencies in the applicants' ability to care for A, B and C that had emerged from the investigation by social authorities, which included information that A and B had been subjected to physical abuse. Some of the other grounds relied on for taking the children into public care might appear less serious considered individually, but taken together they offered a clear picture of the applicants' lack of ability to care for the children, which in turn had had a negative impact on the children's development. They also submitted that regard must be had to the fact that the applicants had shown a lack of will to cooperate with the domestic authorities and that the second applicant, in particular, had interfered in the care of the children in an inappropriate way.

84. The Government observed that the Social Council had based their decisions on public care and contact restrictions on a thorough investigation. Moreover, throughout the domestic proceedings, the responsible courts had unanimously found that it was necessary to take the children into public care and to extend the care order. The domestic courts had also found that contact restrictions were necessary, although the scope of these restrictions was amended in later judgments to allow more contact between the applicants and their children. The applicants were represented by legal counsel throughout the proceedings, as were the children, who had their own legal counsel to protect their interests and who supported the protective measures. Furthermore, oral hearings were held where experts, including child psychologists, were heard. Against this background, the Government

considered that the domestic authorities had had a very solid basis for their assessment of the necessity of the measures complained of.

85. Further, the Government stressed that the domestic legislation was in line with the Convention standards and that the national courts had assessed the proportionality and necessity of the measures each time they had considered the case. Their reasoning had been nuanced and well-justified and the conclusions reached had been both relevant and sufficient for the purpose of Article 8 § 2. The measures had been in the best interests of the children, which should always be a primary consideration. Having regard to the margin of appreciation, there had to be strong reasons for the Court to find that the measures complained of amounted to a violation of Article 8.

86. As concerned the contact restrictions, the Government argued that particular attention should be given to the fact that the applicants had failed to cooperate with the domestic authorities. For instance, the applicants had contacted the children in ways they were not supposed to, thereby interfering in the care of the children in an inappropriate manner and demonstrating a lack of ability to put the interests of the children before their own. Also, the second applicant had behaved in a threatening manner towards the social services on several occasions and the seriousness of this was reflected in the fact that he was sentenced to imprisonment for that behaviour. Moreover, A, B and C had developed in a positive manner since being placed in foster homes. It was therefore understandable that the domestic authorities were reluctant to allow more extended contact rights, as it could potentially have a detrimental effect on the children. Finally, the Government considered that it had to be taken into account that the contact restrictions had become less strict over time and that the relations between the applicant and their children had been preserved.

87. Having regard to all of the above, as well as to their margin of appreciation, the Government maintained that the relevant decisions and judgments of the domestic authorities regarding the public care, contact prohibition and contact restrictions had been proportionate to the aim pursued, which was the protection of the children's health and development. The interferences in the family life of the applicants had therefore been necessary in terms of Article 8 § 2 and thus no violation of the Convention had occurred in the instant case.

B. The Court's assessment

88. The Court notes at the outset that it is clear that the instant case concerns "family life" within the meaning of Article 8 and that the decision to take the children into public care, the decisions to extend their public care and the decisions to impose contact restrictions on the applicants constituted an interference with their right to respect for their family life. It further observes that the measures taken were in accordance with the law, namely

the 1990 Act, and it finds no reason to doubt that the measures were intended to protect the health and the right to development of the children. It thus remains for the Court to examine whether the measures taken were "necessary in a democratic society" under the second paragraph of Article 8.

89. In carrying out this assessment, the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify the measures were relevant and sufficient for the purpose of paragraph 2 of Article 8 (see, *inter alia*, *Olsson v. Sweden* (no. 1), judgment of 24 March 1988, Series A no. 130, § 68). It will have regard to the fact that perceptions of the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area. However, consideration of what is in the best interests of the child is in every case of crucial importance (see *K. and T. v. Finland* [GC], no. 25702/94, § 154, ECHR 2001-VII). Indeed, the Court has emphasised that in cases of this type (public care of children and contact restrictions) the child's interest must come before all other considerations (*Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX).

90. Moreover, the margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake such as, on the one hand, the importance of protecting a child in a situation which is assessed as seriously threatening to his or her health or development and, on the other hand, the aim of reuniting the family as soon as circumstances permit. When a considerable period of time has passed since the child was originally taken into public care, the interests of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited. The Court has indicated that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care (see *K. and T.*, cited above, § 155). However, a stricter scrutiny is called for in respect of any further limitations, such as limitations on parental rights and access (see *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I).

91. Account must also be taken of the fact that the national authorities have the benefit of direct contact with all the persons concerned (see *Olsson v. Sweden* (no. 2), judgment of 27 November 1992, Series A no. 250, § 90). It is not the Court's task to substitute itself for the domestic authorities in the exercise of their responsibilities regarding public care and access but rather to review under the Convention the decisions taken by those authorities in the exercise of their power of appreciation (see, for instance, *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, § 55, and *Johansen v. Norway*, 7 August 1996, § 64, *Reports of Judgments and Decisions* 1996-III).

92. In this regard, the Court reiterates that, although Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8 (see *R. and H. v. the United Kingdom*, no. 35348/06, § 75, 31 May 2011).

93. With regard to the domestic proceedings in the instant case, the Court notes that the applicants were represented by public legal counsel throughout all of the proceedings. They had the possibility to have the Social Council's decisions examined in substance by the Administrative Court and the Administrative Court of Appeal, both of which held oral hearings. They were also able to present their case before every instance, call their own witnesses and cross-examine the authorities' witnesses. The children's interests were safeguarded by a specially-appointed legal representative. It is therefore clear to the Court that the decision-making process as such was compatible with Article 8. This will be an important factor to take into account when it reviews under the Convention whether the domestic authorities acted within their margin of appreciation and gave relevant and sufficient reasons for their decisions (see paragraphs 89-91 above).

1. The public care order

94. It transpires from the public care order of 20 July 2009 that concerns about the family started when C was born in February 2007. These concerns were not only raised in relation to C, but also in relation to A and B. However, the initial efforts by the social authorities to assist and help the applicants came to an end when the applicants refused to continue the contacts with the authorities and the first applicant travelled to Iran with the children. Moreover, it was not only the Swedish authorities that had reacted to the family's situation: the Norwegian social authorities had also initiated an investigation into the family's situation, following their move there in October 2008 and concerns about the children's well-being, reported by A's school and B and C's pre-school.

95. The Court further emphasises that the public care order was based on a comprehensive investigation, which included submissions from the children's temporary foster homes, the local health care service, psychiatric examinations of the children, notes from the BUP and information from relatives and the Norwegian social authorities.

96. This investigation found, *inter alia*, that none of the children had been accustomed to structure or routines. A had stated that he had been beaten by the second applicant and B had told her foster home that she, A and the first applicant had all been beaten by the second applicant. A and B had maintained these statements when talking to various adults, including teachers, the foster home parents and social workers. Moreover, all of the children had lacked communication and emotional response from their parents, which had affected their psychosocial development and their ability to interact socially with other children as well as adults. A was hyperactive and had difficulties following rules and functioning in social situations. His behaviour corresponded to several of the symptoms of ADHD. B was remarkably silent and withdrawn. Psychiatrists had assessed that she was traumatised and had recommended therapy combined with a safe environment where she did not have to deny her experiences. Both she and C were behind in their language development and lacked the ability to express their emotions. Several instances had, over the years, emphasised the children's need for emotional contact with the applicants. The second applicant had failed to compensate for the first applicant's inability in this regard and neither of the applicants had managed to establish routines for the children's basic needs such as food, hygiene, clothes and necessary medical contacts. Thus, the applicants' ability to care properly for their children was questioned. All three children were in need of stability and an environment with clear rules and structure, including stable adults who could compensate for their previous lack of emotional care (see paragraph 17 above).

97. Moreover, the Court cannot ignore the concern expressed by the authorities that the applicants would again decide to travel to Iran with their children. While the Court notes the applicants' explanation that they visited Iran regularly to see the second applicant's family, it is not convinced that their journey to Iran in May 2007 was solely to visit family. It notes, in particular, that they cut all contact with the social authorities just before they left and that the first applicant stayed in Iran with the children for more than one year while the second applicant, after some time, moved to Norway. Moreover, their attempt to travel to Iran in May 2009 also coincided with the on-going investigation into their family situation by the Norwegian authorities. Therefore, the Court acknowledges the social authorities' concerns that the applicants might again leave the country and put the children's health and development at risk. In view of this, it agrees with the domestic authorities that a public care order was motivated by the interest of securing a stable and secure living situation for the children, in particular since the three of them had special needs.

98. The Social Council's decision to take the children into public care was upheld by the administrative courts, which held oral hearings in the case and gave detailed reasons for their decision. In particular, the

Administrative Court of Appeal found that the signs of lack of proper care which had surfaced during the 2007 investigation had emerged even more clearly during the 2009 investigation. All of the children had special needs that had been neglected since the applicants lacked understanding of and ability to care for these special needs. As the applicants opposed voluntary care, the appellate court considered that it was necessary to take the children into public care (see paragraph 24 above).

99. It is also of importance to the Court that the legal representative, who was assigned to defend the best interests of the children, supported the public care order as the investigation had revealed clear warning signs that the children had suffered at home.

100. In view of the above considerations, and having special regard to the best interests of the children, the Court is satisfied that the domestic authorities acted within their margin of appreciation when deciding to take the children into public care.

101. There has accordingly been no violation of Article 8 of the Convention as regards the public care order.

2. The extension of the public care order

102. Turning to the decisions to extend the public care order, the Court notes that the taking into care of a child should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit, and any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child. In this regard a fair balance has to be struck between the interests of the child remaining in care and those of the parent in being reunited with the child. In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child which, depending on their nature and seriousness, may override those of the parent (see *Dolhamre v. Sweden*, no. 67/04, § 111, 8 June 2010, with further references therein).

103. In the present case, the children have been in public care since May 2009. For a public care measure to continue for such a long period of time without there being a violation of Article 8, the Court must be satisfied that the domestic authorities had strong and convincing reasons for their decisions.

104. In this respect, the Court observes that, in reaching its decision on 20 January 2011 to extend the public care order, the Administrative Court found that the applicants had taken steps to improve their ability to care for the children and that the visits between the first applicant and the children had gone well. However, the court observed that the applicants continued to lack understanding of the children's special needs and of their own ability to meet these needs. Moreover, since the applicants had not agreed to the care plan developed for each child, it was not an option to continue the care on a voluntary basis. Thus, the court found no grounds to terminate the public

care since the children were still vulnerable and in need of continued care. These reasons were echoed in the judgment of the Administrative Court of Appeal.

105. Here too, the Court takes into account that the children's legal representative argued for an extension of the public care order and that the national courts held oral hearings and gave well-reasoned judgments.

106. Having regard to the fact that the applicants opposed the children's care plans and considered that there had never been a need to take the children into public care, the Court shares the national courts' concerns that if the public care had been terminated, it would have jeopardised the progress that the children had already made and put their health and development at risk.

107. Although the domestic proceedings in 2015 regarding the extension of the public care order took place after the Court's admissibility decision of 16 December 2014, they give insight into the development of the case on the domestic level and the Court will therefore consider them in the context of the case as a whole. In these proceedings, both the Administrative Court and the Administrative Court of Appeal observed that the applicants' behaviour towards the social authorities was an obstacle to cancelling the public care order. The second applicant had been convicted, *inter alia*, of abusive conduct and threatening the staff of the social authorities (see paragraph 61 above). In the Court's view this shows a serious lack of control on the part of the second applicant, which cannot be explained solely by his feeling frustrated by the situation as well as a lack of respect for others. In such a situation, it is difficult to see how the public care order could be terminated and the children returned to the applicants.

108. Moreover, once again the legal representative argued for an extension of the public care order and, most importantly, the Court observes that all three children had expressed their wish to stay in their foster homes, while meeting with their parents regularly.

109. In these circumstances, the Court is satisfied that the domestic authorities, in the difficult task of balancing the interests of the children remaining in public care and those of the parents in being reunited with them, did not contravene the requirements of Article 8 but gave relevant and sufficient reasons for their decisions to extend the public care order. In reaching this conclusion, the Court takes into account both the children's vulnerability and special needs for stability and security and the applicants' own behaviour which formed an obstacle to reuniting the family (see, for similar reasoning, *Gnahoré*, cited above, § 63, and *Olsson (no. 2)*, cited above, § 91).

110. There has accordingly been no violation of Article 8 of the Convention with regard to the extension of the public care order.

3. The contact rights

111. The Court will also examine the restrictions on the applicants' contact rights. It reiterates that, while the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by the authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life (see *K. and T.*, cited above, § 155).

112. The Court notes that, in December 2010, the applicants were granted limited contact rights, consisting of meeting with the children twice for the first applicant and once for the second applicant, between January and June 2011. Before that, from May 2009, when the children were taken into public care, until December 2010, there was a complete prohibition on contact rights for the applicants. Such complete prohibition on contact should only be applied in exceptional circumstances and could only be justified by an overriding requirement pertaining to the child's best interests (see *Johansen*, cited above, § 78).

113. In this respect, the Court notes that the 1991 Act and the preparatory works to the 1991 Act reflect a very restrictive view on limitations on contact rights (see paragraph 67 above). It is further mindful that the domestic authorities were aware of the implications of the measure and made a careful assessment of all circumstances. Thus, in its judgment of 10 December 2009, the Administrative Court stressed that there had to be "exceptionally strong reasons" to apply such restrictions. The domestic court noted that the applicants were not willing to cooperate with the authorities and that they had repeatedly demonstrated a tendency to evade the Social Council's investigations into their family situation. They further noted that all of the children were in need of special care and stability in order for their development to progress positively. On the basis of the investigation the domestic court found that, if the applicants were granted contact rights to visit the children, there was a real risk that the second applicant, in particular, would intervene in the public care to the detriment of the children. Moreover, there was a risk that the addresses of the children's foster homes would be disclosed, even if the first applicant visited the children alone, for which reason the courts considered that she could not be allowed any contact rights by herself either.

114. The judgment of 8 April 2010 by the Administrative Court of Appeal confirms that the domestic authorities took the applicants' interest into account. The court shared the applicants' concern that the complete contact restrictions could harm the children and noted that the Social Council had a great responsibility to ensure that the children's need for contact with their parents was met. However, for this to be possible, the parents had to cooperate, which they did not fully do. Moreover, the

domestic court had the difficult task of balancing and evaluating whether the risk that the contact rights entailed for the children's health and development outweighed the risk of losing the family bonds if there were no contact. In the present case, the domestic court considered that the only way to find suitable solutions to avoid the risks involved in contact rights between the applicants and the children was for the Social Council to plan the visits carefully together with the applicants and that the applicants be willing to receive the help and support that they needed to help and understand their children. Until these conditions were fulfilled, it would not be possible to arrange the contact. Furthermore, the appellate court carefully considered the possibility of granting only the first applicant contact rights with the children. However, in view of its findings, and the first applicant's passive attitude, it did not consider this a viable option. Thus, a complete prohibition on contact remained the sole solution in the situation as it then was.

115. The Court finds that the domestic courts carried out a detailed and carefully balanced assessment of the applicants' situation and the needs of their children and it finds that their grounds were both sufficient and relevant in the circumstances. Thus, it agrees with the national authorities that there were exceptional circumstances in place which justified the initial complete contact restrictions. The Court further considers that, in large part, the situation was maintained because of the applicants' constant reluctance to cooperate with the social authorities and to understand the needs of their children. It follows that the Court, bearing in mind its subsidiary role (see, *Buchleither v. Germany*, no. 20106/13, § 54, 28 April 2016), concludes that it was justified to maintain complete contact restrictions from May 2009 to December 2010.

116. Since December 2010, the applicants have gradually been granted more extensive contact rights. While the applicants are of the opinion that they should have been granted even more, or unrestricted, contact rights and sooner, the Court notes that the domestic authorities had to consider the best interests of the children and their need for stability in order not to jeopardise their positive development. The Administrative Court stressed in its judgment of 27 September 2011 that only contact restrictions which were necessary for the purpose of the care were allowed and that the best interests of the children should be paramount when making this evaluation. All three children received extra help and assistance to develop and function in their social settings. They were developing well in their foster homes. The domestic court further noted that the applicants' meetings with their children had gone well and that their contact rights had been extended as a consequence. However, in the domestic court's view, the applicants had accepted various measures because the Social Council had told them to do so, not because they felt that they needed them. Thus, having regard to all the circumstances of the case, the courts found that the contact restrictions

decided by the Social Council were still necessary. The domestic courts noted that the Council had to re-evaluate the need for contact restrictions every three months which opened the way for fewer restrictions in time to come.

117. The applicants also had some success in their appeal to the Administrative Court of Appeal. In its judgment of 20 March 2012, the appellate court increased the contact rights and noted that the second applicant had begun to gain better insight into his behaviour and could acknowledge that the way he had sometimes treated his wife could be considered as violence. This, according to the appellate court, was a first step in a process of change with the goal of the children returning home. A part of this process was the contact between the parents and their children. The appellate court found that contact restrictions had been necessary in the instant case but considered that, having regard to the current situation, it should be possible to extend the visits with the children from once every three month to once every other month as requested by the applicants.

118. Thus, the Court is satisfied that the national authorities and courts have continuously reassessed the need for contact restrictions and have, step by step, reduced these restrictions and extended the contact rights. Under the domestic law, such a review takes place every three months and thus it is likely that the contact rights will be further extended, as long as the visits go well and the children benefit from them.

119. Considering the above, the Court concludes that the domestic authorities adequately took into account the applicants' interest in having contact with their children while giving priority to the best interests of the children, ensuring that their well-being was not put at risk. In this respect, the Court observes that the children have continued to develop well in their foster homes but still have special needs which need to be satisfied. Although it took a year and half before contact was restored, the domestic authorities have gradually increased the extent of the contact rights. Importantly, the extent of the contact rights appears to be in line with the express wishes of the children. Therefore, the Court is satisfied that the contact restrictions were necessary with regard to the best interests of the children.

120. It follows that there has been no violation of Article 8 of the Convention in this regard.

FOR THESE REASONS, THE COURT,

1. *Holds*, unanimously, that there has been no violation of Article 8 of the Convention in respect of the public care;

2. *Holds*, by six votes to one, that there has been no violation of Article 8 of the Convention in respect of the contact rights.

Done in English, and notified in writing on 28 August 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Branko Lubarda President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Serghides is annexed to this judgment.

B.L.
J.S.P.

DISSENTING OPINION OF JUDGE SERGHIDES

1. While I voted for the finding that there had been no violation of Article 8 of the Convention in respect of taking the applicants' three children into public care (in a foster family), I regret to say that I was unable to join my distinguished colleagues in finding that there had been no violation of Article 8 of the Convention in respect of the absolute and complete contact restrictions imposed on the applicants and their children. I will thus explain below the reasons for my disagreement.

2. In paragraph 112 of the judgment it is admitted that there had been complete contact restrictions for a period between May 2009 until December 2010, thus for a period of more than a year and a half:

> "The Court notes that, in December 2010, the applicants were granted limited contact rights, consisting of meeting with the children twice for the first applicant and once for the second applicant, between January and June 2011. Before that, from May 2009, when the children were taken into public care, until December 2010, there was a complete prohibition on contact rights for the applicants. Such complete prohibition on contact should only be applied in exceptional circumstances and could only be justified by an overriding requirement pertaining to the child's best interests (see *Johansen*, cited above, § 78)."

3. For the sake of precision, the contact restrictions between May 2009 until December 2010 were, by their nature, not only *complete* but also *absolute* prohibitions. The difference between these two characteristics of contact restrictions or prohibitions, namely being "complete" and "absolute", is that the former refers to all kinds or aspects of contact between the applicants and their children (even telephone or internet communications), while the latter refers to the lack of any exceptions or instances in which the applicants could see their children The latter can also be characterised as a "blanket" ban. Without doubt, such complete and absolute contact prohibitions can be described as particularly far-reaching, strict and harsh measures. All the above characteristics were present in the contact restrictions imposed on the applicants and their children. The children were kept in an unknown place, kept secret from the applicants (see paragraph 35 of the judgment), in a foster family, and the applicants were in absolute and complete isolation from their children for a period of time exceeding a year and a half.

4. However, even after December 2010, for the following six months, as the judgment states (see paragraphs 45 and 112), the contact that the first applicant and second applicant had with their children consisted only in two and one isolated occasions, respectively, since the first applicant had a meeting with the children only twice and the second applicant only once. The Court was, nevertheless, not provided by the Government with information as to the exact dates of these one-off meetings, but was only informed that they had taken place sometime between January and June

2011. On the other hand, the applicants, at page 4 of their observations on the merits (4 May 2015), alleged that they did not see their children for two years. It is also stated in paragraph 81 of the judgment that "[c]oncerning their restricted contact rights, the applicants emphasised that it took two years from the immediate public care decision before they were both allowed to meet with their children".

It is to be noted that the Government, in order to challenge the applicants' allegation that they did not have any contact with their children for the period between January and June 2011, should be in a position to say when these isolated communications took place and for how long. Even after June 2011, the frequency of contacts, as provided for by the Social Council's decision, was very scant, as contact was to be once every three months until the judgment of 20 March of 2012 of the Administrative Court of Appeal, which extended the contact visits to once every other month (see paragraph 117 of the judgment).

It was also very harsh for the Social Council to decide, not only on 29 June 2011 but also on 4 September 2013, to allow telephone contact between the applicants and their children twice a year, for no more than 20 minutes each time and in a controlled setting (see paragraphs 46 and 55 of the judgment).

However, it suffices for me to confine my dissenting opinion to the period from May 2009 until December 2010, for which it is admitted by both parties that there was no contact or communication at all between the applicants and their children.

5. With due respect, although the majority rightly stated the principle, namely that a complete prohibition on contact should only be applied in exceptional circumstances and could only be justified by an overriding requirement pertaining to the child's best interests (see paragraph 112 of the judgment), they, nevertheless, erred in their interpretation of "exceptionally strong circumstances". In the present case, neither the life, nor the physical integrity, nor the morality of the children, were at stake. There was a sufficient reason in the best interests of the children for them to be taken into public care, namely the lack of the applicants' ability to provide for their children's care (simply, the lack of proper care), but there were no "exceptionally strong reasons" for the children to be deprived of *any* contact or communication with their parents.

As to whether the physical integrity of the children was at stake, one cannot but note some contrary allegations from children A and B. In paragraph 23 of the judgment it is stated as follows:

> "During a meeting with the children, A had declared that he wanted to live with his parents and siblings and that there were too many rules where he now lived. He had stated that the second applicant had sometimes beaten him and had sometimes been kind. B had told her foster home parents that the second applicant had beaten her."

However, the applicants "denied that either of them had ever hurt the children" and, "moreover", they argued that "there was no medical evidence substantiating any accusations of physical violence" (see paragraph 21 of the judgment). The majority, in their assessment regarding the "contact rights", neither referred to the above allegations of children A and B, nor invoked such allegations as an "exceptionally strong reason" for absolutely restricting contact rights in the present case. Besides, the applicants were willing to accept contact rights "in the presence of representatives of the Social Council" and "were also willing to hand over their passports to the authorities" (see paragraph 37 of the judgment). That was said by the applicants in denying that they had previously tried to evade the social authorities and in emphasising that, even if the authorities believed that there was such a risk, then, were their proposal for supervisory contact to be adopted, any such concern of the authorities would immediately be removed (ibid).

It is also my view that, were such proposal for supervisory contact to be adopted, then any other concern of the authorities, including domestic violence, would be removed. But, as has been said, no issue of domestic violence was raised as regards contact rights, and the subsequent facts, when the contact rights of the applicants were restored to some extent, show that such an issue was not serious.

6. What the majority considered to be "exceptionally strong reasons" in the present case is stated in paragraph 113-15 of the judgment. From what is said in paragraph 113, it is apparent that the decisive factor which led the Swedish authorities to impose absolute and complete contact restrictions was the settlement and stability of the children in the foster family. In this connection, it is also stated in the judgment (paragraph 113) as follows:

> "... if the applicants were granted contact rights to visit the children, there was a real risk that the second applicant, in particular, would intervene in the public care to the detriment of the children. Moreover, there was a risk that the addresses of the children's foster homes would be disclosed, even if the first applicant visited the children alone, for which reason the courts considered that she could not be allowed any contact rights by herself either."

7. But the above could in no way be considered, in my humble view, as constituting "exceptionally good reasons". Furthermore, as will be seen later on, according to the case-law of the Court (see extracts from *Johansen v. Norway,* no. 17383/90, § 78, 7 August 1996, and *Margareta and Roger Andersson v. Sweden,* no. 12963/87, § 95, 25 February 1992, quoted below), the measures taken to restrict contact must be compatible with the aim of reuniting the applicants with their children and not deprive them of any conduct or relations or isolate them completely such that the family bonds are lost. However, the measures taken in the present case were of such an absolute or blanket character that they were not conducive to the reuniting of the family, but on the contrary risked causing a complete and permanent

break-up. In this connection, a complaint of one of the applicants was "that the social authorities had made no efforts to work towards reuniting the family" (see paragraph 80 of the judgment).

Furthermore, the fact that the applicants, after about two years, had some contact with their children (albeit very scant), does not invalidate the argument that these absolute measures, which lasted for so long, were inconsistent with the aim of reuniting the applicants with their children.

It should be noted that in family matters the passage of time can have irremediable and irreparable consequences for relations between children and parents, and a period in which there is no communication between them can never be compensated for by anything.

8. In paragraph 114 of the judgment it is stated that the domestic court:

> "shared the applicants' concern that the complete contact restrictions could harm the children and noted that the Social Council had a great responsibility to ensure that the children's need for contact with their parents was met. However, for this to be possible, the parents had to cooperate, which they did not *fully* do [emphasis added]"

But the fact that the parents did not *fully* cooperate with the Social Council, could not be considered as an "exceptionally strong reason" to deprive the applicants and their children from any contact or relationship for such a long time. Cooperation with the Social Council would not be an end in itself, but a means to improve the relations between parents and children.

In paragraph 115 of the judgment, the majority refer to "the applicants' constant reluctance to cooperate with the social services and to understand the needs of their children" as an exceptional circumstance to justify the complete contact restrictions. The "constant reluctance to cooperate", mentioned in paragraph 115, would seem to be at odds with a "lack of full cooperation" (see the exact wording above), mentioned in paragraph 114, unless one is to understand that the Court meant "continuous" but not full cooperation of the applicants with the Social Council.

9. In any event, what is stated in paragraph 115 (quoted in the previous paragraph of my opinion), as well as in other paragraphs of the judgment, as to the cooperation required of the applicants by the social services in order for the applicants to understand their children's needs, could be a relevant reason regarding the issue of the public care order, but not an "exceptionally strong reason" to impose on the applicants and the children such absolute and complete contact restrictions.

10. No complete and absolute contact prohibitions should be used, as they have been used in the present case, as a means of disciplining or punishing the parents or coercing them to cooperate fully with the Social Council. It is important to note from the wording of the judgment, namely "which they did not *fully* do" (emphasis added), that the parents' cooperation with the Social Council was partial and not full. On the other hand, the applicants at page 4 of their observations on the merits (4 May 2005), alleged that their cooperation with the social services had

been good and they gave details of it. This position of the applicants, regarding their good cooperation with the social services, is also referred to in paragraph 80 of the judgment, where it is stated that the applicants further argued that the social authorities had made no efforts to work towards reuniting the family. But even assuming that the applicants' cooperation with the social services was only partial, that was not an "exceptionally strong reason" for the imposition on them of absolute and complete contact prohibitions, so as to make such cooperation "full".

11. Indeed, the measures and attitude of the Swedish authorities in the present case, even if they were adopted for pedagogical reasons, were very harsh and inflexible, and were not compatible with the nature of a family relationship, which requires understanding and sensitivity by the authorities and by all parties concerned. With all due respect, when the Social Council, which is a non-judicial body, and other national authorities, treat parents and children with such an imperium, it could be catastrophic for family relationships.

It can be acknowledged that the access restrictions and secrecy of the children's location were subject to review by the Social Council at least every three months, as provided by law (see paragraphs 68, 116 and 118 of the judgment), but again, in so far as, without any "exceptionally strong reasons", the decision of the Social Council in the present case was always for the absolute and complete contact prohibitions to be continued – ultimately lasting for at least a year and a half – the end result was the same. Therefore, there could be no valid argument on the basis of this "three-monthly review", for finding no violation of the applicants' right under Article 8 in spite of the absolute contact restrictions.

12. Unless there are "exceptionally strong reasons", which did not obtain in the present case, such complete and absolute restrictions, as imposed on the family in question, run counter to the *core* or *essence* of the best interests of the applicants' three children as well as to the *core* or *essence* of the applicants' right to respect for their family life. This, in the context of the provisions of Article 8 §§ 1 and 2, would mean: (a) that the complete and absolute restrictions could not be used for a legitimate aim in relation to "the protection of the rights and freedoms of others" (see paragraph 2 of the said Article), because such measures could be detrimental or harmful to the best interests of the "others", in the present case, the applicants' three children, and (b) that those measures could violate the applicants' right to respect for their family life under paragraph 1 of the said Article, in terms of their right to be able to have contact and communicate with their children.

Despite the public care order, this aspect of the applicants' right under Article 8 § 1, to have contact with their children, has a dual function or character, because it could offer protection to the parents' own interests as well as to the best interests of their children. In this connection, it must be remembered that, according to the case-law of the Court, in balancing the

human rights involved, "the child's best interests must be *the* primary consideration" (see, *inter alia*, *Neulinger and Shuruk v. Switzerland*, [GC], no. 41615/07, § 134, ECHR 2010, emphasis added)[1]. And it is a requirement of the best interests of the children, especially for their proper development in every aspect, for them to have contact with their parents. Besides, the wishes of the children should always be taken into account.

13. To impose complete and absolute or blanket restrictions on contact rights between parents and children, as the restrictions can be characterised in the present case, without there being "exceptionally strong reasons" – and there were none in the present case – amounted, in my humble view, to applying the principle of proportionality wrongly, or, more precisely to not applying it at all. That was so, because there was no legitimate aim to be pursued by the restrictions, since they were not serving the best interests of the children – which require that children have contact with their parents – but ran counter to those interests.

However, even assuming that the restrictions had a legitimate aim in so far as they had been imposed in the name of the children's best interests, they were, nevertheless, extremely disproportionate to that aim, and, therefore, not "necessary in a democratic society", not being capable of meeting a "pressing social need". For the same reasons for which the measures were not necessary or proportionate, they were also not relevant, suitable or adequate to achieve the legitimate aim pursued, namely the best interests of the children.

14. As in *Margareta and Roger Andersson v. Sweden* (cited above, § 96, quoted below), the reasons adduced by the Government in the present case to justify the interference at issue were of a general nature and were not "relevant and sufficient", nor did they specifically address the need to prevent any misconduct between the applicants and their children. The Swedish authorities could, in the present case, have opted for a measure that was less intrusive or less injurious in relation to the right affected (that of the applicants), while pursing the same limitation aim, such as, for instance, regular meetings between the applicants and their children supervised by the social services, as was also suggested by the applicants.

The principle of proportionality, prohibiting a measure from being disproportionate to its object, requires avoiding exaggeration when adopting restrictions on individual rights. On the contrary, it requires what is "proportionate". Something disproportionate goes beyond what is necessary, analogous or proportionate.

15. A relevant theoretical but also practical question may arise in the present case regarding the application of the principle of proportionality:

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[1] See, also, Stijn Smet, *Resolving Conflict between Human Rights*, London, 2017, at pp. 145, 165 and 169-171, and Gernard van der Schyff, *Limitation of Rights – A Study of the European Convention and South African Bill of Rights*, Tilburg, The Netherlands, 2005, § 156, at p. 194.

what is the relationship or affinity of the third step of the proportionality principle, namely that the means must be proportionate to their object (i.e. the proportionality test), with the "fair balancing test" made between the limitation and the right, given that the first refers to the balance between the means employed and the purpose pursed, while the latter refers to the balance between a public interest (general interest of the community) and a private (individual) interest, or between two private (individual) interests[2]. In the present case, "the best interests" of the children, represented, in my view, both a private and a public interest. It was a public interest because the applicants' children were in public care, and the State or community had an interest in protecting them; and the children's interest, being a private and public interest, had to be weighed in the balance against the private interest of the applicants under Article 8. In the context of this question, some more specific questions may also arise: is the "proportionality test" the same thing as the "fair balancing test"; is it part of the latter; or is it something different, and, if so, when does it take place before or after the "fair balancing test"?

It is submitted – and I believe this is a matter of logic – that the "proportionality test", i.e. the balancing of the means against their aim, is not an independent balancing exclusively between these two variables, i.e. "the means" and "the object", but is part of a wider balancing exercise, what is known as the "fair balancing test", i.e., the weighing up and balancing of "the limitation" and "the right affected" [3]. Thus, in examining and deciding, as I tried to do in the present case, whether the means are proportionate to their aim, this is done not in isolation, but (a) by taking into account, at the same time, the right engaged by the measure – in the present case the applicants' right – in the context of the wider balancing exercise between the limitation and the right affected[4], and (b) with a view to finding out

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[2] Though the facts in *Phinikaridou v. Cyprus* (no. 23890/02, § 53, 20 December 2007) were different from the facts of the present case, the following extract from that case can present a good example of the balancing test the Court makes of the different interests involved:

> "53. When deciding whether or not there has been compliance with Article 8 of the Convention, the Court must determine whether on the facts of the case a fair balance was struck by the State between the competing rights and interests at stake ... Apart from weighing the interests of the individual vis-à-vis the general interest of the community as a whole, a balancing exercise is also required with regard to competing private interests."

[3] Sometimes, however, the "proportionality test" is used in a wider sense so as to describe the "fair balancing test", but sometimes also the balancing exercise is used in a stricter sense for the purpose of examining whether the interference answered a pressing social need and was proportionate to the legitimate aims pursued, that is, whether it amounted to a justifiable limitation of the rights in question (see *C.G. and Others v. Bulgaria*, no. 1365/07, § 62, 24 April 2008).

[4] It is to be noted, that unlike the last stage of the principle of proportionality, i.e. the proportionality *stricto sensu*, its other stages are assessed independently from the balancing of the measure against the right, rather dealing with the rationality of the measure (see

whether there are any means or alternatives that would be less intrusive or injurious in relation to the right affected, while pursing the same limitation aim. My finding in the present case is that there could have been a less intrusive means, for example supervisory contacts, to pursue the same legitimate aim and surely in such a way as the rights of the parents and the children would be effectively protected.

If it is ascertained that the limitation completely destroys the *core* or *essence* of a right, without there being exceptionally strong reasons, while, at the same time, there were less restrictive alternative measures available, then one should proceed immediately to find a violation of that right. That was what, in my view, happened in the present case to the applicants' right. In such circumstances, one cannot but conclude that the measures taken, (a) had extremely disproportionate effects on the exercise of the applicants' right, and (b) were also similarly disproportionate to their aim, and, therefore violated Article 8 of the Convention.

16. In the present case, all the elements of the legitimacy of an interference under Article 8 § 2 were absent: (a) legitimate aim of the interference or limitation: "protection of the rights and freedoms of the others", and (b) all steps of the principle of proportionality *lato sensu*: thus, (i) suitability or adequacy of the means, (ii) necessity of the means, and (iii) proportionality *stricto senso*, a "fair balancing test" between the limitation and the right.

17. A lack of or defect in any of the elements of legitimacy of a limitation or restriction required by Article 8 § 2 leads automatically to the conclusion that the principle of proportionality was not complied with properly, or at all, by the national authorities, and, therefore, that the entire proportionality procedure was defective.

I regret to say that in the present case there was no "proportionality test" by the national authorities, contrary to their allegation – and one that the Court accepted (see paragraph 115 of the judgment) – but rather arbitrariness on the part of the national authorities, which cannot fall within their margin of appreciation. Stated otherwise, with due respect, the Swedish authorities seem to have overstepped or transgressed their margin of appreciation.

18. In my view, the principle of effectiveness, which is inherent in the Convention, together with the scope of Article 8 of the Convention on which this principle is based, was not respected in the present case by the national authorities, not only regarding the applicants' right under Article 8 § 1, but also regarding the "the protection of rights and freedoms of others", i.e. the rights of the applicants' children under a relevant

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Francisco J. Urbina, *A Critique of Proportionality and Balancing*, Cambridge, 2017, at p. 37; Aharon Barak, *Proportionality – Constitutional Rights and their Limitations*, Cambridge, 2012, at pp. 344-5; and J. Rivers, "Proportionality and Variable Intensity of Review", 65 *Cambridge L. J.* 174, at p. 200).

limitation aim provided for in paragraph 2 of this Article, as well as directly under paragraph 1 of the same Article. More precisely, on the one hand, the applicants' right could not be practical and effective if the interference imposed was, as has been said above, prone to destroying or negating that right; on the other hand, the rights of the applicants' children could not be practical and effective, in the context of either paragraph 2 or paragraph 1 of Article 8, if the interference imposed was capable of undermining or negating these rights as well. Moreover, as already stated (see paragraph 15 above), the community's interest could not be satisfied if the measures taken ran counter to the best interests of the applicants' children.

It is a very rare phenomenon for a limitation measure to have, in fact, two arrows, one directed against its own aim and the other against the right on which it is imposed. But, again, metaphorically speaking, I cannot put it more vividly than to say this: such a phenomenon may resemble, in terms of the consequences of a limitation on the right engaged by the limitation and the limitation itself, to the simultaneous committing of a murder and a suicide by the same aggressor.

Thus, in such cases, one cannot speak of a real or genuine conflict (but of a fake or imaginary conflict, or no conflict at all), between the rights protected under the limitation and the right engaged by the limitation, because ultimately both these rights are negatively affected by the limitation and neither of them is in fact protected.

There would be no conflict of rights at all if the measure had provided, at the outset, for regular supervised contacts. In such a case, both the applicants' right and the children's right would have been practically and effectively exercised and protected.

19. The national authorities not only had a negative obligation to abstain from violating the applicants' right, as well as the children's right, under Article 8, but also a positive obligation, under the same Article, and under Article 1 of the Convention, to secure, protect and make practical and effective these rights, not by isolating the parents from their children for so long, as they did in the present case, but by finding ways to preserve regular contacts between parents and children without any interruption and with a view to reuniting the family. In *Kosmopoulou v. Greece* (no. 60457/00, § 44, 5 February 2004) the Court pertinently held as follows:

> "As to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a right for parents to have measures taken with a view to their being reunited with their children, and an obligation for the national authorities to take such measures. This applies not only to cases dealing with the compulsory taking of children into public care and the implementation of care measures, but also to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family (*Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299, p. 20, § 55)."

20. Under no circumstances may a limitation on a right lead: (a) to an abuse of this right, or (b) to limiting the "rights and freedoms of others", thus, also, to an abuse of the limitation itself. As rightly expressed by Steven Greer[5]:

> "The principles of non-abuse of rights and non-abuse of limitations found in Articles 17 and 18 also derive from the principle of effective protection since they prohibit states and others from undermining the protection of rights by abusing either the rights themselves or their limitations."[6]

21. Though the majority in the judgment, when dealing with "the contact rights", rightly refer to *Johansen v. Norway* (cited above, § 78), on the issue that complete prohibition should only be applied in exceptional circumstances, they, nevertheless, did not refer to what was also mentioned in the same paragraph 78, as well as in paragraphs 80 and 84 of *Johansen*, which were very relevant to the present case and should be taken into account:

> "78 ... In the present case the applicant had been deprived of her parental rights and access in the context of a permanent placement of her daughter in a foster home with a view to adoption by the foster parents ... These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests (see, *mutatis mutandis*, the *Margareta and Roger Andersson* judgment ...).
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> ...
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> 80. It is also relevant that it was in the child's interest to ensure that the process of establishing bonds with her foster parents was not disrupted ...
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> ...
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> 84. Against this background, the Court does not consider that the decision of 3 May 1990, in so far as it deprived the applicant of her access and parental rights in respect of her daughter, was sufficiently justified for the purposes of Article 8 para. 2, it not having been shown that the measure corresponded to any overriding requirement in the child's best interests (see paragraph 78 above).
>
> Therefore the Court reaches the conclusion that the national authorities overstepped their margin of appreciation, thereby violating the applicant's rights under Article 8 of the Convention."

22. Regrettably, the majority omitted to refer to and discuss a very relevant judgment of the Court, which was mentioned at page 5 of the applicants' observations on the merits (4 May 2015), namely *Margareta and Roger Andersson v. Sweden* (cited above). Unfortunately, the majority departed from the principles of that judgment while my proposed approach, I humbly suggest, is in line with these principles. In that case, the Court held

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[5] See Steven Greer, *The European Convention on Human Rights – Achievements, Problems and Prospects*, Cambridge, 2006.
[6] Ibid., at p. 198.

as follows, and this holding should also have been applied in the present case:

> "95. In the circumstances of the case the restrictions on meetings between the applicants should however be considered in the broader context of the restrictions on access as a whole. Indeed, besides the fact that the applicants' right to visits was severely restricted, they were also prohibited from having any contact by mail or telephone during the period from 6 August 1986 to 5 February 1988. As of the latter date, the prohibition was revoked, except that it was for Roger to take the initiative of telephone communications. In the Court's view the measures relating to this period were particularly far-reaching. They had to be supported by strong reasons and to be consistent with the ultimate aim of reuniting the Andersson family, in order to be justified under Article 8 para. 2.
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> 96. The reasons adduced by the Government are of a general nature and do not specifically address the necessity of prohibiting contact by correspondence and telephone. The Court does not doubt that these reasons were relevant. However, they do not sufficiently show that it was necessary to deprive the applicants of almost every means of maintaining contact with each other for a period of approximately one and a half years. Indeed, it is questionable whether the measures were compatible with the aim of reuniting the applicants.
>
> 97. Having regard to all the circumstances of the case, the Court considers that the aggregate of the restrictions imposed by the social welfare authorities on meetings and communications by correspondence and telephone between the applicants was disproportionate to the legitimate aims pursued and, therefore, not 'necessary in a democratic society'. There has accordingly been a breach of Article 8."

23. In view of the above, the interference was made neither in accordance with the requirements of the provisions of Article 8 § 2 of the Convention nor in accordance with the existing case-law of the Court, and, therefore, the measure taken should not have prevented the applicants from exercising their right to respect for their family life. Consequently, there has been, in my view, a breach of Article 8 of the Convention.

24. I would have made an award to the applicants in respect of non-pecuniary damage, plus costs, for the violation of their right to respect for their family life under Article 8, but being in the minority, it is unnecessary to determine the amount of such damage and costs.