THE PROPORTIONALITY OF NON-CONSENSUAL ADOPTION IN ENGLAND AND WALES UNDER S52(1)(B) OF THE ADOPTION AND CHILDREN ACT 2002

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A thesis submitted for the degree of a Doctorate of Philosophy in Law

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Date of submission 04 February 2016

Abstract

This thesis conducts a conceptual analysis of the proportionality of non-consensual adoptions in England and Wales. It does so by examining the English legislation and case law on adoption and the jurisprudence of the European Court of Human Rights (ECtHR). This thesis considers and applies rights from the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of the Child (UNCRC) to determine when non-consensual adoption may be regarded as a necessary and proportionate interference with children's and parents' rights.

The proportionality principle requires the domestic courts and the ECtHR to strike a balance between the various rights and interests of children and parents while taking into account children's welfare. The final strand of the proportionality principle identifies whether the State measure is the least restrictive measure available to satisfy the State's objective. This strand is not applied in all non-consensual adoption cases heard by the domestic courts or the ECtHR. However, this thesis argues it is essential to identify whether less restrictive alternatives exist as these measures may prove equally effective in protecting children's welfare when compared with adoption, and may also protect children's and parents' rights.

This thesis makes a conceptual contribution to the academic scholarship on non-consensual adoption law by identifying how the UNCRC, the ECHR, the best interests principle and ECtHR jurisprudence can be applied so as to provide optimal protection for children's and parents' rights in adoption cases. This thesis concludes that judicial reasoning in the courts should routinely consider UNCRC rights and the effectiveness of less restrictive alternatives. Furthermore, it argues that there is a positive obligation under ECHR Article 8 to provide State assistance in circumstances where children can safely be raised by their parents, which is not yet recognised in English case law.

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Acknowledgements

Sometimes it seems like a lifetime ago that I began this PhD journey. At times, it has been a pleasure and one of the most blissful experiences I could ever have imagined. At other times, I have had less than blissful experiences along the way, but with patience, determination and support from my supervisors, friends, family (and lots of chocolate!) I have made it through this long journey.

I would like to thank my supervisors Professor Sabine Michalowski and Dr Aoife Daly for their time, patience and support during this process. You have helped me to grow and helped me to realise my dream and, for that, I am very grateful. I would also like to thank Professor Maurice Sunkin and Dr Laure Sauve who have provided me with valuable feedback over the years, which has served to improve the quality of my work. I would also like to thank both Kate Standley and David Sykes for their feedback and their encouraging e-mails in the final stages of the thesis during which I began to live a hermit-like existence.

I would like to thank my friends Melody, Michelle and Dawn, who listened to me when I needed to talk about how the thesis was going and who have been privy to the ups and downs. I would like to thank Julia for advice which helped me to see clearly in some of the challenging moments and to thank Bart for his uplifting humour. Last, but not least, I would like to thank my family for their encouragement in the difficult moments and for their help in caring for my daughter Meredith, which enabled me to work on my thesis. I am very grateful as I could not have completed the thesis without their help. I would like to thank Meredith too, for her beautiful hand-made ‘rescue’ owls, her knock-knock jokes and her willingness to play independently in the final stages of my thesis.

Thank you to everyone who has been a part of my PhD journey.

Chapter 1: Introduction

1.1 General Introduction

A picture is worth a thousand words. In a well-publicised YouTube video,[1] which later gave rise to the case of *Re J (A Child)*,[2] a social worker can be seen forcibly removing a baby from the crying mother's arms. The video is highly emotive and disturbing, and yet it is just one example of many troubling stories on non-consensual adoption. Such stories can be found on different news websites including the BBC,[3] *The Telegraph*,[4] *The Guardian*,[5] *The Daily Mail*[6] and various blogs.[7] Television documentaries,[8] online petitions[9] and freedom of information requests[10] have been made. Furthermore, non-governmental organisations[11] and high profile figures such as John Hemming MP[12] and

[1] Harrowing. Six-hour-old baby day taken away by Social Services. https://www.youtube.com/watch?v=XOZPsSuINco

[2] [2013] EWHC 2694 (Fam).

[3] 'MP claims 1,000 children "wrongfully" adopted every year' (13 December 2011) http://www.bbc.co.uk/news/uk-politics-16157124
'Rape victims children face 'barbaric' adoption' (27 March 2014) http://www.bbc.co.uk/news/uk-26768256
'Families flee UK to avoid forced adoption' (6 October 2001) http://www.bbc.co.uk/news/uk-29502832
'Adoption: Thousands of children forcibly taken into care' (2 February 2015) http://www.bbc.co.uk/news/uk-31089412

[4] Christopher Booker, 'Forced adoption is a truly dreadful scandal' (*The Telegraph*, 3 July 2010) http://www.telegraph.co.uk/comment/columnists/christopherbooker/7870342/Forced-adoption-is-a-truly-dreadful-scandal.html

[5] Owen Bowcott, 'Latvia complains to UK parliament over forced adoptions' (*The Guardian*, 9 March 2015) http://www.theguardian.com/uk-news/2015/mar/09/latvia-complains-to-uk-parliament-over-forced-adoptions. See for example a case which attracted media attention: *CB (A Child)* [2015] EWCA Civ 888.

[6] Frances Hardy 'Blood chilling scandal: of the thousands of children stolen by the State: Denise Robertson writes about her lengthy investigation' (*Daily Mail*, 27 May 2015) http://www.dailymail.co.uk/news/article-3098468/Blood-chilling-scandal-thousands-babies-stolen-State-TV-agony-aunt-Denise-Robertson-s-spent-years-investigating-says-s-monstrous-injustice-age.html . Denise Robertson has written a fictional book, 'Don't Cry Aloud' on what she states are based on real life situations she encountered, where parents had their children removed by the State.

[7] https://punishmentwithoutcrime.wordpress.com/, http://suesspiciousminds.com/tag/forced-adoption/

[8] For example, the ITV series, 'Don't Take My child' and Panorama 'The Truth About Adoption.'

[9] https://www.change.org/p/eu-parliament-abolish-adoptions-without-parental-consent

[10] https://foi.brighton-hove.gov.uk/requests/3233 19 May 2014; http://www.lincolnshireecho.co.uk/Courts-act-protect-133-risk-youngsters/story-11225063-detail/story.html

[11] http://www.aims.org.uk/Journal/Vol21No2/childAbuse.htm; http://www.justice-for-families.org.uk/, http://www.fassit.co.uk/ian_joseph.htm . Ian Joseph has referred to this type of adoption as 'forced' adoption. This terminology is considered by Munby P in *N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112 at para 8. It has been noted in Julie Doughty, '"Where nothing else will do": Judicial approaches to adoption in England and Wales' [2015] 39 *Adoption and Fostering* 105 at 107 that this terminology is derived from jurisdictions such as Spain and Australia where many adoptions took place without parental consent, in the past.

[12] For overview of John Hemming's concerns see: 'MP claims 1,000 children 'wrongly' adopted every year' (13 December, 2011) http://www.bbc.co.uk/news/uk-politics-16157124 ; Children first: the child protection system in England, Fourth Report of Session 2012-13, Volume II Q370-374.

Dr Peter Dale, a former NSPCC advisor,[13] have voiced their concerns about how readily children may be taken into care[14] and, in some cases, placed for adoption without the consent of their parents. The issue has also caught the attention of the Council of Europe, which has expressed concern about how existing legislation and practice on adoption in England and Wales may violate children's rights.[15]

The number of looked after children has increased steadily.[16] In 2014, 30,430 children entered the care system.[17] Of these children, 5,050 were placed for adoption and 76 per cent of these adopted children were aged between 1 and 4.[18] The average age to be adopted is 3 years and 5 months, which is 6 months younger than in 2010 and the number of children who are reunited with their parents continues to fall, with there being a decrease of 24 per cent since 2010.[19] The emphasis on adoption as a measure of permanence for children in care can be traced back to the Waterhouse Inquiry.

In 2000, the Waterhouse Inquiry[20] raised concerns about the poor social, emotional and educational long-term outcomes for children who remain in care.[21] While parental neglect or abuse may predispose children to poor long-term outcomes,[22] remaining in State care is, nonetheless, seen as detrimental to children's well-being.[23] Statistically, figures

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[13] 'Adoption: Thousands of children forcibly taken into care' (2 February, 2015) http://www.bbc.co.uk/news/uk-31089412 ; Dr Peter Dale, *Contact Arrangements for Children: A Call for Views*, (Department for Education, 2012) - http://www.peterdale.co.uk/downloads/

[14] Sometimes, a child may be accommodated as a 'child in need' under the Children Act 1989, s20 before a care order is made under the Children Act 1989, s31 and then an adoption order without parental consent under the Adoption and Children Act 2002, s52(1)(b). This has been controversial. For example, see: *N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112 and Julie Stather, 'Is time running out for section 20 of the Children Act?' (2014) http://www.familylawweek.co.uk/site.aspx?i=ed129019

[15] Olga Borzova, *Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member states* (Council of Europe, 2015).

[16] Department for Education, *Children Looked After in England (including care leavers) year ending 31 March 2014* (Department of Education, 2014).

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

[20] *Lost in Care - Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974* (2000). See also: The Special Standing Committee on the Adoption and Children Bill, 29 November 2001 (afternoon).

[21] It should be noted, however, that poor educational outcomes may be associated with pre-care experiences or pre-existing special educational needs rather than due to being in care, even though while in care, children's problems may persist. See: Aoife O'Higgins, Judy Sebba and Nikki Luke, *What is the relationship between being in care and the educational outcomes of children? An international systematic review* (University of Oxford, 2015).

[22] *Ibid.*

[23] Moira Szilagyi, David Rosen, David Rubin and Sarah Zlotnk, 'Health Care Issues for Children and Adolescents in Foster Care and Kinship Care' [2015] 136 *American Academy of Pediatrics* 1131.

suggest that children in care are more likely to suffer from mental illness, to perform poorly at or fail their GCSEs[24] and are more likely to go to prison than children outside of the care system.[25] The high numbers of and poor outcomes for children in care considered in the Waterhouse Report sparked discussion on how law and policy reform could best tackle this social problem. Based on the positive social, emotional and educational outcomes for adopted children,[26] adoption was seen by the Labour government as the best option for removing children from care and for improving their long-term outcomes in life.[27]

It is apparent then that there is tension between the principles of non-intervention in family life on the one hand and child protection on the other,[28] as removing a child into care and subsequently placing a child for adoption may potentially be a violation of parental rights under ECHR Article 8. State intervention into family life and the removal of a child into care can be justified on the basis of the child's welfare. However, non-consensual adoption is a severe and permanent form of intrusion into family life. It is important to consider when such intrusion may be necessary to protect the child's right to life under Article 2 of the European Convention on Human Rights (ECHR[29]), the right to freedom from torture or inhuman or degrading treatment under ECHR Article 3[30] and, the child's right to respect for private and family life under ECHR Article 8. These rights may, in some cases, be protected via non-consensual adoption but potentially there may be less restrictive alternatives available which may be equally effective.

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[24] National examinations taken by children in England and Wales at the age of 16.
[25] This is still the case today. See, for example: Rachel Blades, Di Hart, Joanna Lea and Natasha Willmott, *Care - A Stepping Stone to Custody?* (Prison Reform Trust, 2011), p1. Government figures consistently demonstrate that more children in care commit criminal offences than children who are not in care. Children in Care in England Statistics, 13 August 2014. In the year ending March 2012, for example, 7 per cent of looked after children aged between 10-17 were subject to a conviction, final warning or reprimand compared with 2 per cent of all children.
[26] *Adoption: A New Approach* (White Paper, 2000). For example, see: J. Castle, C. Beckett and C. Groothues, 'Infant Adoption in England' [2000] 24 *Adoption and Fostering* 26. See subsequent research which confirms the benefits of adoption: John Triseliotis, 'Long-term foster care or adoption? The evidence examined' [2002] 7 *Child and Family Social Work* 23; D. Quinton and J. Selwyn, 'Adoption: Research, Policy and Practice' [2006] *CFLQ* 459.
[27] *Ibid.*
[28] See for example *Re J (Children)* [2013] UKSC 9 and the discussion of Brian Sloan in: 'Re J – Uncertain Perpetrators in Child Protection Cases' https://www.youtube.com/watch?v=WYhaxBanCts . More generally on clashes between rights and welfare (or wellbeing) see: E. Kay Tisdall, 'Children's Wellbeing and Children's Rights in Tension?' [2015] 23 *International Journal of Children's Rights* 769.
[29] Formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms.
[30] *In the Matter of J (Children)* [2013] UKSC 9 at para 1, *per* Lady Hale (in relation to Article 3).

The ECHR is an important Convention which forms part of a substantial body of law on human rights in England and Wales and indeed in Europe.[31] Judges, social workers and other professionals involved in deciding whether or not children ought to be placed into care and/or placed for adoption have an obligation to have regard to the Convention Rights of children and parents. The legal basis for this obligation is the Human Rights Act (HRA) 1998, s6(1) which states that: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'. Therefore, all bodies involved in the adoption decision-making process (such as the courts, Social Services and central government) must not act (or fail to act) in a manner which is incompatible with the ECHR.

Under the HRA, s2(1)(a), the courts in England and Wales must 'take into account' judgments of the European Court of Human Rights (ECtHR). Thus, it is important to consider European jurisprudence and the potential impact that it could have on the decision-making by the courts in England and Wales. It is also important to consider ECtHR judgments because the ECtHR adopts a different approach to decision-making. The impact of this is potentially a different case outcome when the Court considers arguments before it that parents' ECHR Article 8[32] rights have been violated. However, as the ECHR does not expressly refer to children's rights,[33] it is desirable also to examine the United Nations Convention on the Rights of the Child (UNCRC), which is the main international treaty on children's rights. It has been ratified by the UK and is a persuasive authority in both the ECtHR and the English courts. Thus, its general principles provide a relevant framework for discussing and assessing the circumstances in which non-consensual adoption may be a necessary and proportionate measure.

This thesis seeks to establish, by reference to the proportionality principle, whether the existing law on non-consensual adoption in England and Wales appropriately balances the competing interests of children and their parents. In particular, this includes the need to balance the public's interest in protecting children from being subjected to neglect

[31] Most of the provisions of the ECHR are incorporated into English Law through the Human Rights Act 1998.
[32] Claire Simmonds 'Paramountcy and the ECHR: A Conflict Resolved?' [2012] 71 *CLJ* 448.
[33] Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights?' Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' [2001] 21 *HRQ* 308 at 311. The exception to this is a brief reference to the interests of 'juveniles' under Article 6(1) of the ECHR, on the right to a fair hearing.

and/or abuse by their parents with the rights of children and birth parents' mutual rights to live together and/or to develop and maintain relationships with one another. These are important rights which are protected under ECHR Article 8 (the right to respect for private and family life) and under the UNCRC. It is essential to explore what is meant by 'non-consensual adoption' and 'proportionality' as well as the relationship between the concepts (see below).

1.2 Non-Consensual Adoption and Proportionality

The legal definition of adoption in the law of England and Wales is found in the Adoption and Children Act 2002, s67(1)-(3) which provides that an adopted child is regarded as the 'legitimate child of the adopter or adopters' and the effect of an adoption order is to extinguish the parental responsibility of the birth parents. Under the Adoption and Children Act 2002, children may be placed for adoption with or without parental consent. The statute provides that the Court can make an adoption order without parental consent if 'the parent or guardian cannot be found or is incapable of giving consent' (see s52(1)(a)) or 'the welfare of the child requires the consent to be dispensed with' (see s52(1)(b))'.

The term 'non-consensual' adoption is used within this thesis to reflect the fact that parental consent can be dispensed with by the courts in England and Wales and that there is no requirement to take into account the question of whether or not the *child* consents to the adoption. In private law proceedings the Court is required to consider the wishes of the child and will afford significant weight to the child's wishes (under the Children Act 1989) if he or she is regarded as 'Gillick'[34] competent (i.e. has sufficient intelligence and understanding to be able to make his or her own decisions). However, there is no requirement that children need to be consulted about let alone need to consent to adoption. Non-consensual adoption refers then, to adoptions which have taken place without the agreement of birth parents *and* children.

Non-consensual adoption is contentious[35] because it can clash with fundamental human rights since it brings an end to children's and parents' legal, and potentially, factual relationships with one another. Adoption orders are typically irrevocable so as to avoid

[34] *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.
[35] Michelle Donnelly, 'The Supreme Court and the welfare ground for dispensing with parental consent to adoption: *ANS and another v ML (Scotland)*' [2014] *IFLJ* 110.

uncertainty for the prospective adopter(s) and the child.[36] Adoption orders have, however, been revoked[37] in rare cases based on grounds such as the fact that consent to the adoption was based on a fundamental mistake[38] or that the adoption procedure was contrary to natural justice.[39] The general principle in English Law is that the social significance of adoption orders and the protection that adoption provides to adopted children and their adoptive parents is an important reason for not revoking adoption orders.[40]

A significant case where the Court of Appeal refused to revoke non-consensual adoptions of three children is *Webster and another v. Norfolk County Council and others*.[41] This case was the subject of significant media attention[42] and sparked academic scrutiny of adoption law because three children were adopted within less than 19 months of being taken into care and, under the circumstances, the outcome was regarded to be unjust for the parents.[43] In this case, Norfolk Social Services determined that the birth parents were responsible for the bone fractures which the Websters' youngest child, a boy, had sustained. As a consequence, Social Services applied for care orders[44] in respect of all three of the couple's children because their other children were also regarded to be at risk of harm. The judge granted care orders in relation to the children in May 2004 and freed them for adoption under the Adoption Act 1976. Subsequently, the children were placed with prospective adopters and were adopted in December 2005, after the Adoption and Children Act 2002 came into force. The adoption orders were made under the ACA 2002 s52(1)(b) and parental consent was dispensed with on the basis of the children's welfare.

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[36] See discussion in: *Webster and another v. Norfolk County Council and others* [2009] EWCA Civ 59.
[37] In *Re B* [1995] 3 FCR 671, for example, on the basis of his ethnic heritage a young man wished to have an adoption order made when he was a baby, to be set aside. The court refused to do this, believing that it would be damaging to the life-long commitment of adoptive parents if they knew the adoption orders could be set aside.
[38] *Re M (A Minor) (Adoption)* [1991] 1 FLR 458.
[39] *Re K (Adoption and Wardship)* [1997] 2 FLR 221.
[40] *Webster and another v. Norfolk County Council and others* [2009] EWCA Civ 59.
[41] [2009] EWCA Civ 59.
[42] Caroline Gammell, 'Adoption stands despite possible miscarriage of justice' (*The Telegraph*, 11 February, 2009) http://www.telegraph.co.uk/news/newstopics/lawreports/4592069/Adoption-stands-despite-possible-miscarriage-of-justice.html ; http://news.bbc.co.uk/1/hi/england/norfolk/7885047.stm (12 February 2009), http://www.familylaw.co.uk/news_and_comment/court-of-appeal-refuses-to-revoke-adoption-orders#.VXMb9btFCW8 (12 February 2009).
[43] J Herring, 'Revoking Adoptions' [2009] 159 *NLJ* 377; Andrew Bainham, 'The Peculiar Finality of Adoption' [2009] 68 *CLJ* 283.
[44] The Children Act 1989, s31(2).

The parents, Mr and Mrs Webster, were later cleared of any wrong-doing due to expert medical evidence put before the Court, which suggested that the child suffered from a rare vitamin C deficiency known as 'scurvy'.[45] Their legal counsel presented an argument to the Court of Appeal that the finding amounted to exceptional circumstances which justified setting the adoption order aside. The Court of Appeal acknowledged that the parents had suffered an injustice but nonetheless rejected the Websters' appeal. The Court unanimously held that to reverse the adoption orders would run counter to the best interests of the children who had been settled with their adoptive parents for four years by the time of the appeal. Although Wall LJ acknowledged that 'on the face of it, a clear breach of their rights to respect for their family life under Article 8(1)'[46] had occurred, he found that 'the European authorities do not assist Mr and Mrs Webster'.[47] The decision in *Webster* has been criticised by several academic commentators.[48] Herring, for example, suggested that the outcome of the case was 'possibly a manifest injustice'[49] because the parents lost legal ties and the opportunity to maintain relationships with their children, despite the fact that they had not abused them. Similarly, Bainham described *Webster* as a 'profoundly disturbing case'.[50]

A particular concern raised by leading judges in subsequent Court of Appeal and Supreme Court cases is that, in some circumstances, adoption orders may have been made by the lower courts[51] despite the availability of less restrictive alternatives to non-consensual adoption. Sir James Munby, the President of the Family Division of the High Court opined in *Re B-S (Children)*[52] that non-consensual adoption may not always be a proportionate measure and has emphasised that adoption should be regarded as a 'last resort'.[53] Furthermore, Lady Hale, dissenting in the decision of *In the Matter of B (a*

[45] A rare condition which may occur if a person does not have enough Vitamin C in his or her diet.
[46] *Webster and another v. Norfolk County Council and others* [2009] EWCA Civ 59 at para 2, *per* Wall LJ.
[47] *Ibid* at para 175, *per* Wall LJ.
[48] J Herring, 'Revoking Adoptions' [2009] 159 *NLJ* 377; Andrew Bainham, 'The Peculiar Finality of Adoption' [2009] 68 CLJ 283; Brian Sloan, '*Re C (A Child) (Adoption: Duty of Local Authority)* – Welfare and the Rights of the Birth Family in 'Fast Track' Adoption Cases' [2009] 21 *CFLQ* 87; Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' 25 [2013] *CFLQ* 40; Kirsty Hughes and Brian Sloan, 'Post-Adoption Photographs: Welfare, Rights and Judicial Reasoning' [2011] *CFLQ* 393; Sonia Harris-Short, 'Making and Breaking Family Life: Adoption, the State and Human Rights' [2008] 35 *Journal of Law and Society* 28; Peter Harris, 'Article 8 of the European Convention and the welfare principle: a thesis of conflict resolution' [2014] *Fam Law* 331.
[49] J Herring, 'Revoking Adoptions' [2009] 159 *NLJ* 377.
[50] Andrew Bainham, 'The Peculiar Finality of Adoption' [2009] 68 *CLJ* 283.
[51] For example, the Family Proceedings (Magistrates) Court and the County Court.
[52] [2013] EWCA Civ 1146.
[53] See *B-S (Children)* [2013] EWCA Civ 1146.

child)[54] on appeal to the Supreme Court, stated that non-consensual adoption was not proportionate unless it could be shown that adoption was the only way to protect a child and that less restrictive measures of State assistance would not suffice.[55] It has been observed by Munby P, that adoption orders have been made in cases when other less restrictive options may have been available;[56] and that, where possible, less restrictive measures should be used. It can be suggested then, that an important principle which underpins this type of decision-making is the proportionality principle.

Proportionality is a legal principle or methodological tool[57] which enables competing interests to be balanced. Judges can apply the principle of proportionality to decide whether a measure is necessary in order to satisfy a legitimate objective. Proportionality means that a State measure taken in pursuit of a legitimate objective must be commensurate to that objective. The concept of proportionality helps to determine the relationship between the aims and the means or the proper relationship between the constitutional right(s) affected and the means used to achieve the State's purpose.[58] Proportionality means, then, that the measure ought to strike an appropriate balance between the different interests at stake. In adoption cases, this means that the decision-maker ought to take into account the interests of children and parents and balance these (potentially) competing interests and the public interest in child protection. This thesis therefore aims to explore and assess whether or not the law of adoption in England and Wales strikes the correct balance in examining the rights and interests of children and the rights of birth parents in non-consensual adoption cases.

1.3 Non-Consensual Adoption: A Brief Overview of Relevant Literature

There is a considerable body of academic, governmental and judicial commentary as well as media criticism of the current law[59] on non-consensual adoption in England and Wales.

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[54] [2013] UKSC 33.
[55] *In the Matter of B (a child)* [2013] UKSC 33 at para 197.
[56] See *B-S (Children)* [2013] EWCA Civ 1146.
[57] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) p131; David Feldman, 'Proportionality and the Human Rights Act 1998' – in Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (Oregon: Hart Publishing, 1999) p118.
[58] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) p131-132; Tom Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010) p26.
[59] C Barton, 'The Adoption Bill – The Consultative Document' [1996] *Fam Law* 4.
Lynn Davis, 'Adoption and Children Act 2002: Some Concerns' [2005] *Fam Law* 294; J Herring, 'Family: Revoking Adoptions' [2009] 159 *NLJ* 377; Sonia Harris-Short, 'Adoption and Children Bill – A Fast Track

The Adoption and Children Act 2002, s52(1)(b) provides for adoption orders to be made without parental consent, on the basis of the child's 'welfare'.[60] This statutory provision raises difficult issues such as whether or not the rights of birth parents are given sufficient weight and consideration in adoption proceedings, whether consideration is given to children's rights and how the rights of children and parents may be reconciled with children's best interests. Some academics, such as Bainham have argued that there has been a tendency to deny that parents have rights in general;[61] but this argument has the most relevance in adoption cases where there has been deliberate minimisation of parental interests and rights in the context of adoption.[62] Harris-Short has observed that many people may regard what she considers to be sacrificing the rights of parents as being justified in order to ensure that children leave the care system faster.[63] She has acknowledged that the parents' behaviour and the reasons for taking their children into care and placing them for adoption may not warrant sympathy. Harris-Short nonetheless argues that the present adoption system sees parents being unnecessarily 'demonised' and 'marginalised' in the adoption process.[64]

Sloan, for example, has been critical of the fact that parents' ECHR Article 8 rights are not given independent consideration as adoption is such a severe measure that it has the

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to Failure?' [2001] 13 *CFLQ* 405; Sonia Harris-Short, 'Making and Breaking Family Life: Adoption, the State and Human Rights' [2008] 35 *Journal of Law and Society* 28; Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' 25 [2013] *CFLQ* 40; Brian Sloan, '*Re C (A Child) (Adoption: Duty of Local Authority*) – Welfare and the Rights of the Birth Family in 'Fast Track' Adoption Cases' [2009] 21 *CFLQ* 87; Barry Luckock and Karen Broadhurst, 'Adoption cases reviewed: an indicative study of process and practice' (Department for Education, 2013); Michelle Donnelly, 'The Supreme Court and the welfare ground for dispensing with parental consent to adoption: *ANS and another v ML (Scotland)*' [2014] *IFLJ* 110; Finola Moss, 'Authorised abuse?' [2007] 157 *NLJ* 1310.

[60] J Herring, 'Family: Revoking Adoptions' [2009] 159 *NLJ* 377; Andrew Bainham, 'The Peculiar Finality of Adoption' [2009] 68 *CLJ* 283; Andrew Bainham and Hannah Markham, 'Living with *Re B-S, Re S* and its implications for parents, local authorities and the courts' [2014] *Fam Law* 991; Sonia Harris-Short, 'Making and Breaking Family Life: Adoption, the State and Human Rights' [2008] 35 *Journal of Law and Society* 28; Brian Sloan, '*Re C (A Child) (Adoption: Duty of Local Authority)* – Welfare and the Rights of the Birth Family in 'Fast Track' Adoption Cases' [2009] 21 *CFLQ* 87; Brian Sloan 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' 25 [2013] *CFLQ* 40; Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law*, (Oxford: Hart Publishing, 2010).

[61] Andrew Bainham, 'Honour Thy Father and Thy Mother: Children's Rights and Children's Duties' in Gillian Douglas and Leslie Sebba, *Children's Rights and Traditional Values*, (Hants: Dartmouth Publishing, 1998) p93.

[62] Sonia Harris-Short, 'Adoption and Children Bill – A Fast Track to Failure?' [2001] 13 *CFLQ* 405 at 419; Sonia Harris-Short, 'Making and Breaking Family Life: Adoption, the State and Human Rights' [2008] 35 *Journal of Law and Society* 28 at 32.

[63] Sonia Harris-Short, 'Adoption and Children Bill – A Fast Track to Failure?' [2001] 13 *CFLQ* 405 at 424.

[64] Sonia Harris-Short, 'Making and Breaking Family Life: Adoption, the State and Human Rights' [2008] 35 *Journal of Law and Society* 28 at 30.

potential to violate parental rights.[65] This thesis will consider whether it is necessary for independent consideration to be given to parental rights in adoption cases and will consider what this analysis might look like. This thesis will also consider whether the emphasis on speeding up the process of adoption means that, in some cases, non-consensual adoption orders are being made where a less restrictive but equally effective alternative might have been available.

There have been no in-depth studies which have compared the law in England and Wales with the jurisprudence in the ECtHR, and which have considered whether or not the proportionality analysis undertaken by the courts ought to involve an assessment of whether less restrictive alternatives than adoption were available. Bainham, for example, has argued that human rights 'militate against' adoption and favour a less drastic measure, which might preserve kinship links and contacts.[66] More recently, Donnelly has pointed out that there are increasing calls for adoptions not to take place unless there are no equally effective measures available which will protect a child's welfare.[67]

This thesis provides a strong basis to argue that a proportionality analysis (particularly in adoption cases) ought to routinely consider whether or not less restrictive alternatives may be available to non-consensual adoption. It is argued that this is the best approach towards analysing the potentially conflicting rights of children and parents and best interests of children, because it protects children's welfare and rights while simultaneously respecting parental rights.

In general, there has been a great deal of criticism about the lack of protection afforded to parental rights. However, while there has been increasing examination of children's rights in a range of different contexts,[68] there has been limited discussion on the minimal consideration of children's rights in adoption cases, including the child's right to have and continue to develop a relationship with his or her parents and the right to have a say in the adoption process. Harris has suggested that the alleged conflict between the welfare

[65] Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' [2013] 25 *CFLQ* 40.
[66] Andrew Bainham, 'Arguments about parentage' [2008] *CLJ* 322 at 350.
[67] Michelle Donnelly, 'The Supreme Court and the welfare ground for dispensing with parental consent to adoption: *ANS and another v ML (Scotland*)' [2014] *IFLJ* 110.
[68] Note too, initiatives such as the Children's Rights Judgments https://www.liverpool.ac.uk/law/research/european-childrens-rights-unit/childrens-rights-judgments/

principles in Adoption and Children Act 2002 and Children Act 1989 and ECHR Article 8 exists because judges do not distinguish between the different legal purposes and character. He has argued that Article 8 provides important protection for families in that it acts as an 'overarching constitutional provision'[69] which prevents the State from interfering disproportionately in the private and family life of individuals.

He argues that Article 8 has the purpose of determining which orders are available in law and which orders may be proportionate, but not which order should be made. The purpose of the welfare principle, however, is not to provide protection of rights but to dictate which order, if any, to make. He therefore proposes that Article 8 and the welfare principle can be used as part of a two-stage process. The first step of the court ought to be to determine whether or not an adoption order violates the rights of all family members and if so, whether or not the violation is a proportionate measure. Secondly, whether or not the adoption order was a proportionate measure would be relevant in determining children's best interests and deciding whether or not to make an adoption order, another order instead or no order at all.

However, this approach could be seen as more complex than other methods for identifying and balancing rights. While it may be relevant to consider the rights of other family members (such as siblings) who clearly have rights under ECHR Article 8, it is argued that considering the rights of all family members adds unnecessary complexity to the process of analysing parents' and children's rights in adoption cases. Thus, it is argued that unless another family member is making the claim in a non-consensual adoption case, then the focus should be on the rights of the child (or children) and birth parents. Furthermore, such rights considerations could be addressed purely in terms of the child's own interests. For example, if the child has a strong relationship with other family members, this may be a factor under ECHR Article 8 and also under UNCRC Articles 7, 8 and 9 which is relevant for the court to consider. Another difficulty with Harris's approach is that it may also have the effect of making the welfare principle subservient to Article 8. In fact, Harris has acknowledged that judges might be reluctant to conceive of Article 8 and the welfare principle in this way.

[69] Peter Harris, 'Article 8 of the European Convention and the welfare principle: a thesis of conflict resolution' [2014] *Fam Law* 331.

Herring advocates an approach towards children's and parents' rights based on relational ethics[70] whereby solutions are found to promote relationships rather than to focus on best interests or individual rights. He argues that it is the best way forward in legal decision-making since people are 'relational, inter-connected and interdependent'.[71] According to Herring, people do not understand their lives in terms of interests or rights but in terms of their relationships with others and that the legal decision-making process should reflect this reality.[72] He suggests starting a legal analysis with a presumption of an obligation rather than a freedom and indicates that it is a practical norm and it is in responsibilities where our relationships flourish.

Eekelaar has observed that a potential detriment to the child (for example, if an adoption did not occur) ought to be balanced against the potential detriment to the birth parents (for example, if an adoption did occur). According to Eekelaar: 'The best solution is surely to adopt the course that avoids inflicting the most damage on the well-being of any interested individual'.[73] In adoption cases then, if Eekelaar's approach was adopted, the courts would draw up a list of children and parents' interests in adoption cases and consider the approach which was least harmful to all parties. This approach fits in with the central argument of this thesis, which is that a non-consensual adoption ought not take place if there is a less restrictive alternative, but equally effective, alternative available.

However, while useful to this thesis, Eekelaar's approach is weakness-based rather than strength-based. Thus, while a chosen measure might in fact be the least harmful for all of the parties involved, it will not necessarily be the most effective course of action for the child or children in question. Furthermore, if for example, only two different options are available and one option is regarded as less harmful to the child but more harmful to the parent, and vice versa, it is not clear how this dilemma would be resolved. This is why this thesis focuses on the existence of equally effective alternatives to non-consensual adoption rather than measures which emphasise the least detriment to affected parties. Thus, this thesis is based on and aims to build on an approach advocated by Goldtein *et al*

[70] V. Bergum and J. Dossetor, *Relational ethics: The full meaning of respect* (Hagerstown, MD: University Publishing Group, 2005); Cheryl Pollard, 'What is the Right Thing to Do: Use of a Relational Ethic Framework to Guide Clinical Decision-Making' [2015] 8 *International Journal of Caring Sciences* 362.
[71] Jonathan Herring, 'Forging a relational approach: Best interests or human rights?' [2013] 12 *Medical Law International* 32 at 34.
[72] *Ibid* at 36.
[73] John Eekelaar, 'Beyond the welfare principle' [2002] 12 *CFLQ* 237.

who advocated that, where possible, the least detrimental alternative to the family unit, which best meets the needs of the child should be taken.[74]

A unique part of the analysis in this thesis, which has not been considered directly in the existing literature, is how the child's rights under Article 2 (the right to life) and Article 3 (the right to freedom from torture or inhuman or degrading treatment) may be balanced against Article 8 (the right to respect for private and family life) and used to assist in determining whether or not it is proportionate for children to be placed for adoption without parental consent. This thesis also considers the relevance of the UNCRC in adoption cases and whether or not these rights could be helpful in providing an analysis of whether a less restrictive but equally effective alternative to non-consensual adoption may be found.

Inherent in this thesis is an acknowledgment of the apparent tension between the welfare principle and the child's and parents' rights to respect for private and family life under ECHR Article 8. This tension has been acknowledged by many academics,[75] who have emphasised the importance of identifying and providing protection for children's rights in court proceedings. This thesis contributes to the existing academic literature and provides observations which extend beyond previous writings, by emphasising the importance of acknowledging children's rights in the specific context of non-consensual adoption. Although it is clear that children's best interests (protected under UNCRC Article 3) are an important right which must be protected by the courts in England and Wales and the ECtHR, the irrevocability of adoption and the potential loss of meaningful family relationships (protected by ECHR Article 8) means that there ought to be more emphasis on children's rights in the adoption process, including the child's right to be heard in court proceedings (see UNCRC Article 12).

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[74] J. Goldstein, A. Freud, A, Solnit, *Before the Best Interests of the Child* (Norfolk: Burnett Books, 1980) p19-20.

[75] Kerry O'Halloran, *The Welfare of the Child: The Principle and the Law* (Aldershot: Ashgate, 1999); J. Herring, 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary?' [1999] *CFLQ* 223; Shazia Choudhry and Helen Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' [2005] 25 *OJLS* 453; Peter Harris, 'Article 8 of the European Convention and the welfare principle: a thesis of conflict resolution' [2014] *Fam Law* 331; Jane Fortin, 'Children's rights – flattering to deceive?' [2014] 26 *CFLQ* 51; E. Kay Tisdall, 'Children's Wellbeing and Children's Rights in Tension?' [2015] 23 *International Journal of Children's Rights* 769.

This thesis distinguishes itself from previous academic literature by conducting an extensive examination and analysis of important adoption cases heard in the High Court and the Court of Appeal in England and Wales, the UK Supreme Court and the ECtHR. In doing so, it examines the rights and best interests at stake in adoption cases, different methodological frameworks which may be appropriate to be applied in adoption cases where children's and parents' rights (including but not limited to ECHR Article 8) are at stake, less restrictive alternatives but (potentially) equally effective alternatives which may be available to non-consensual adoption and analysis of the circumstances in which non-consensual adoption may (or may not) be regarded as proportionate. While there is undoubtedly a large body of research on adoption law, as evidenced by the critique considered above, there is no study which considers all of these different aspects of adoption and human rights in one text.

1.4 The Research Question

The main issue which is explored in this thesis is whether non-consensual adoption in England and Wales under the Adoption and Children Act 2002, s52(1)(b) can be regarded as a proportionate measure and, if so, in what circumstances it may be regarded as proportionate. In order to determine when non-consensual adoption is a proportionate measure, this enquiry will consider if and when non-consensual adoption strikes the appropriate balance between the best interests and rights of the child on the one hand and the rights of the birth parents on the other. In order to determine whether or not the appropriate balance has been struck, this thesis will explore whether in non-consensual adoption cases, there are less restrictive alternatives available (such as State assistance, kinship care, special guardianship or non-consensual adoption with direct contact) which may be equally effective measures to protect children from harm.[76]

1.5 The Research Methodology

This thesis engages in a black-letter law analysis[77] of non-consensual adoption by focusing on primary sources such as case law, statutes (for instance, the Adoption and Children Act 2002 and the Children and Families Act 2014), government papers and

[76] Donnelly has argued that there is increased emphasis on the need to consider alternatives to adoption which may be equally effective. See: Michelle Donnelly, 'The Supreme Court and the welfare ground for dispensing with parental consent to adoption: *ANS and another v ML (Scotland*)' [2014] *IFLJ* 110.
[77] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) p4.

academic commentary. It also does so by applying 'proportionality' as an interpretive tool to evaluate legal decisions. A black-letter methodological approach to legal analysis has been criticised by some commentators. For instance, the approach has been criticised for its tendency to repeat existing knowledge and for its failure to connect law to life by failing to assess the real world consequences of doctrinal frameworks.[78] Such criticism may be mitigated, however, by analysing the relevant social, psychological and political considerations underpinning adoption law, which are examined throughout this thesis.

This thesis supplements the primary documents used in a black-letter law analysis with brief reference to secondary data such as commentary from BBC news, media reports and other relevant websites. Although caution must be exercised in examining material from sources which have not been corroborated by academic studies,[79] these sources highlight the concern that has been generated by adoption legislation in England and Wales. Reference to such non-legal sources helps to connect the theme of this research to what happens in the 'real' world and thereby to counter the criticism considered above. Although this thesis largely uses qualitative data from the primary and secondary documents referred to above, it also uses quantitative data from the Office for National Statistics and from governmental and non-governmental organisations in order to assess trends in relation to non-consensual adoption in England and Wales.

This thesis considers how the courts apply the best interests test and human rights, in particular the ECHR, in adoption cases. The identification and discussion of the approach taken by the courts provides a platform for examining when and whether children's best interests may clash or be in alignment with their own rights and/or those of their birth parents in non-consensual adoption cases. Examining human rights instruments (in particular, the ECHR and the UNCRC and how these instruments are applied by the courts in England and Wales and by the ECtHR will help to determine whether the legislation and court decisions on adoption in England and Wales are proportionate.

1.6 The Structure of the Thesis

[78] Dawn Watkins and Mandy Burton, *Research Methods in Law* (London: Routledge, 2013) p17.
[79] The value of exercising caution in considering such sources has been acknowledged in the following report: Claire Fenton-Glynn, *Adoption without parental consent: Study for the Peti Committee* (European Union: Brussels, 2015), p24.

In addition to this introduction, this thesis consists of the following six chapters:

Chapter 2 provides an overview of the best interests and rights of children and the rights of birth parents which are relevant in adoption cases. It considers how international human rights instruments, such as the ECHR and UNCRC, may be used as frameworks for furthering the rights of children and parents in the adoption process. This chapter refers to the domestic, European and international legal frameworks which assist in providing an assessment of the circumstances in which non-consensual adoption under the Adoption and Children Act 2002, s52(1)(b) may be proportionate.

Chapter 3 considers the approach taken by the European Court of Human Rights in non-consensual adoption cases where violations of ECHR rights have been alleged. This chapter considers how the Court has analysed parents' and children's rights and children's best interests in adoption cases and how the ECtHR has applied the principle of proportionality. This chapter demonstrates that the State has a positive obligation under ECHR Article 8 to reunite children and parents, where possible. The case law also appears to suggest that there may be a wider obligation under Article 8 to provide State assistance, which might prevent the need for restrictive measures such as non-consensual adoption. This chapter considers how different principles laid down in ECtHR case law could be applied on a consistent basis to determine whether or not a non-consensual adoption order may be regarded as a proportionate measure.

Chapter 4 explains and analyses the relevant case law and statute law on non-consensual adoption in England and Wales, focusing on decisions from the Court of Appeal and the Supreme Court and the legislative framework of the Adoption and Children Act 2002, s52(1)(b). This chapter considers the approach of the courts to the rights of children and birth parents in adoption cases and the extent to which the courts balance these rights against the best interests of children in determining the proportionality of non-consensual adoption. This chapter explains that the law in England and Wales is based on a pro-adoption policy and the courts have gradually started to acknowledge the importance of ECHR rights in adoption cases. This chapter also considers the potential tension between the case law on adoption and the government's pro-adoption policy.

Chapter 5 provides an examination of less restrictive alternative measures to non-consensual adoption in England and Wales. These options are: State assistance, concurrent planning, special guardianship orders, kinship care and non-consensual adoption with contact. The chapter outlines and evaluates these measures and the circumstances in which these measures may be equally effective when compared with non-consensual adoption. In doing so, this chapter considers the circumstances in which these alternative measures are likely to be a more proportionate response to protecting children from neglect and/or abuse at the hands of their parents.

Chapter 6 provides an in-depth discussion of two cases heard in the UK which went to the European Court of Human Rights (*R and H v. UK*[80] and *Y.C. v UK*[81]). This chapter brings together the discussion of children's best interests and rights and parental rights in Chapter 2, the significance of European jurisprudence on non-consensual adoption in Chapter 3 and discussion of case law in England and Wales in Chapter 4 as well as the examination of less restrictive alternatives to non-consensual adoption in Chapter 5.

Chapter 7 concludes the thesis by considering the circumstances in which non-consensual adoption may or may not be proportionate and when it might be more appropriate to use less restrictive alternatives instead. The chapter also makes suggestions for further research with regard to non-consensual adoption law in England and Wales.

[80] [2011] ECHR 844.
[81] (Application no. 4547/10) 13 March 2012.

Chapter 2: Children's Best Interests and Children's and Parents' Rights

2.1 Introduction

The aims of this chapter are to provide an overview of children's best interests, to explain which rights children and parents may argue in adoption cases and to briefly consider the extent to which parental rights may clash, or be in alignment with children's rights and best interests in the context of adoption. 'Best interests' is the determinative principle in England and Wales when the courts are making decisions in relation to children.[82] Since the enactment of the Human Rights Act 1998,[83] the courts in England and Wales have had to consider the relationship between the best interests of children and the rights of children and birth parents because the Act brought the principles of the European Convention on Human Rights (ECHR) into English Law.[84] Furthermore, domestic courts must take into account decisions from the European Court of Human Rights (ECtHR),[85] and international treaties such as the United Nations Convention on the Rights of the Child (UNCRC), which has been ratified by the United Kingdom but not incorporated into domestic law.[86]

This chapter will briefly consider the ECHR (which will be discussed in more detail in Chapter 3) and the UNCRC to see which parents' and children's rights have been and could be argued in adoption cases. In doing so, this thesis will also consider the extent to which certain provisions of the UNCRC clarify what rights children have, what rights parents have, what is meant by children's best interests and the extent to which these competing rights and interests may be balanced against each other in adoption cases. This chapter will consider UNCRC rights which are relevant in non-consensual adoption cases and whether or not the UNCRC could be said to regard non-consensual adoption as a proportionate measure.

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[82] *J v. C* [1970] AC 668.
[83] This statute came into force on 2 October, 2000. It incorporates the European Convention on Human Rights into domestic law.
[84] The full name is the Convention for the Protection of Human Rights and Fundamental Freedoms.
[85] See: *ANS and another v. ML* [2012] UKSC 30.
[86] There have, however, been attempts to incorporate the UNCRC into English Law. See, for example the Children's Rights Bill: http://www.publications.parliament.uk/pa/ld200910/ldbills/008/10008.1-7.html#j01

This chapter can be seen then, primarily as a descriptive chapter in that it explains the legal and rights-based frameworks that have been or could be applied by the courts in non-consensual adoption cases. This chapter will first consider the relevance of the ECHR, the UNCRC, how these treaties are applied in English Law and other relevant principles in respect of children's best interests and children's and parents' rights in English Law. These principles will then be applied throughout this thesis.

2.2 The European Convention on Human Rights

2.2.1 An Overview of the European Convention on Human Rights

In England and Wales, the Human Rights Act 1998, s6, imposes a positive obligation on public authorities (including but not limited to the courts and social workers) to protect the ECHR rights of individuals affected by State action (for example, children and their parents separated by the adoption process). Under the HRA, s2, the courts in England and Wales must take ECtHR jurisprudence into account in the course of decision-making. The European Convention on Human Rights (ECHR) is, therefore, considered by the courts in England and Wales in many cases, including adoption proceedings. [87] Furthermore, when domestic remedies have been exhausted, parents may decide to argue before the ECtHR that their Convention Rights have been violated.

The ECHR has an important role to play in cases where parents have argued that non-consensual adoption has violated their own human rights. Children in adoption cases are typically too young to allege violations of ECHR Rights and so it is only in rare cases such as *P, C and S v. UK*,[88] where parents argue that their children's rights have also been violated that the ECtHR (or indeed the courts in England and Wales) will examine children's rights in adoption cases. In practice, the most important ECHR rights in adoption cases are: Article 6 (the right to a fair hearing)[89] and ECHR Article 8 (the right to respect for private and family life). [90] Other applicable rights may be Article 2 (the right to life) and Article 3 (the right to freedom from torture or inhuman or degrading treatment)[91] and there may, in some cases, be a need to balance children's rights under

[87] For example, see: *ANS and another v. ML* [2012] UKSC 30 (Supreme Court), *Re B-S (Children)* [2013] EWCA Civ 813 (Court of Appeal).
[88] (Application no. 56547/00) 16 July 2002.
[89] *P, C and S. v. UK* (Application no. 56547/00) 16 July 2002.
[90] *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) 6 July 2010 para 135.
[91] *A v. UK* (100/1997/884/1096) 23 September 1998; *Z v. UK* (Application no. 29392/95) 10 May 2001.

Articles 2 and 3 against their parents' rights under Articles 6 and 8. The aforementioned provisions of the ECHR and relevant European jurisprudence will be considered in more detail in Chapter 3. This chapter will now briefly consider the way in which the ECtHR has interpreted and applied the best interests principle.

2.2.2 The European Court of Human Rights on the Best Interests of Children in Adoption Cases

This section explains how the best interests principle has been interpreted and applied by the ECtHR generally and in particular adoption cases. An adoption order which amounts to an interference with parents' right to respect for private and family life under Article 8(1) may, in some cases, be justified under Article 8(2) which states that: 'There shall be no interference by a public authority with the exercise of this right except such as in accordance with law and is necessary in a democratic society…' Article 8(2) will be satisfied, for example, if adoption is found to be in the child's best interests.[92] It is worth examining the Court's approach to the best interests principle since, as Ifezu and Rajabali have suggested, the differences between the decision-making in the UK Supreme Court and the ECtHR are most apparent when looking at adoption cases. These differences are not necessarily seen in terms of the case outcomes (see Chapters 3 and 6), but in the approach to the best interests principle.[93]

The ECtHR has recognised the important role which the best interests test plays in adoption cases. In *Scott v UK,*[94] for example, the Court considered whether a mother's Article 8 rights had been breached by a local authority who had applied to free the child for adoption and held that: 'the best interests of the child is always of crucial importance' in determining when a violation of a parent's right under Article 8(1) may be justified under Article 8(2). Again, in *Johansen v. Norway,*[95] the Court recognised the importance of the best interests tests and how it can override parental rights, emphasising that:

> '[A] fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child... 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

[92] Shazia Choudhry and Helen Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' [2005] 25 *OJLS* 453.
[93] Godsglory Ifezu and Maria Rajabali, 'Protecting the interests of the child' [2013] *CJICL* 81 at 83.
[94] [2001] 1 FLR 958.
[95] (Application no. 17383/90) 7 August 1996.

> those of the parent. In particular… the parent cannot be entitled under Article 8 of the Convention (art. 8) to have such measures taken as would harm the child's health and development'.[96]

In *Johansen*, the Court acknowledged that removing a child into care and placing a child for adoption:

> '…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'.[97]

Despite the fact that the ECtHR has always considered the best interests principle, in *Neulinger and Shuruk v. Switzerland*[98] the ECtHR provided, for the first time, a detailed explanation of how it examines the best interests of the child. In *Neulinger*, the father had successfully obtained (in the Swiss Court) an order under the 1980 Hague Convention on the Civil Aspects of International Child Abduction[99] ordering the return of his son to Israel. The mother and son took their case to Strasbourg where they argued that there had been a breach of their rights to respect for their family life under ECHR Article 8 as the Swiss Court had failed to accept the mother's defence under Article 13(b) of the Hague Convention, that the child would suffer a grave risk of harm if he was returned. With respect to the best interests test, the Court in *Neulinger* observed that the concept of 'best interests' under UNCRC Article 3(1) had not been developed[100] (see Section 2.3.2) and that there were no proposed criteria for the assessment of best interests.[101] The ECtHR has emphasised the importance of children's relationships with family members and has stated that:

> '…[T]he child's ties with its family must be maintained, except in cases where the family had proved particularly unfit. It follows that family ties may only be severed in exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family…[I]t is clearly also in the child's interests to ensure its development in a sound environment, and a parent

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[96] *Johansen v. Norway* (Application no. 17383/90) 7 August 1996 at para 78.
[97] *Ibid.*
[98] (Application no. 41615/07) 6 July 2010.
[99] The Hague Convention on the Civil Aspects of International Child Abduction (1980). The treaty was concluded on 25 October 1980 and entered into force between the signatories on 1 December 1983. Article 1(a) indicates that the purpose of the Convention is to 'secure the prompt return of children wrongfully removed to or retained in any Contracting State'.
[100] It should be noted that since this decision the UNCRC has since provided General Comment 14 which provides a more comprehensive explanation of what is meant by the term 'best interests' and what a best interests assessments will entail.
[101] *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) 6 July 2010 at para 51.

> cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development'.[102]

The Court made it clear in *Neulinger* that the issue was whether there was a fair balance between the competing interests of the child, parents and of public order, within the State's margin of appreciation, but with the child's best interests being treated as the Court's primary consideration. It stated that depending on the nature and seriousness of the child's interests, these may override the rights of the parents.[103] The Court said that this approach was supported by the consensus of Member States and by international law (such as the UNCRC) which also emphasises the paramountcy of the child's best interests.[104] The outcome in *Neulinger* was that the ECtHR ruled that the boy did not need to return to Israel. It was not in his best interests because several years had passed since litigation had commenced and the child was settled in Switzerland. The Court in *Neulinger* assessed both its role in determining the best interests of the child and what the substance of these interests would be. It stated that the child's best interests would depend on a range of factors such as the child's age, maturity, presence or absence of his parents and the child's environment and experiences and emphasised that best interests should be assessed on a case by case basis.[105] However, the Court held that it needed to establish whether the national authorities had:

> '. . .conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be…'[106]

Although in previous ECtHR jurisprudence, the concept of 'best interests' was not clearly defined, it is argued that the ECtHR has fleshed out its own definition, for the purposes of case law, in *Neulinger*. In fact, it has been suggested by Boschiero *et al* that the criterion of best interests now has a 'precise and concrete interpretation'[107] which could potentially be applied in international law. It is not simply the Court's intention to define best interests which makes this decision significant and potentially relevant in adoption cases.

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[102] *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) 6 July 2010 at para 136.
[103] *Ibid* at para 134.
[104] *Ibid* at para 135.
[105] *Ibid* at para 138.
[106] *Ibid* at para 139.
[107] Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, Chiara Ragni, *International Courts and the Development of International Law* (The Netherlands: Springer, 2013) p607.

The Court held that instead of deferring to the national authorities' assessment of best interests, the Court could perform its own assessment of the child's best interests and proceeded to do so in this case. The Court's approach in *Neulinger* was therefore a departure from its usual approach. In fact, according to Van Bueren assessing the best interests of the child has typically been seen as a matter within the State's margin of appreciation, rather than a matter for the ECtHR.[108] The question then is whether the Court of Human Rights should use its discretion to perform its own assessment in adoption cases. Unlike the approach taken in *Neulinger*, it has been rare for the ECtHR to offer express criticism of the merits of a domestic court decision in adoption proceedings,[109] including a domestic court's assessment of best interests. Despite the fact that the Court has acknowledged that this discretion applies in all cases, it has not been followed in adoption cases (see Chapter 6 for further discussion). This chapter will now go onto consider the significance of the UNCRC and how it has defined 'best interests'.

2.3 The United Nations Convention on the Rights of the Child

2.3.1 The UNCRC, the Courts in England and Wales and the European Court of Human Rights

The UNCRC is an important Convention which is tailored specifically to the rights of children[110] and is regarded as the most important international document addressing children's rights.[111] The overall ethos of the UNCRC is that children should be raised in accordance with the ideals listed within the Convention, in an atmosphere of love and understanding, and that the family unit should be provided with assistance so it can fully assume its responsibilities.[112] The UNCRC therefore attempts to strike a balance between respecting the child's individual rights while also recognising and protecting the child's wider interest in rights derived from being part of a family unit. This thesis will consider

[108] Geraldine Van Bueren, *Child rights in Europe* (Belgium: Council of Europe Publishing, 2007) p35.
[109] *Haase v. Germany* [2004] 2 FLR 39.
[110] In contrast to the ECHR which is worded primarily to address the rights of adults (discussed in detail in Chapter 3).
[111] Eugeen Verhellen, 'Children's rights in Europe' [1993] 1 *International Journal of Children's Rights* 357 at 376; Linda Stuart, 'Interpreting and Limiting the Basic Socio-Economic Rights of Children in Cases where they Overlap with the Socio-Economic Rights of Others' [2008] 24 *South African Journal on Human Rights* 472 at 484; Nuno Ferreira, *Fundamental Rights and Private Law in Europe: The case of tort law and children* (Oxon: Routledge, 2011) p120.
[112] See the UNCRC Preamble.

which UNCRC provisions may be relevant in adoption cases and if any provisions might emphasise the use of less restrictive alternatives to non-consensual adoption.

It is helpful to provide a brief overview of the status of the UNCRC before considering its applicability in adoption cases. The United Kingdom ratified the UNCRC on the 20th of November, 1989 but the UK has yet to incorporate the UNCRC into domestic legislation.[113] Upon the advice of the UNCRC, the post of Children's Commissioner was created to promote the rights of children[114] (including UNCRC rights) and as a result has attempted to introduce the UNCRC more formally in the policy-making process. Thus, the Children's Commissioner for Wales was involved in developing a Children's Rights Scheme in Wales[115] whereby Welsh ministers are duty-bound to have regard to the rights and obligations in the UNCRC in the exercise of their functions.[116] Despite having a Commissioner to promote children's UNCRC rights in England,[117] England has not followed the approach taken in Wales and has not introduced a similar scheme on Children's Rights.

The Children's Commissioner, nevertheless, still has an important role to play in ensuring that UNCRC rights are protected and, in fact, the Commissioner has expressed concerns about adoption law in England and Wales.[118] Furthermore, the Children and Families Act 2014 has strengthened the powers of the Children's Commissioner which may lead to increased consideration of UNCRC rights in judicial decision-making and in government policy in general and specifically in adoption law and policy. In practice, however, because the UNCRC is not incorporated into English legislation its enforcement mechanism is still widely regarded as weak[119] and there has been pessimism about the

[113] Mr Justice Cobb, 'Seen but not heard?' [2015] 45 *Fam Law* 144.
[114] The post of Children's Commissioner for Wales was created by the Children Act 2004, s5.
[115] The Children's Commissioner for Wales was involved in this process.
[116] 'Children's Rights in Wales' http://www.childrensrightswales.org.uk/uncrc-rights.aspx . For further discussion, see generally: Jane Fortin, 'Children's rights – flattering to deceive?' [2014] 26 *CFLQ* 51. The scheme was brought into effect on 27 March 2012 and the Children's Commissioner for Wales was involved in this process.
[117] See ss1-4 of the Children Act 2004.
[118] Children's Commissioner, *A Child Rights Impact Assessment of Parts 1-3 of the Children and Families Bill (HC Bill 131)* 27 February 2013.
[119] Lawrence LeBlanc, *The Convention on the Rights of the Child*, (USA: University of Nebraska Press, 1995) p186, Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights?' Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' [2001] 21 *HRQ* 308 at 311, Nuno Ferreira, *Fundamental Rights and Private Law in Europe: The case of tort law and children* (Oxon: Routledge, 2011) p121.

likelihood of incorporation of the UNCRC in the foreseeable future.[120] Mr Justice Cobb has argued that the UNCRC ought to have primary or secondary legislative status,[121] which would strengthen the status of the UNCRC.

Despite assertions by Lady Hale that the UNCRC amounts to international law with which domestic courts must comply,[122] the courts in England and Wales do not scrutinise the extent to which legislation and policy-making respects children's UNCRC rights. At present, the courts can choose to consider relevant articles of the UNCRC in their judgments[123] but they are not obliged to do so[124] and they are not in the habit of considering the UNCRC in adoption cases. Despite the UNCRC's current limitations, it is referred to in an increasing number of domestic law cases[125] as well as in Strasbourg jurisprudence.[126] It has also been suggested by Stalford and Drywood that the EU is referring to the UNCRC with increasing frequency either directly or indirectly in policy and legislative documents.[127]

Kilkelly has described the relationship between the UNCRC and the ECHR as having 'created an intricate web of standards that is mutually reinforcing'.[128] In practice, this means that, when the ECtHR is making decisions about whether or not ECHR rights have been violated, the UNCRC is referred to and the content of the UNCRC may potentially become included within particular ECHR rights. Thus, these rights have been and may be considered when a claim is made, for example, under ECHR Articles 6 or 8. According to

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[120] A. James, 'Children, 'The UNCRC, and Family Law in England and Wales' [2008] 46 *Family Court Review* 53–64.
[121] Mr Justice Cobb, 'Seen but not heard?' [2015] 45 *Fam Law* 144 at 147.
[122] *Re ZH (Tanzania) v. Secretary of State* [2011] UKSC 4.
[123] See for example: *R (on the application of SG and others) v. Secretary of State for Work and Pensions* [2015] UKSC 16. In particular, see paras 78 and 86.
[124] International conventions do not create domestic legal rights and duties unless these rights are given effect in domestic law. An important example of this in the UK is the Human Rights Act 1998 which incorporates many of the rights within the European Convention on Human Rights into domestic law.
[125] For example, see: *Re H and A (Paternity: Blood Tests)* [2002] 1 FLR 1145 and *Mabon v. Mabon* [2005] EWCA Civ 634.
[126] *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) 6 July 2010; *Odièvre v. France* (Application no. 53176/99) [2002] 1 FCR 720; *Gaskin v. UK* (Application no. 10454/83) (1989) EHRR 36. Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights?' Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' [2001] 21 *HRQ* 308 at 315 observes that Commission and Court of Human Rights have both referred to CRC since it came into existence.
[127] Helen Stalford and Eleanor Drywood, 'Using the CRC to Inform EU Law and Policy-Making' in Antonella Invernizzi, and Jane Williams, *The Human Rights of Children: From Visions to Implementation* (Surrey: Ashgate, 2011) p206.
[128] Ursula Kilkelly, 'Using the Convention on the Rights of the Child in Law and Policy: Two Ways to Improve Compliance' in Antonella Invernizzi, and Jane Williams, *The Human Rights of Children: From Visions to Implementation* (Surrey: Ashgate, 2011) p183.

Lady Hale in the UK Supreme Court, the UK is bound to apply the UNCRC in keeping with its international obligations.[129] In *R (on the application of SG and others) v. Secretary of State for Work and Pensions,*[130] Lord Kerr has gone further and has argued that despite its legal status that the UNCRC is directly enforceable.[131] Although Lord Kerr provided a dissenting judgment in this case, his comments may be used in a future case to argue that the UNCRC is directly enforceable. It is therefore important to explain and consider the relevance of the UNCRC in non-consensual adoption cases.

2.3.2 The UNCRC and the Best Interests Principle

UNCRC Article 3 is a central provision of the UNCRC which is considered and applied by the European Court of Human Rights and by the UK Supreme Court in adoption cases. Article 3 provides that a child's best interests should be a 'primary' consideration in determining State action:

> '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.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision'.

Hodgkin and Newell have argued that the best interests principle recognises the possibility of conflict between the interests of the child and those of their parents and wider community.[132] Despite the existence of this potential conflict, Henricson and Bainham have claimed that the UNCRC nonetheless recognises the importance of parents in several provisions of the UNCRC, including the best interests principle itself.[133]

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[129] For example, see: *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] UKSC 4; *H (P) v. Deputy Prosecutor of the Italian Republic v. H (P) v. F-K v. Polish Judicial Authority* [2012] UKSC 25.
[130] [2015] UKSC 16.
[131] *R (on the application of SG and others) v. Secretary of State for Work and Pensions* [2015] UKSC 16 at paras 233-255. In particular, see: paras 233 and 255.
[132] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (Geneva: United Nations Publications, 2007), p38.
[133] Clem Henricson and Andrew Bainham, *The child and family policy divide: Tensions, convergence and rights* (York: Joseph Rowntree Foundation, 2005) p21.

The best interests principle in Article 3 can be seen as a substantive right, a fundamental interpretative legal principle and a rule of procedure. It is one of the UNCRC 'general' principles[134] which should be applied in legislation and decision-making in relation to all of the other Convention rights.[135] The UN Committee has emphasised that there is no hierarchy of rights and that the best interests principle exists to ensure a child's 'effective enjoyment'[136] of all UNCRC rights. The Committee has stated that:

> 'The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity'.[137]

In other words then, the UNCRC's conception of best interests involves a consideration of a wide range of human rights, arguably including a number of rights which are relevant in adoption cases (including but not limited to UNCRC Articles 5, 7, 8 and 9). Although the best interests principle is relevant in respect of all of the Convention Rights, explicit reference to 'best interests' can be found within a number of UNCRC rights including Articles 9, 18, 20, 21, 37 and 40.[138] Article 3 provides that the child's best interests must be 'a primary consideration' in the decision-making process. In other words, the child's best interests will not necessarily take priority over others' rights, such as, for example, those of the child's birth parents. The exception to the principle that children's best interests will not take precedence over the rights of others, is Article 21 on the right to adoption (considered below).

2.3.3 The UNCRC and Adoption

Article 21 outlines the circumstances in which adoption may be permitted:

> 'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

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[134] The other three are Article 2 non-discrimination, Article 6 maximum survival and development, Article 12 participation of the child. See: UNCRC General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1); Aoife Daly, *A Commentary on the United Nations Convention on the Rights of the Child, Article 15 the Right to Freedom of Association and the Freedom of Peaceful Protest* (Boston: Brill Nijhoff, 2016) p16.

[135] General Comment No 5 'General measures of implementation for the Convention on the Rights of the Child'.

[136] UNCRC General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).

[137] *Ibid.*

[138] See the discussion in: Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Michael Freeman, *Children's Rights Volume II* (Aldershot: Ashgate, 2004) p183 at 185.

> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary'.

Although there is no explicit reference to non-consensual adoption, the wording states that parental consent to adoption will only be required where it is also required under domestic legislation. By implication then, provisions enabling adoption without parental consent will be lawful, as long as such an adoption is in a child's best interests. It can be concluded then, that non-consensual adoption under the Adoption and Children Act 2002, s52(1)(b) is permitted by Article 21. In fact, the child's best interests can be regarded as a determining factor dictating when an adoption should or should not take place. The fact that the child's best interests are paramount in adoption cases has been interpreted to mean that the child's best interests should be placed above those of the prospective adopter(s) as well as those of the birth parents.[139]

Not only is non-consensual adoption clearly permitted under Article 21, the UNCRC also emphasises the paramountcy of children's best interests in adoption cases. However, it has been argued that the welfare analysis required under Article 21 may be more extensive than first thought. Thus, Sloan, for example, has argued that 21(a) of the UNCRC may 'point in a different direction'[140] from a simple welfare test. This is important in the context of this thesis since a simple welfare test has, since the enactment of the ACA 2002, been applied by the courts when deciding whether or not an adoption ought to take place under s52(1)(b) of the ACA. If more than a simple welfare test is, in fact, required under Article 21 then it could be argued that the approach taken by the courts in England and Wales in determining whether or not it is in the child's best interests to be adopted is at best, insufficient and at worst, amounts to a violation of other UNCRC rights (for example, Articles 7, 8 and 9).

UN General Comment No. 14 has made it clear that where the child's best interests has the potential to conflict with the rights of other children (or children in general) a careful

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[139] Nigel Cantwell, 'Are Children's Rights Still Human' in Antonella Invernizzi and Jane Williams, *The Human Rights of Children: From Visions to Implementation* (Surrey: Ashgate, 2011) p49.
[140] Brian Sloan, 'Fostering and Adoption as a Means of Securing Article 6 Rights in England' [2015] 26 *Stellenbosch Law Review* 363 at 370-371.

balancing process must take place so as to find a 'suitable compromise'[141] and that the same approach must be taken:

> 'if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations'.[142]

Although the UN Committee on the Rights of the Child is not opposed to the adoption of children in care, it is not positively in favour of non-consensual adoption. This assertion is supported by Sloan who has suggested that the UNCRC can ultimately be seen as 'neutral'[143] on the subject of adoption. Further support for this argument can be found within the UNCRC itself and also, in the UN Guidelines on Alternative Care for Children.[144] In fact, both the UNCRC and the Guidelines emphasise the importance of keeping children and birth parents together, and of reuniting children with their parents where a separation has occurred. The Guidelines mention foster care and kinship care as alternatives to children living with birth parents who may be unable to provide adequate care for their children[145] while Article 20(3) of the UNCRC explicitly mentions alternatives to adoption for children in care.[146]

Under UNCRC Article 6 (see Section 2.3.5), States must protect the child's 'inherent right to life' and the right to maximal 'survival and development'. Thus, Article 6 is a relevant consideration under the best interests analysis to be undertaken by the courts in adoption cases. According to Sloan, it may 'provide clues'[147] as to the meaning of best interests (under Article 3) and how they ought to be applied under Article 21. Prioritising non-consensual adoption for children in care has consequences for various UNCRC

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[141] UNCRC General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) at p10.
[142] *Ibid.*
[143] Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' [2013] 25 *CFLQ* 40.
[144] Brian Sloan, 'Fostering and Adoption as a Means of Securing Article 6 Rights in England' [2015] 26 *Stellenbosch Law Review* 363 at 372.
[145] UN Guidelines on Alternative Care for Children (2010) at para 29.
[146] Article 20(3) UNCRC states: '…care could include… foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'.
[147] Brian Sloan, 'Fostering and Adoption as a Means of Securing Article 6 Rights in England' [2015] 26 *Stellenbosch Law Review* 363. Also see: Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (Geneva: United Nations Publications, 2007), p303.

provisions[148] (such as Articles 5, 7, 8, and 9) which emphasise the importance of maintaining children's relationships with their birth parents. It can be argued then, that the UNCRC may in fact be consistent with a conception of proportionality which routinely incorporates the assessment of less restrictive alternatives to non-consensual adoption.

Another relevant consideration when determining whether or not an adoption ought to take place is the extent to which a child has had a say in the adoption process. It is argued that, where possible, the child should be able to participate in the adoption process.[149] Although, within Article 21, there is no explicit reference to the child's views or whether or not the child should be able to consent to adoption. Article 21 could be construed alongside Article 12. In this sense, taking children's views into account in adoption cases may be regarded as an implied requirement under UNCRC Article 12 (considered below).[150]

2.3.4 The UNCRC and the Child's Right to be Heard

Article 12 (the right of the child to be heard) concerns children's right to participate in court proceedings and provides that the child's views should be 'given due weight in accordance with the age and maturity of the child' thereby acknowledging the importance of children's right to autonomy in the context of court proceedings.[151] It provides:

> '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'.

[148] Brian Sloan, 'Fostering and Adoption as a Means of Securing Article 6 Rights in England' [2015] 26 *Stellenbosch Law Review* 363 at 374.
[149] F Ang, E Berghmans, L Cattrijsse, I Delens-Ravier, M Deplace, V Staelens, T Vandewiele, C Vandresse and M Verheyde, *Participation Rights of Children* (Oxford: Intersentia, 2006) p163.
[150] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (Geneva: United Nations Publications, 2007), p296; F Ang, E Berghmans, L Cattrijsse, I Delens-Ravier, M Deplace, V Staelens, T Vandewiele, C Vandresse and M Verheyde, *Participation Rights of Children* (Oxford: Intersentia, 2006) at p164-165.
[151] See also: UNCRC General Comment No. 12: The Right to be Heard.

There are three aspects to Article 12: the ability to be heard, to be heard in official proceedings and for the child's views to be given due weight but there is no guarantee that a child's views and wishes will be followed because the balance between the child's participatory rights and the child's best interests needs to be respected. Article 12 was developed because of the scant attention paid to the views of children.[152]

Article 12 has been influential in cases in England and Wales,[153] but it has not yet been referred to in adoption cases. It can be argued, nonetheless, that it has the potential to be an important right which may be used in support of the child's right to have a say in the adoption process or even to provide or withhold consent to adoption. As the law currently stands, however, while the wishes and feelings of the child are a factor which courts may consider, they are not compelled to do so.[154] In practice, children in England and Wales have a very limited role to play in expressing themselves in the adoption process.

Fortin has argued that even though Article 12 does not explicitly refer to the rights of parents, it nonetheless promotes children's autonomy while respecting parents' authority.[155] This can be demonstrated by the relationship between Article 12 and Article 5 (on respect for parents' rights, duties and responsibilities) since parents must take into account the evolving capacities of the child when making decisions in relation to the child. It is important under Article 12, for adults - including parents and policymakers - to facilitate the participation of children in matters that affect their lives,[156] including in particular, the draconian step of adoption.

Other rights which may balance against Article 12 include Article 3 (the best interests principle) which arguably takes precedence over Article 12 in legal proceedings in some countries[157] such as in England and Wales. Articles 3 and 12 are interrelated since a best interests determination (including but not limited to adoption cases, for example) should mean that decision-makers take into account the child's own views as to what will be in

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[152] Nigel Cantwell, 'Are Children's Rights Still Human' in Antonella Invernizzi and Jane Williams, *The Human Rights of Children: From Visions to Implementation* (Surrey: Ashgate, 2011) p55.
[153] *Mabon v Mabon* [2005] EWCA Civ 634; *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; *R (on the application of SG) and Others v Secretary of State for Work and Pensions* [2015] UKSC 16.
[154] Children Act 1989, s1(3)(a).
[155] Jane Fortin, *Children's Rights and the Developing Law*, 3rd edn (Cambridge: Cambridge University Press, 2009) p43.
[156] Trevor Buck, *International Child Law*, (New York: Routledge, 2011) p130.
[157] Aisling Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (New York: Routledge, 2013) p58.

his/her best interests.[158] However, there can be a tension between Articles 3 and 12[159] since a child might wish to remain with his or her birth parents or not to be adopted when in practice, this may be the best way to meet a child's emotional needs and ensure stability and permanence for that child. In England and Wales, children's participatory rights are limited because as Tisdall *et al*[160] have recognised, the wider implementation of Article 12 in children's proceedings in England and Wales has been hindered by the belief that listening to children might clash with their best interests. This could be seen, for example, where a child may wish to be reunited with his or her parents and this may not be possible due to severe neglect and/or abuse (relevant rights in this context are Articles 6, 19 and 34 of the UNCRC).

2.3.5 The UNCRC and Child Protection

Under UNCRC Article 6 it is stated that:

> '1. States Parties recognize that every child has the inherent right to life.
>
> 2. States Parties shall ensure to the maximum extent possible the survival and development of the child'.[161]

This right overlaps with Article 3 of the Convention, in the sense that Article 6 also aims to ensure that children grow up in a healthy and safe environment and reach their full potential.[162] Thus, there is a need for the State to consider children's safety and development when drafting laws and policies.[163] Rights under Article 6 can be bolstered by Article 19, which protects children from abuse.

The positive educational, social and emotional outcomes which may be attributed to adoption are relevant considerations when developing an appropriate and effective way of protecting children in care. It should be noted, though, that the State must consider 'the

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[158] Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Netherlands: Martin Nijhoff Publishers, 1999) p89.
[159] Kathleen Marshall, *Children's Rights in the Balance: The Participation-Protection Debate'* (Edinburgh: The Stationery Office, 1997) p14.
[160] E. Kay Tisdall K. Marshall, A. Cleland and A. Plumtree, 'Listening to the views of children? Principles and Mechanisms within the Children (Scotland) Act 1995' *Journal of Social Welfare and Family Law* 24 [2002] 385 at 394.
[161] For further discussion see: Aoife Daly, *A Commentary on the United Nations Convention on the Rights of the Child, Article 15 the Right to Freedom of Association and the Freedom of Peaceful Protest* (Boston: Brill Nijhoff, 2016), p28.
[162] *Ibid* at p27.
[163] *Ibid.*

least intrusive intervention as warranted by the circumstances'[164] and under Article 20 must give 'special protection and assistance' to children who cannot be raised by their birth parents. Although at first glance, Articles 6 and 19 could be regarded as relevant considerations when determining whether or not non-consensual adoption is a proportionate measure, the emphasis on the need for less intrusive intervention (also found in the UN Guidelines on Alternative Care for Children) implies that the State ought to avoid 'intrusive' measures (e.g. non-consensual adoption). Furthermore, Sloan has asserted that, 'given the other requirements of the UNCRC,[165] the right to development must ordinarily relate to development *within* one's home environment'.[166] Thus, the need for State intervention is insufficient by itself to justify a restrictive measure such as non-consensual adoption. In other words, non-consensual adoption ought to be a measure reserved for circumstances in which less restrictive alternatives are unavailable.

2.3.6 The UNCRC and the Child's Relationship Rights

Article 7 (the right to know and be cared for by one's parents) and Article 8 (the right to know one's identity) alone or in conjunction with each other emphasise that children ought to be raised by their birth parents and that they ought to know who they are and where they come from. See below.

> ***'Article 7***
>
> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.
>
> 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.
>
> ***Article 8***
>
> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

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[164] UNCRC General Comment No. 13 (2011): The Right of the Child to Freedom from All Forms of Violence (CRC/C/GC/13, 2011) at para 54.
[165] Brian Sloan referred to Articles 7, 8 and 9 of the UNCRC. See: Brian Sloan, 'Fostering and Adoption as a Means of Securing Article 6 Rights in England' [2015] 26 *Stellenbosch Law Review* 363 at 366.
[166] *Ibid.*

> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity'.

Article 7 can be read along with other articles of the UNCRC in addition to Article 8 such as Articles 5, 9, 10 and 20 and 27.[167] Articles 7 and 8, like Article 12, could also be seen as constituting participation rights which are relevant to making decisions in adoption cases since children may wish to have information about[168] or contact with their birth parents. Articles 7 and 8 have been referred to briefly in some adoption cases heard by the ECtHR,[169] as well as by the UK Supreme Court[170] but have not been considered in depth. Also, the ECtHR made no reference at all to the UNCRC in two important ECtHR cases concerning non-consensual adoption (*P, C and S v. UK*[171] and *Kutzner v. Germany*[172]) despite the importance of the UNCRC in international law.

There is disagreement about the scope of Article 7 and whose rights it protects. This is significant in the context of adoption proceedings because it could be interpreted as applying to all types of parent (birth, foster and adoptive parents for example),[173] or solely to relationship between children and their birth parents.[174] The right to identity and preservation of family relationships under UNCRC Article 8 is most 'at risk' when an adoption order is made.[175] As O'Donovan has argued, a person's identity exists at birth and our childhood, life experiences[176] and our genetics[177] all form part of our identity. Regardless of the age at which a child is adopted, he or she has an identity that comes

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[167] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (Geneva: United Nations Publications, 2007) p97.
[168] *Odièvre v. France* (Application no. 53176/99) [2002] 1 FCR 720, *Gaskin v. UK* (Application no. 10454/83) [1989] EHRR 36.
[169] *Keegan v. Ireland* (Application no. 16969/90); *Odièvre v. France* (Application no. 53176/99) [2002] 1 FCR 720; *Saviny v. Ukraine* (Application no. 39948/06) 18 December 2008; Kearns v. France (Application no. 35991/04) 10 January 2008; *E.B. v. France* (Application no. 43546/02) 22 January 2008.
[170] *In the Matter of B (A Child)* UKSC 33.
[171] (Application no. 56547/00) 16 July 2002.
[172] (Application no. 46544/99) 26 February 2002. For further discussion on reference to UNCRC provisions in ECtHR cases, see: James Moloney, Steve Symonds and Elinor Harper, *Consideration by the European Court of Human Rights of the UN Convention on the Rights of the Child 1989* (London: ILPA, 2008).
[173] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (Geneva: United Nations Publications, 2007) p97.
[174] Andrew Bainham, 'Honour Thy Father and Thy Mother: Children's Rights and Children's Duties' in Gillian Douglas and Leslie Sebba, *Children's Rights and Traditional Values*, (Hants: Dartmouth Publishing, 1998) p104.
[175] Gerison Lansdown and Peter Newell, *UK Agenda for Children* (London: Child Rights Development Unit, 1994) p43.
[176] 'Interpretations of Children's Identity Rights' by Katherine O'Donovan in Deidre Fottrell, *Revisiting Children's Rights*, (The Netherlands: Kluwer Law International, 2000) p73.
[177] *Re H and A (Paternity: Blood Tests)* [2002] 1 FLR 1145.

from his or her birth family based on genetics and experiences up to the point of adoption which will influence children even after the adoption process.

When parents face poverty and housing problems, this increases the likelihood of public care and raises issues under Articles 7 and 8.[178] Where less restrictive alternatives are available to the State which will keep children and parents together, States may have an obligation to provide assistance (e.g. practical assistance with housing or help from social workers or financial assistance). Where such assistance is likely to help children to remain with their birth parents while simultaneously protecting them from harm, this affords protection of children's rights under Articles 7 and 8. Thus, it may be argued that in some circumstances, less restrictive alternatives to non-consensual adoption may be required to protect children's rights under Articles 7 and 8.

In fact, Sloan has argued that Articles 7 and 8 serve as a reminder that adoption may not be proportionate, even where it is appropriate to separate parent and child.[179] In the light of these Convention articles, Sloan has rightly expressed concern that the judicial approach towards adoption in England and Wales is not necessarily compatible with Article 7 or with the emphasis on 'family relations' in Article 8.[180] This thesis will now consider in further detail how the UNCRC protects familial rights and may in fact support the use of less restrictive but equally effective alternatives to non-consensual adoption.

2.3.7 The UNCRC and the Family Unit

Article 5 aims to respect the role of parents and others in the child's upbringing and to provide limited protection of parents' rights to make decisions in relation to their children:

> ***'Article 5***
>
> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention'.

[178] Gerison Lansdown and Peter Newell, *UK Agenda for Children* (London: Child Rights Development Unit, 1994) p83.
[179] Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' [2013] 25 *CFLQ* 40.
[180] *Ibid.*

Article 5 is not routinely referred to in adoption cases but, like other Convention articles considered in this thesis, it may also suggest the need for less restrictive alternatives than non-consensual adoption. There is an absence of a paramountcy principle in Article 5 which means it places an emphasis on the interests of both adults as well as children and Article 5 also recognises the possibility of conflict between the best interests of the child and the interests of the birth parents and the wider community.[181] Furthermore, it refers to 'extended family' or the 'community' thereby acknowledging that other persons involved in the child's life, and who may care for the child, may also have rights.[182]

According to Ferreira, Article 5 reflects 'progressive autonomy'[183] since it acknowledges that the evolving capacity of the child will have a bearing on the discharge of parental rights and responsibilities. For example, Article 5 could be used in support of providing children with the opportunity to be involved in the adoption decision-making process,[184] which will ultimately impact on the extent to which their birth parents may have a say in their lives. Recognition of the importance of parents' rights and duties under Article 5 implies that where possible, children should be raised by their parents who ought to be able to make decisions about their children's lives. Implicit in Article 5 then, is the notion of minimal intervention[185] and a recognition of the importance of the birth family's guiding role in a child's life. In fact, it has been observed by McGillivray that the Convention refers to parents 36 times, with 19 of its substantive articles deferring to parents.[186] Nevertheless, despite the reference in Article 5 to parents' rights, it is not clear what the scope of these rights is and how they are to be balanced against the rights of children.[187]

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[181] John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children?' [2009] 33 *Melbourne University Law Review* 579 at 587-589; Aoife Daly, *A Commentary on the United Nations Convention on the Rights of the Child, Article 15 the Right to Freedom of Association and the Freedom of Peaceful Protest* (Boston: Brill Nijhoff, 2016) p59.
[182] Lawrence LeBlanc, *The Convention on the Rights of the Child*, (USA: University of Nebraska Press, 1995) p113.
[183] Nuno Ferreira, *Fundamental Rights and Private Law in Europe: The case of tort law and children* (Oxon: Routledge, 2011) p122.
[184] Claire Fenton-Glynn, 'The Child's Voice in Adoption Proceedings: A European Perspective' [2014] 22 *International Journal of Children's Rights* 135.
[185] The emphasis on minimal State intervention is inherent in the Children Act 1989 also.
[186] Anne McGillivray, 'The Long Awaited: Past Futures of Children's Rights' [2013] 21 *IJCR* 209. This includes Article 18, for example, which emphasizes that parents have responsibilities 'for the upbringing and development of the child.' Also, see the Preamble of the UNCRC.
[187] Ann Quennerstedt, 'Balancing the rights of the Child and the Rights of the Parent in the Convention on the Rights of the Child' [2009] *Journal of Human Rights* 162 at 173.

Another relevant article when considering the family unit as a whole is Article 18. This Convention Right states that parents have 'common responsibilities for the upbringing and development of the child' and Article 18(2) states that States need to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities'. This provision is significant[188] because it implies that less restrictive alternatives, such as State assistance (see Section 5.2), ought to be considered before more serious measures such as non-consensual adoption, take place. Hodgkin and Newell, for example, have suggested that to satisfy Article 18 this may mean that the State should help with financial benefits, housing, day care, home help and psychiatric and professional support where needed.[189] The role of increased assistance for parents in potentially decreasing the need for non-consensual adoption will be considered in more depth in Chapters 3-5 of this thesis.

The case law on adoption in both the courts in England and Wales and the ECtHR typically does not refer to UNCRC Article 5 or Article 18. However, both of these articles could be considered in cases where parents allege that their own ECHR Article 8 rights, and potentially those of their children, have been violated. It could be argued that if the State fails in its positive obligation under Article 8, to provide 'appropriate assistance' to the birth parents or wider birth family to help them care for a child (e.g. by the provision of financial or practical support from the State), then this may violate the rights of children, birth parents and members of the wider birth family.

UNCRC Article 9 is another important right which refers to the family unit. Article 9 recognises a principle of family integrity[190] and acknowledges that a child should only be separated from his or her parents when it is 'necessary for the best interests of the child'.[191] This may apply in situations where children are neglected or abused by their parents or where their parents live apart.[192] Article 9 provides that:

> '***Article 9***

[188] Brian Sloan, 'Fostering and Adoption as a Means of Securing Article 6 Rights in England' [2015] 26 *Stellenbosch Law Review* 363 at 371.
[189] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (Geneva: United Nations Publications, 2007) p237.
[190] Trevor Buck, *International Child Law*, (New York: Routledge, 2011) p137.
[191] See reference to Article 9 and Article 21 of the UNCRC in a European Court of Human Rights decision on adoption without parental consent: *X v. Croatia* (Application no. 11223/04) 17 July 2008.
[192] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (Geneva: United Nations Publications, 2007) p122.

> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
>
> 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
>
> 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned'.

Article 9 may also be read in conjunction with Article 27 which recognises 'the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development'. Protection of children's Article 27 rights may, for example, include keeping children with their parents where it is safe to do so. So it may be said that homelessness or poverty should not be grounds for removal from their parents,[193] (e.g. where living conditions of the parents may justify a child or children being taken into care). Furthermore, even where such removal may be necessary to protect a child's right under Article 27 (or in fact Articles 6 and 19), this does not mean that non-consensual adoption will be a necessary or proportionate measure.[194] UN General Comment No. 14, on the best interests principle, states that:

> 'Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child. Before resorting to separation, the State should provide support to the parents in assuming their parental responsibilities, and restore or enhance the family's capacity to take

[193] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (Geneva: United Nations Publications, 2007) at p123.
[194] *SH v. Italy* (Application no. 52557/14) 13 October 2015.

> care of the child, unless separation is necessary to protect the child. Economic reasons cannot be a justification for separating a child from his or her parents'. [195]

Thus, it could be argued in cases where economic factors (for example, inadequate housing) have an adverse impact on a parent's ability to raise his or her child (see *Zhou v. Italy*,[196] in Chapter 3 for example), that the removal of a child into care and the subsequent non-consensual adoption of a child may be in violation of UNCRC Article 9. Articles 5, 9, and 18 not only acknowledge parental interests but suggest that a less restrictive alternative to non-consensual adoption must be chosen, where possible, for the State to satisfy its obligations under the UNCRC.

UNCRC Article 9 states that separation will be justified when it is in a child's best interests under Article 3, where the child has been subjected to neglect or abuse.[197] This means that removal of a child into care is clearly consistent with the spirit of Article 9. However, if a less restrictive alternative to adoption is available (including but not limited to State assistance, kinship care or special guardianship), which is as equally effective as adoption, then it could be argued that the separation of the child from his or her parents and wider family is potentially a disproportionate measure and when read in conjunction with other rights (such as Articles 5, 7 and 8) then Article 9 becomes relevant in non-consensual adoption cases. In other words, in cases where a less restrictive and equally effective alternative is available, adoption is not a 'necessary' step. In fact, an adoption in such circumstances, may be contrary to the child's best interests and may even violate Article 9.

The reference to 'necessary' in Article 9 interpreted along with the Article 3 best interests principle seems similar to the approach taken by the ECtHR, which employs a test of proportionality when assessing rights violations and the best interests of children (for further discussion see Chapter 3). The ECtHR referred to Article 9 in *Saviny v. Ukraine*[198] (for further detail see Section 3.4.6) and emphasised the need to provide assistance so as to enable birth parents to parent more effectively, thereby ensuring that families are kept

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[195] UNCRC General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) at p10. See also the UN Guidelines for the Alternative Care of Children at para 15.
[196] (Application no. 33773/11) 21 January 2014.
[197] Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Netherlands: Martin Nijhoff Publishers, 1999) p172.
[198] (Application no. 39948/06) 23 December 2008.

together, where possible.[199] Lansdown and Newell have interpreted UNCRC Articles 7 and 9 as requiring every possible effort to be made to seek security for a child within his or her own family and where this is not possible, for the child to at least have contact and be able to maintain relationships with family members.[200] This interpretation suggests that the UNCRC requires the least restrictive but equally effective alternative to non-consensual adoption to be chosen.

2.3.8 The UNCRC and the Third Optional Protocol

The United Nations Committee on the Rights of the Child aims to ensure that countries which have signed the UNCRC respect, protect and fulfil the rights in the UNCRC, via a reporting mechanism whereby the Committee produces a report on each Member State, which must be responded to within a specific timeframe. The UNCRC General Assembly recently approved a Third Optional Protocol on a communications procedure which enables children to make complaints to the UN Committee on specific violations of their Convention Rights by their State to the UN Committee.[201] This measure has the effect of addressing criticisms that the Committee is currently limited in what it can do to address violations of children's rights[202] and it fills a 'lacuna'[203] in the law by creating a mechanism for aggrieved children to raise rights' violations.[204]

Although the Third Optional Protocol has not been ratified by the UK, it is hoped by Fortin that this may, one day, make the UNCRC more effective for children.[205] The Protocol raises the potential for adoption cases to be examined by the Committee. However, there are still issues which may affect the effectiveness of the Optional Protocol. Thus, for instance, children may be unaware that they have rights, or if they are

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[199] *Saviny v. Ukraine* (Application no. 39948/06) 23 December 2008 at paras 35-36. The Court refers to recommendations of the Council of Europe on 'positive parenting'. See: Recommendation Rec (2005)5 of the Committee of Ministers on the rights of children living in residential institutions, adopted on 16 March 2005, and Recommendation Rec (2006)19.

[200] Gerison Lansdown and Peter Newell, *UK Agenda for Children* (London: Child Rights Development Unit, 1994) p43.

[201] See UN General Assembly A/RES/66/138 66th session agenda item 64. https://treaties.un.org/doc/source/signature/2012/a-res-66-138-english.pdf (This came into force on April 14, 2014).

[202] Warren Binford, 'Utilizing the Communication Procedures of the ACERWC and the UNCRC' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209507

[203] Loophole.

[204] Rhona Smith, 'The Third Optional Protocol to the UN Convention on the Rights of the Child?' – Challenges Arising Transforming the Rhetoric into Reality' [2013] 21 *IJCR* 305 at 305.

[205] Jane Fortin, 'Children's rights – flattering to deceive?' [2014] 26 *CFLQ* 51.

aware, they may not have the practical means to enforce them. Also, children may still face the arduous task of having to exhaust domestic remedies first before making use of the Option Protocol.[206] Despite these limitations, there is at least potential for children or their birth parents as representatives of children, to use the Optional Protocol to challenge an adoption order made without parental consent, on the basis of one or more of the rights mentioned above.

2.4 England and Wales: Children's Best Interests, Children's Rights and Parental Responsibilities

2.4.1 The Nature of Parental Rights and Responsibilities

The Children Act 1989, s3 refers to parental responsibility and states that parents have 'rights, duties, powers, responsibility and authority… in relation to a child and his property'. Although the Children Act recognises that parents have rights, it does not list what these rights are or procedures by which these rights ought to be determined. Thus, it is necessary to examine case law to assess the status of parental rights in English law. The courts in England and Wales have tended to emphasise the importance of the biological tie between child and birth parent. In *Re KD (a minor) (ward: termination of access)*,[207] for example, Lord Templeman stated that: 'the best person to bring up the child is the natural parent'. This has been interpreted to mean that the court should not oppose claims of the birth parent to raise the child unless there is evidence that suggests these rights should be suspended.[208] *Re D (Natural Parental Presumption)*[209] is an example of this emphasis on the desirability of birth parents raising their children. Here, the Court made a residence order in favour of the father, despite the fact that the father had a history of drug abuse and had children from other relationships. In applying the welfare checklist, the court stressed that the benefits of enabling a child to be raised by a birth parent warranted ordering residence in favour of the father, removing the child from its grandparents. This approach seemed to emphasise that children should be raised by their parents unless there are very compelling reasons to suggest otherwise.

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[206] Rhona Smith, 'The Third Optional Protocol to the UN Convention on the Rights of the Child?' – Challenges Arising Transforming the Rhetoric into Reality' [2013] 21 *IJCR* 305 at 311.
[207] [1988] AC 806.
[208] *Re K (a minor) (ward: care and control)* [1990] 1 WLR 431.
[209] [1999] 1 FLR 134. For further commentary, see: Jane Fortin, 'Re D (Care: Natural Parent Presumption) Is blood really thicker than water?' [1999] *CFLQ* 423.

However, the weight that should be attached to the relative interests of natural parents has, according to Everett and Yeatman, 'vexed' the courts for years.[210] In the House of Lords[211] decision *Re G (Children)*[212] Lady Hale placed a strong emphasis on the biological tie between the children and their mother, when considering whether the children ought to live with their biological mother.[213] While emphasising that there is no presumption in favour of biological parents, she nonetheless acknowledged its importance. She stated that:

> '[The] fact that CG is the natural mother of these children in every sense of the term, while raising no presumption in her favour, is undoubtedly an important and significant factor in determining what is best for them now and in the future'.[214]

However, in *Re B (a child)*,[215] the UK Supreme Court placed less emphasis on the importance of the biological tie. In this case, the parents had been separated since the child's birth and the boy had been raised by his grandmother. The issue at stake was whether or not the child should remain with his grandmother or go and live with his father. Here, the High Court and Court of Appeal in *Re B* both affirmed the emphasis placed in *Re G (Children)* on the significance of the biological tie and held that the boy should live with his father.

However, the UK Supreme Court in *Re B* overruled the Court of Appeal's decision. The Supreme Court held that it was in the child's best interests to remain living with his grandmother in order to maintain the status quo. The Court did not discuss the rights of the different parties (the child, birth parents or the grandmother) but instead solely focused on the welfare of the child. It was seen as best for the child's welfare to remain with his grandmother and maintain stable living arrangements rather than disturb the status quo so as to be placed with his birth father. This decision demonstrates a shift from incorporation of parental preferences within the best interests principle. Bainham has criticised this decision for not placing an emphasis on the rights of both children and birth

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[210] Kim Everett and Lucy Yeatman, 'Are Some Parents More Natural than Others?' [2010] *CFLQ* 290.
[211] It is now known as the UK Supreme Court.
[212] [2006] UKHL 43.
[213] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015) p60.
[214] *Re G (Children)* [2006] UKHL 43 at para 44 *per* Lady Hale.
[215] [2009] UKSC 5.

parents to have a mutual right to live together,[216] which is also an important right in adoption cases.

It has been suggested by Everett and Yeatman that *Re G* still opens the door for raising arguments about genetic parentage[217] and is relevant in non-consensual adoption cases. However, because of *Re B*, it is now unclear how much weight is to be placed on the interests of birth parents, in general, within the best interests assessment.[218] It is also unclear how much weight courts will place on the interest that the child may have in residing with his or her natural parents. This is especially significant as it was a Supreme Court decision, while other key cases placing an emphasis on the importance of the tie with natural parents have arisen within the Court of Appeal. However, in the Court of Appeal decision of *Re E-R (A Child)*,[219] King LJ stated explicitly that: 'there is no "broad natural parent presumption" in existence in our law.

It is helpful to look beyond English Law when considering the status of parental rights and considering how much weight ought to be placed on parental rights in the context of non-consensual adoption cases. The primary international legal resource which addresses the rights of birth parents in English law is the European Convention on Human Rights which, the principles of which are incorporated into English Law via the Human Rights Act 1998. There is a wealth of European jurisprudence which examines the significance of ECHR Article 6 (the right to a fair hearing) and ECHR Article 8 (the right to respect for private and family life) in adoption cases. It is apparent from the UNCRC (which was ratified by the UK) as well as from ECtHR jurisprudence, that one aspect of children's own rights may include a need to enable adults to make decisions on their behalf in order to protect their short-term and long-term well-being.[220] In other words, it will usually be the child's birth parents who will be the primary decision-makers in the child's life.

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[216] Andrew Bainham, 'Rowing back from Re G? Natural Parents in the Supreme Court' [2010] *Family Law* 395.
[217] Kim Everett and Lucy Yeatman, 'Are Some Parents More Natural than Others?' [2010] *CFLQ* 290.
[218] Under the CA 1989 s1(3)(f) the Court may consider 'how capable each of his parents… is of meeting his needs'. This is narrower than the range of interests of birth parents that the court has under s1(4) but may have some bearing in the courts' attitude towards reuniting children with their natural parents as against placing children for adoption.
[219] [2015] EWCA Civ 405 at para 31 *per* King LJ.
[220] John Eekelaar, 'The Emergence of Children's Rights' [1986] 6 *OJLS* 161.

In general, the UNCRC makes it clear that governments need to respect the rights and duties of parents and families who foster the well-being and development of children.[221] This is why an emphasis can be found - in the UNCRC, the ECHR and child law in England and Wales - on minimal intervention in family life. Parents need to be able to exercise rights over their children so that they are able to exercise their responsibilities towards children. English Law has reconceptualised parental rights as parental responsibilities thereby emphasising their duties as parents.[222] For example, parents have a duty to protect children from neglect and physical and emotional abuse and a duty to promote the child's best interests.[223] Parents can be said, however, to need rights (such as those under the ECHR and under UNCRC Article 5, for example) as 'tools'[224] to help them carry out their responsibilities.

Parents have many rights in relation to their children such as the right to make decisions related to their child's interests,[225] which may include the determination of the religion and education of the child since parents may wish to influence their child's beliefs and values.[226] It has been argued that it may even be morally permissible for parents to pursue their own interests at some cost to those of their children and that they have may exclusive rights to do things with their children, that others may not.[227] These are all important rights which are lost when an adoption order is made. When children are in care, birth parents may have a decreased ability to make decisions in their children's lives (with day-to-day decisions made by foster carers or social workers) but there still exists the possibility that they may resume these decision-making rights. If one adheres to a trusteeship or stewardship model to describe the parent/child relationship, it might be said

[221] Jonathan Todres 'Family Integrity and Children's Rights: A UN Convention Perspective' [2009] 36 *Human Rights* 20. It can be suggested that this approach is similar to the approach to parental rights outlined by the House of Lords in *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.
[222] Andrew Bainham, 'Honour Thy Father and Thy Mother: Children's Rights and Children's Duties' in Gillian Douglas and Leslie Sebba, *Children's Rights and Traditional Values*, (Hants: Dartmouth Publishing, 1998) p93-96. For further discussion on this issue see: Michael Freeman, *The moral status of children: Essays on the Rights of the Child* (The Netherlands: Kluwer, 1997).
[223] Ferdinand Schoeman, 'Rights of Children, Rights of Parents and the Moral Basis of Family' [1980] 91 *Ethics* 6 at 7.
[224] Jonathan Herring, 'Forging a relational approach: Best interests or human rights?' [2013] 12 *Medical Law International* 32 at 34-37.
[225] Samantha Brennan and Robert Noggle, 'The Moral Status of Children: Children: Children's Rights, Parents' Rights and Family Justice' [1997] 22 *Social Theory and Practice* 1 at 13.
[226] Harry Brighouse and Adam Swift, 'Parents' Rights and the Value of the Family' [2006] 117 *Ethics* 80.
[227] *Ibid*. This is characteristic of the approach taken by England and Wales in relocation cases, where the courts often characterise the child's best interests as being intimately connected to those of their birth parents. See, for example *Payne v. Payne* [2001] EWCA Civ 166.

that if parents are found to be incapable of meeting the needs of their child, it may be justifiable for them to lose these rights. Thus, it could be argued that parents do not have rights in circumstances where their children have been removed on the basis of neglect and/or abuse and placed for adoption. Alternatively, it could be said that parents' rights ought to be suspended while parents are incapable of exercising their duties to protect children's best interests.

According to Brighouse and Swift, the State must not interfere with relationships unless 'danger is serious, clear and imminent'.[228] While parents clearly have limited authority to direct children's upbringing, the parents' right to make such choices will be overridden when their child is harmed by them.[229] The rights of parents may, therefore, be overridden in the following circumstances: if they are not meeting their child's needs to such a degree that their conduct amounts to a violation of ECHR Article 3,[230] (the right to freedom from torture or inhuman or degrading treatment), if they are actively violating the child's rights (for example, by abuse which satisfies the threshold required under ECHR Article 3) or if they are allowing others to violate their child's rights (under ECHR Article 3, for example). The child's right to be free from harm under Article 3 will therefore outweigh parents' right to parent their children free of State intrusion under Article 8 (the right to respect for private and family life). According to Brighouse and Swift, children and parents' interests can be regarded as 'intertwined'.[231] Although there are both legal and theoretical foundations on which parents' rights may be based, they are primarily linked to parents' responsibilities and duties towards their children so that they are able to meet their children's needs.

Guggenheim has stressed the importance of the family's right to autonomy, emphasising that all family members are separate individuals but ultimately, they are interdependent.[232] Brighouse and Swift have emphasised the importance of protecting family relationships arguing that intrusion from the State 'depresses the sense of security of the relationship'.[233] They have described freedom from scrutiny as an important moral

[228] Harry Brighouse and Adam Swift, 'Parents' Rights and the Value of the Family' [2006] 117 *Ethics* 80.
[229] Samantha Brennan and Robert Noggle, 'The Moral Status of Children: Children: Children's Rights, Parents' Rights and Family Justice' [1997] 22 *Social Theory and Practice* 1 at 9.
[230] *In the Matter of J (Children)* [2013] UKSC 9 at para 1 *per* Lady Hale.
[231] Harry Brighouse and Adam Swift, 'Parents' Rights and the Value of the Family' [2006] 117 *Ethics* 80.
[232] *Ibid*.
[233] *Ibid.*

claim[234] and have posited that too much intrusion can shatter familial relationships which society would seek to protect. This can, in particular, be seen in the context of making adoption orders which are generally permanent and irreversible. It is suggested that parental rights may also be acknowledged and protected via recognising the rights of the family (i.e. the rights of birth parents and children as a family unit which Henricson and Bainham would refer to as 'collective rights'[235]). The recognition and protection of these rights could take place through ensuring that families have appropriate practical and financial assistance from the State including the adequate supply of social housing and social security.[236] Ensuring the adequate provision of appropriate assistance exists ultimately promotes parental autonomy and may, in some cases, enable them to raise their own children. This particular conception of parental rights informs an important part of the analysis in Chapters 3, 4 and 5 of this thesis.

2.4.2 The Welfare Principle in England and Wales

The child's welfare was, at one time, regarded as the 'dominant matter for the consideration of the Court'.[237] It was acknowledged in *Ward v. Laverty*[238] that the child's welfare is, in fact, paramount. This acknowledgement that the child's welfare was the Court's paramount consideration was subsequently provided for in the Guardianship of Infants Act 1925, s1 and in the Children Act 1989, s1.

Before discussing what is meant by 'welfare' it is important to note the relationship between the terms 'best interests' and 'welfare'. Both the Children Act 1989 and the Adoption and Children Act 2002 refer to the child's 'welfare' rather than the child's 'best interests' when the courts decide which court order to make. In practice though, the terms 'best interests' and 'welfare' are interchangeable.[239] Reference to 'welfare' in key legislation is therefore interpreted as referring to the need for a determination of the child's best interests. Under the Adoption Act 1976, s6 ('old' law which governed adoption in England and Wales), the child's welfare was the court's 'first' consideration rather than its 'paramount' consideration.

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[234] Harry Brighouse and Adam Swift, 'Parents' Rights and the Value of the Family' [2006] 117 *Ethics* 80.
[235] Clem Henricson and Andrew Bainham, *The child and family policy divide: Tensions, convergence and rights* (York: Joseph Rowntree Foundation, 2005).
[236] *Ibid.*
[237] *Re McGrath (Infants)* [1983] 1 Ch 143 at 148 *per* Lindley LJ.
[238] [1925] AC 101 at 108 *per* Lord Cave LC.
[239] Michelle Taylor-Sands, *Saviour Siblings: A Relational Approach to the Welfare of the Child in Selective Reproduction* (New York: Routledge, 2013) p48.

The use of 'first' rather than 'paramount' was based on the assumption that there might be other considerations, than the child's welfare, which might have relevance in deciding whether or not to make an adoption order (e.g. parents' interests). This change from 'first' to 'paramount' reflected government concern that adults' interests (i.e. parents) were being treated as paramount in the adoption process, rather than those of children.[240] Section 6 stated that an adoption order should be made where it would 'safeguard and promote the welfare of the child throughout his childhood'. The ACA 2002 changed the law to bring the welfare test into line with the paramountcy test in the Children Act 1989, s1(1). The ACA 2002, s1(2) thus states that in making an adoption order, the 'paramount consideration of the court or adoption agency must be the child's welfare, throughout his life'.

It is helpful to explain what is meant by the terms 'welfare' and 'paramount consideration' since these terms are used in adoption law in England and Wales. Welfare, broadly speaking, refers to ensuring the child's physical, social, emotional and moral well-being. This encompasses a range of considerations based on the child's age and level of intelligence and understanding including interests in being healthy,[241] being protected from harm,[242] and being heard in court proceedings.[243] 'Welfare' is multi-faceted. It reflects the value, importance and vulnerability of children[244] and is a largely paternalistic notion.[245] Munby LJ (as he was then) described welfare in the following terms:

> '[It] is synonmous with 'well-being' and 'interests'… [It] extends to and embraces everything that relates to the child's development as a human being and to the child's present and future life as a human being. The judge must consider the child's welfare now, throughout the remainder of the child's minority and into and throughout adulthood…'[246]

Munby LJ (as he was then) has made it clear that how far into the future the Court will need to consider 'will depend upon the context and nature of the issue'.[247] In adoption cases, it is apparent from ACA 2002, s1(2) (considered above) that the Court must consider the child's welfare throughout his or her life.

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[240] Adoption and Children Bill Special Standing Committee Discussion 21 November (Afternoon).
[241] *Re C (Welfare of Child: Immunisation)* [2003] 2 FLR 1095.
[242] Claire Breen, *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference*, (The Netherlands: Martinus Nijhoff, 2006) p7.
[243] *Mabon v. Mabon* [2005] EWCA Civ 634.
[244] Jonathan Herring, 'Farewell Welfare' [2005] 27 *JFSWL* 159 at 168.
[245] Claire Breen, *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference*, (The Netherlands: Martinus Nijhoff, 2006) p7.
[246] *Re G* [2012] EWCA Civ 1233 at para 26 *per* Munby LJ.
[247] *Re G* [2012] EWCA Civ 1233 at para 26 *per* Munby LJ.

The phrasing 'paramount consideration' means that when the courts consider the interests of others (e.g. parents[248] or siblings[249]), the interests of the child (or children) in the case will be treated as the court's main consideration and will outweigh others' interests. For example, if adoption is deemed to be in a child's best interests but clashes with the interests of their birth family, the child's best interests will prevail.[250] In *J v. C*[251] it was thus emphasised that paramountcy involved taking a course 'which is most in the interests of the child'.[252]

In *Re P (Contact: Supervision)*[253] it has been emphasised that: 'the court is concerned with the interests of the mother and father only in so far as they bear on the welfare of the child'. Thus, when the court treats the child's welfare as its paramount consideration, it indicates that the welfare of the child should be the court's *sole* consideration.[254] Although the ACA 2002 s1(4) welfare checklist is similar to the checklist under the CA 1989, s1(3), the main difference is that the child's relationship with his or her birth family is explicitly recognised within the ACA 2002 (see s1(4)(f)).

Section 1(4) (the welfare checklist) states that:

> 'The court or adoption agency must have regard to the following matters (among others)
> (a)the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
> (b)the child's particular needs,
> (c)the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
> (d)the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
> (e)any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,
> (f)the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including:
> (i)the likelihood of any such relationship continuing and the value to the child of its doing so,
> (ii)the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,

[248] *LB of Sutton v Gray and Butler* [2012] EWHC 2604 (Fam).
[249] *A and S v Lancs CC* [2012] EWHC 1689 (Fam), *D-O'H (Children)* [2011] EWCA Civ 1343.
[250] *Webster and another v. Norfolk County Council and others* [2009] EWCA Civ 59.
[251] [1970] AC 668.
[252] *J v. C* [1970] AC 668 at 710-711 *per* Lord MacDermott.
[253] [1996] 2 FLR 314 at 328.
[254] Jonathan Herring, 'Forging a relational approach: Best interests or human rights?' [2013] 12 *Medical Law International* 32.

> (iii)the wishes and feelings of any of the child's relatives, or of any such person, regarding the child'.

S1(4) provides the courts in England and Wales with the discretion to consider the value of the child's relationship with his or her birth family, the birth family's ability to meet the child's needs and the wishes and feelings of the birth family in determining whether or not a non-consensual adoption ought to take place. These are lists which the courts have a broad discretion[255] in applying. Principles from case law on the CA 1989, s1(3) welfare checklist are also relevant to the ACA 2002, s1(4) welfare checklist. For example, Staughton LJ stated in *H v. H (Residence Order: Leave to Remove from the Jurisdiction),*[256] that in respect of the welfare checklist under the CA 1989, s1(3) is not to be treated 'like the list of checks which an airline pilot has to make' but as the considerations which are deemed to be important in a specific case. Arguably then, this principle also applies to adoption cases.

The welfare test can be criticised for its vagueness and the lack of guidance on how much weight to afford to each factor under the test. However, any disadvantages that the best interests assessment may have are amplified in non-consensual adoption cases because of the severity and permanence of adoption for children and birth parents. In fact, in the Court of Appeal decision of *Re B-S (Children),*[257] Munby P went beyond the traditional best interests assessment and stated that a balancing approach[258] was helpful in considering different options for children in care including adoption. Munby P explained that the balance sheet approach involved weighing up the pros and cons of each available option, so that the most proportionate option (i.e. the most appropriate, least restrictive option) could be chosen.

The value of using a balance sheet type of analysis in determining a child's best interests in *any* complex matter has been endorsed in the UK Supreme Court by Lady Hale.[259] Jones has, however, warned that applying a balance sheet approach is by itself insufficient to improve the quality of judgments. Application of the balance sheet approach would need to be accompanied by detailed analysis of the facts before

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[255] *Re G (Children)* [2006] UKHL 43, Robin Tolson, 'The Welfare Test and Human Rights - where's the beef in the sacred cow?' http://www.familylawweek.co.uk/site.aspx?i=ed307
[256] [1995] 1 FLR 529 at 532.
[257] [2013] EWCA Civ 1146.
[258] First enunciated in the UK by Thorpe LJ in *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FLR 549.
[259] *Re ZH (Tanzania) v. Secretary of State* [2011] UKSC 4 at para 51.

balancing the different options and reaching a final decision.[260] Furthermore, the use of a balance sheet approach does not guarantee consideration of the interests of others, such as birth parents or siblings or their rights under ECHR Article 8, for example.

After the enactment of the Human Rights Act 1998 the courts needed to provide a fuller explanation of how the application of the ECHR could be reconciled with the paramountcy principle, since the former seemed to suggest a need to consider the rights of the parents whereas the latter did not.[261] In *Payne v. Payne*,[262] a relocation case in which the parents disagreed about whether the child should continue to live in the UK or move abroad,[263] it was held by Thorpe LJ that courts uphold the child's welfare as the paramount consideration even though there will be an 'inevitable' conflict with the rights of the parents and that the child's own rights could be encompassed within consideration of the child's welfare.

Although in *Payne v. Payne*, the Court suggested that the ECtHR applies the paramountcy principle, in *Johansen v. Norway*[264] the ECtHR treated the child's welfare as having particular importance and did not regard it as the sole consideration of the Court which would automatically justify an interference with a parent's right under ECHR Article 8. Indeed, according to *Johansen*, welfare may in some cases override the parents' rights but this depends on the nature and seriousness of breach of parents' rights and the relative strength of the child's interests. Herring has rejected the Court of Appeal's interpretation of Strasbourg jurisprudence in *Payne v. Payne*, suggesting that the ECtHR has always clearly emphasised a balancing exercise where the welfare of the child may, but will not always, override parental rights.[265]

Since the case of *Payne v. Payne* was decided, further clarification has been provided in *Re F (A Child) (International Relocation Cases)*[266] on the analysis to be undertaken by the courts in international relocation cases. Ryder LJ has observed that:

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[260] Michael Jones 'Re B-S and the Perils of the 'Balance Sheet' Approach' http://www.familylawweek.co.uk/site.aspx?i=ed129743
[261] Clem Henricson and Andrew Bainham, *The child and family policy divide: Tensions, convergence and rights* (York: Joseph Rowntree Foundation, 2005).
[262] [2001] EWCA Civ 166 at para 57 *per* Thorpe LJ.
[263] The parents were in a dispute over the country in which the child should reside.
[264] [1996] 23 EHRR 33.
[265] Jonathan Herring, 'Moving Forward?' [2011] 161 *NLJ* 1011.
[266] [2015] EWCA Civ 882.

> 'The questions identified in *Payne* may or may not be relevant on the facts of an individual case and the court will be better placed if it concentrates not on assumptions or preconceptions but on the statutory welfare question'.[267]

He went on to state the appropriate approach to be taken in international relocation cases, placing an emphasis on the need to undertake an analysis with reference to proportionality:

> 'Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary. That is neither a new approach nor is it an option. A welfare analysis is a requirement in any decision about a child's upbringing. The sophistication of that analysis will depend on the facts of the case. Each realistic option for the welfare of a child should be validly considered on its own internal merits (i.e. an analysis of the welfare factors relating to each option should be undertaken). That prevents one option (often in a relocation case the proposals from the absent or 'left behind' parent) from being sidelined in a linear analysis. Not only is it necessary to consider both parents' proposals on their own merits and by reference to what the child has to say but it is also necessary to consider the options side by side in a comparative evaluation. A proposal that may have some but no particular merit on its own may still be better than the only other alternative which is worse.
>
> …a step as significant as the relocation of a child to a foreign jurisdiction where the possibility of a fundamental interference with the relationship between one parent and a child is envisaged requires that the parents' plans be scrutinised and evaluated by reference to the proportionality of the same… international relocation cases engage articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 [ECHR]'.[268]

The ECtHR has presumed that the rights of parents and children carry equal weight but that interference with a parent's right may be justified in the light of the child's welfare.[269] Indeed, as Simmonds has observed, the domestic courts have traditionally applied a different approach to decision-making, a different method of reasoning and may potentially reach a different conclusion under the welfare principle than might be the case when applying an analysis under ECHR Article 8.[270] However, recent case law may demonstrate a shift in the approach of the Courts in England and Wales towards proportionality and a greater emphasis on the child's best interests can be seen in the approach of the ECtHR when considering parental rights and children's welfare in adoption cases (see Section 2.2 and Chapter 3).

2.5 Conclusion

[267] *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882 at para 18 *per* Ryder LJ.
[268] *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882 at paras 30-31 *per* Ryder LJ.
[269] *Johansen v. Norway* [1996] 23 EHRR 33.
[270] Claire Simmonds 'Paramountcy and the ECHR: A Conflict Resolved?' [2012] 71 *CLJ* 448 at 498.

The purpose of this chapter has been to explain and analyse children's best interests and children's and parents' rights and to show how they may be applied and argued in non-consensual adoption cases. In doing so, this chapter has served to lay down foundations for the discussion and analysis in subsequent chapters as to the circumstances in which non-consensual adoption may be regarded as a proportionate measure. As considered in Chapter 1 and in this chapter, the welfare (or best interests) of the child under s52(1)(b) of the Adoption and Children Act 2002 determines whether or not a non-consensual adoption takes place. Therefore, it has been relevant to this thesis to explain what is meant by the welfare principle and the way in which it may be applied by the courts in England and Wales.

In the ECtHR, the application of the best interests principle (under Article 8(2)) may, in some cases, justify interference with parental rights to respect for private and family life under ECHR Article 8. Thus, this chapter has considered the best interests principle applied by the ECtHR and enshrined within the United Nations Convention on the Rights of the Child (in Article 3). The best interests principle, which is recognised internationally, is similar to the welfare principle in England and Wales, and may justify the making of an adoption order without parental consent. This chapter has provided a detailed discussion and analysis of children's rights, in particular, under the UNCRC.

This chapter has also provided brief reference to parental rights in England and Wales and also under the ECHR and the UNCRC. It has drawn a number of important conclusions about the relevance of the UNCRC. While the UNCRC is non-binding in the courts in England and Wales, and is considered intermittently by the English courts and the ECtHR in adoption matters, it has been argued that many UNCRC rights are relevant in non-consensual adoption cases (e.g. Articles 3, 5, 6, 7, 8, 9, 18, 19, 20 and 21). UNCRC Article 20, for example, explicitly states that, where possible, the least restrictive measures available to States to protect children from harm ought to be taken.

Furthermore, it is suggested that it is implied within Articles 5, 7, 8, 9 and 18 (as well as the UN Guidelines) that the least restrictive measure available to the State must be taken so as to ensure, that where possible, families stay together. While it appears that Article 21 may permit non-consensual adoption solely on the basis of the child's welfare, a bare welfare test is not necessarily sufficient to justify non-consensual adoption. In fact, due to

the indivisible and interdependent nature of the Convention, the interpretation of welfare must encompass consideration of other UNCRC rights. Thus, State measures such as non-consensual adoption which are chosen when alternatives are available may not be in children's best interests under UNCRC Article 3. Furthermore, in some cases then, non-consensual adoption may be regarded as a disproportionate measure in the light of these provisions of the UNCRC.

This chapter has not only served as a descriptive chapter which has provided an overview of children's best interests and children's parental rights which may be relevant in non-consensual adoption cases, it has also considered the wider implications and potential influence of the UNCRC on non-consensual adoption. Having explained the main rights which arise in cases before the ECtHR and having considered the approach the Court takes towards the best interests principle, the following chapter discusses how ECHR rights, the best interests principle and UNCRC rights, have influenced the decision-making process of the ECtHR.

Chapter 3: Adoption Cases in the European Court of Human Rights

3.1 Introduction

The European Court of Human Rights (ECtHR) in Strasbourg is the last port of call for parents who seek to challenge adoption proceedings in England and Wales. The Court's role is not to act as a final court of appeal[271] and set aside adoption orders, however, but to assess whether or not the birth parents' rights have been violated either by the making of an adoption order itself[272] or by an error with regard to the decision-making process leading up to the adoption.[273] In these cases, the birth parents may allege that an adoption itself was a disproportionate measure or that measures taken prior to the adoption (such as the making of care orders or the removal of a child into care) violated their rights under Article 6 (the right to a fair hearing) and/or Article 8 (the right to respect for private and family life).

This chapter assesses what legal rights birth parents and children have under the ECHR and whether the scope of these rights ought to be widened. The chapter provides a brief analysis of areas for possible development in Strasbourg case law in the context of adoption proceedings. This includes the potential relevance of children's rights under Article 2 (the right to life) and Article 3 (the right to freedom from torture or inhuman or degrading treatment) and how these rights may be balanced against other rights which children and their parents may claim under Articles 6 and 8. Articles 2 and 3 are not currently discussed and applied by the domestic courts and the ECtHR in cases where children have been separated from their parents and have been subject to non-consensual adoption, even though it would be relevant and appropriate for the courts to do so. Although the Court is not bound to consider arguments put before it, this chapter considers how examining children's rights could enrich existing Strasbourg jurisprudence generally and, in particular, in adoption cases. An examination of these different ECHR rights and how they have been and may be applied to adoption by the ECtHR and by

[271] *Malone v. UK* (1984) 7 EHRR 14.
[272] *Aune v. Norway* (Application no. 52502/07) 28 October 2010.
[273] *P, C and S v. UK* (Application no. 56547/00) 16 July 2002.

courts and policy-makers in England and Wales will provide a way of evaluating the proportionality of non-consensual adoption.

The chapter first considers the Convention Rights which are most relevant to adoption proceedings. It next discusses who has argued the Convention rights referred to above, how they have been argued and the circumstances in which steps leading to a non-consensual adoption or even the non-consensual adoption itself, may lead to a violation (or violations) of ECHR rights. The chapter also discusses the ECtHR's approach to balancing the different rights and interests of birth parents and children in non-consensual adoption cases.

3.2 The Protection of Children: Articles 2 and 3 of the European Convention

3.2.1 Article 2: Right to Life

> 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.

Article 2 is a relevant consideration in non-consensual adoption cases since adoption typically serves the purpose of protecting the child from harm and may also protect the child from risks to his or her life. Article 2 comprises both positive and negative obligations. The State has a positive obligation to protect life[274] and a negative obligation to refrain from taking life. Implicit in Article 2 is a positive obligation on the part of the State to protect children. It is useful to consider some factual circumstances in which Article 2 has been argued to demonstrate that a failure to provide adequate resources to sustain the lives of children may constitute a breach of Article 2.

Thus, for instance, in *Nencheva and others v. Bulgaria,*[275] 15 children and young adults living in a State institution died because of a shortage of food, medicine and other basic necessities as well as the effects of the cold. The ECtHR held that Article 2 had been violated because the State had failed in its positive obligation to protect vulnerable children from a serious and immediate threat. States have a positive obligation to be proactive and to intervene to protect the lives of children by taking measures of

[274] *Dink v. Turkey* (Application no. 2668/07) 14 September 2010, *Paul and Audrey Edwards v. UK* (Application no. 46477/99) 14 March 2002, *Centre for Legal Resources On Behalf of Valentin Câmpeanu v. Romania* (Application no. 47848/08) 17 July 2014.
[275] (Application no. 48609/06) 18 June 2013.

investigation and/or protection. In *Kontrova v. Slovakia*,[276] the police's response to reports of domestic violence was held to be inadequate as it had resulted in the death of the female victim and her children, at the hands of her husband. The ECtHR held that the Slovakian authorities were in breach of their positive obligation under Article 2 as the deaths were a direct consequence of police failings. Thus, to meet its positive obligation to act to protect children's lives, the State will sometimes have a duty to intervene in cases where children are experiencing severe neglect or abuse – whether it be at the hands of the State (such as in the care of an institution) and/or at the hands of a family member (such as a parent). It is possible that a State's failure to intervene when children are at risk at the hands of specific individuals,[277] (including their parents) could give rise to an arguable case under Article 2 if the child's death was foreseeable.[278]

When children have been removed into care, the ECtHR has commented that there is an obligation under Article 8 to reunite these children with their parents where this is possible.[279] However, in cases of severe neglect and/or abuse where a child's life is endangered, returning the child to his or her birth parents would be unthinkable. Such a step would potentially threaten the child's right to life under Article 2, since, in the most serious of cases, a child who is returned to an abusive parent (or parents) could be killed. If it is decided that a child should not be reunited with his or her parents because of the risk of the child suffering from life-threatening neglect and/or abuse then adoption may well be in the child's best interests. In other words, as Sloan has argued, for some children, adoption could be a way of protecting a child's right to life and be part of the State's obligation to ensure the child's maximum development.[280] Thus, the violation of the birth parents' right to respect for private and family life under Article 8 may be trumped by the child's Article 2 right. It is argued in this thesis, however, that Article 2 should only apply in the most serious cases of neglect and/or abuse. There may be cases where children's lives may not necessarily be endangered at the hands of their parents, but they may still have suffered from (or be likely to suffer from) neglect or abuse which will harm the child physically and/or emotionally. In such cases then, any rights-based

[276] (Application no. 7510/04) 31 May 2007.
[277] *Osman v United Kingdom* (1999) 29 EHRR 245.
[278] The difficulty is that there must be an interested party able to proceed with the cases. However, in practice, there may be no one who is willing or able to bring a case on behalf of the deceased child.
[279] *Hokkanen v. Finland* [1996] 1 FLR 289 at para 55.
[280] Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' [2013] 25 *CFLQ* 40.

arguments in favour of adoption would instead stem from Articles 3 and 8 (considered below).

3.2.2 Article 3: Right to Freedom from Torture or Inhuman or Degrading Treatment or Punishment

> 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

Many non-consensual adoptions in England and Wales take place after children have been removed into care because they were neglected and/or abused by their parents. As such steps may be appropriate and necessary to protect children's Article 3 rights, it is therefore important to assess the relevance of Article 3 to the question of the proportionality of adoption. Under Article 3, there is an absolute right to freedom from torture or inhuman or degrading treatment. ECtHR case law on Article 3 has emphasised the State's duty to intervene to protect children from abuse or neglect at the hands of their parents.[281] This can be seen, for example, in *Z and Others v. UK*[282] where a local authority failed to intervene early enough to protect four children from severe neglect and abuse at the hands of their parents. The local authority had known, for five years, about the serious neglect and ill-treatment, but despite having the means to do so, had failed to take any effective steps to bring the children's distress to an end. The social workers were reluctant to intervene because they had not established that physical abuse had occurred, but only what they regarded as 'neglectful parenting'.[283]

The children brought a case against the UK, alleging that the State's failure to intervene to protect them had violated their rights under Article 3. The ECtHR found that the children had suffered from emotional and physical abuse and neglect and that the harm the children suffered had reached the level of severity prohibited under Article 3. The Court stated that: 'the severity of the damage suffered by the children is inextricably linked to the long period of time over which the abuse persisted'.[284] The Court held that the State had a positive obligation under Article 3 to protect the children from being

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[281] Ursula Kilkelly, 'Protecting children's rights under the ECHR: the role of positive obligations' 61 *NILQ* [2011] 245 at 248. This is borne out by case law such as *A v. UK* (Application no. 29392/95) 10 May 2001, *Z v. UK* (Application no. 29392/95) 10 May 2001; *O'Keeffe v. Ireland* (Application No. 35810/09) 28 January 2014.
[282] (Application no. 29392/95) 10 May 2001.
[283] *Ibid* at para 14.
[284] *Z and Others v. UK* [2001] 2 FLR 612 at para 121.

harmed by their parents. The State had not satisfied its obligation through its failure to intervene sooner and consequently, the ECtHR held that the children's Article 3 right to freedom from torture or inhuman or degrading treatment had been violated.

As the above case shows, neglect and/or abuse or risk of it may justify removing children into the care of the State, even though this will amount to an interference with the parents' Article 8 right. In some cases, non-consensual adoption may be a necessary and proportionate measure to prevent further abuse and further potential violations of Article 3. In particular, adoption may serve to protect the Article 3 rights of children who have been abused by their parents and who risk further abuse if they are returned to their parents or maintain relationships with them. Thus, adoption may sometimes be the most effective measure to protect children's Article 3 right.

It is clear that the State has a positive obligation to act to protect children from harm, as is seen from *Z and Others v. UK*. However, there may be cases where even though the threshold under Article 3 may be satisfied and it is necessary and proportionate to remove children from the care of their parents, such children have the potential to be able to have beneficial relationships with their parents. In cases where children have been subjected to neglect and/or abuse, not all of them will be harmed by maintaining relationships with their parents or even, in some circumstances, being reunited with their parents. It depends on the facts in individual cases. This can be seen in *Aune v. Norway*,[285] for example, where a child retained contact with his mother but could not be raised by her because of her drug abuse problems.

Alternatively, in some cases, parental circumstances may change so significantly that it may be arguable that it is appropriate for children to be returned to their parents (see Section 3.5) and in other cases it may be desirable to seek a less restrictive measure than non-consensual adoption which may be just as effective (such as kinship care or special guardianship - see Chapter 5). As has been shown in Chapter 2, UNCRC Article 7 (the right to know and be cared for by one's parents), UNCRC Article 8 (the right to preservation of one's identity, which includes family relations) and UNCRC Article 9

[285] (Application no. 52502/07) 28 October 2010.

(the right not to be separated from one's parents unless it is necessary) are all rights which could be argued on the child's behalf, against non-consensual adoption.

However, it can be a challenge to ensure that the appropriate balance is achieved in protecting children's rights under ECHR Article 3 on the one hand and children's rights to respect for private and family life under ECHR Article 8 and under UNCRC Articles 7, 8 and 9, on the other. At one end of the spectrum, State intervention whereby a child is removed from his or her family home may be a necessary and proportionate measure which protects a child from experiencing further neglect or abuse, thereby protecting his or her rights under Article 3.[286] However, at the other end of the spectrum, taking a child into care may in some cases be a disproportionate measure which violates the rights of both the child under Article 3 and/or Article 8 and his or her parents' right to respect for private and family life under Article 8.[287] To date, Article 3 has not been considered by the ECtHR in the context of adoption proceedings. However, Article 3 has been argued by the State as a justification for intervening in family life (which potentially violates ECHR Article 8).

This can be seen in *P, C and S v. UK*,[288] where a newborn baby (S) was removed into care because she was determined by the High Court in England to be at risk of harm and who was placed for adoption without parental consent. Here, the UK government argued Article 3 in its defence.[289] In fact, if the State had not taken sufficient precautions to protect S, and if S had been subjected to significant harm by her mother in the future, she could have argued the existence of an Article 3 violation. The UK government argued that the State had a positive obligation to intervene to protect a newborn child from harm and risked falling foul of Article 3 if it did not do so. This is a right of S which can be seen as distinct from the rights and interests of the parents. An important question, however, would be whether removal of S at birth, preventing contact between S and her parents and, S's adoption were necessary and proportionate measures to protect her right

[286] *In the Matter of J (Children)* [2013] UKSC 9 at para 1 *per* Lady Hale.
[287] *Haase v. Germany* (Application no. 11057/02) 8 April 2004.
[288] [2002] 35 EHRR 31.
[289] *Ibid* at para 108.

under Article 3. It is at least arguable that S could have been protected from harm and that the State could have discharged its positive obligation via less restrictive measures.[290]

Article 3 may have further relevance in non-consensual adoption cases. Article 3 could potentially be argued, for example, in cases where children face trauma due to being taken into care and/or due to the experience of the adoption process itself. Although parental distress and humiliation, which may occur when a child is taken into care, will not cross the necessary threshold for an Article 3 obligation to arise,[291] it is arguable that such distress and humiliation in the context of adoption cases might engage children's and parents' rights under Article 3. Thus, if parents and/or their children suffer physical or emotional harm due to the children being taken into care and subsequently placed for adoption without parental consent, this may satisfy the threshold required to engage Article 3 since the ECtHR has recognised that severe mental distress can reach a threshold that satisfies Article 3.[292]

Article 3 could also be argued by children who have been abused in care when it would have been possible to reunite children with their parents or to place them with birth relatives. Such an argument has been successful before the Court of Appeal in England and Wales[293] and it could be raised before the ECtHR. Although neglect and/or abuse which is severe enough to engage Article 3 may be a very persuasive factor in favour of adoption, in cases where non-consensual adoption has the potential to be traumatic for a child and potentially violate the child's Article 3 right, then a less restrictive alternative to adoption ought to be found. This is, for example, argued in respect of *Y.C. v. UK*[294] (see Section 6.2.2).

3.3 Procedural Protection of Rights in Adoption Proceedings

3.3.1 The Relationship between Article 6(1) and Article 8

Birth parents have argued, in some cases, that the procedures for the care proceedings and/or the adoption proceedings have violated their rights under Articles 6(1) and/or

[290] See Section 3.3 for further discussion on *P, C and S v. UK* (Application no. 56547/00) 16 July 2002 and Chapter 5 for further discussion on less restrictive alternatives to non-consensual adoption.
[291] *MAK v. UK* (Application no. 45901/05) [2010] 2 FLR 451 (ECHR).
[292] *Kurt v. Turkey* (Application no. 24276/94) 25 May 1998.
[293] *A and S v Lancashire County Council* [2012] EWHC 1689 (Fam).
[294] (Application no. 4547/10) 13 March 2012.

Article 8. This section first discusses the relevance of Article 6(1) which states that: 'In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…' Before considering how Article 8 can also provide procedural protection to parents' (and potentially children's) rights in adoption cases. This chapter discusses the protection that these rights provide for children and parents.

Under Article 6(1), children and parents' rights to a fair hearing must be protected in general, and this therefore includes protection in adoption cases. There are four different procedural rights in Article 6(1): a right to court,[295] a right to be heard by an independent and impartial tribunal established by law,[296] a right to have fairness in the court process[297] and a right for the hearing to take place within a reasonable time.[298] ECtHR jurisprudence has established a number of procedural protections for parents, including in the course of adoption proceedings. Thus, there must be fair and effective access to the court and decision-making must be transparent with parents being informed of evidence against them in the proceedings.[299] Parents have the right to an oral hearing,[300] they must be

[295] The first express right concerns whether there has been access to court and whether or not there is legal certainty. Lack of access to court is where the applicant complains that he was unable to submit a claim to a court to examine the facts and law relevant to his case. This principle was first recognised in *Golder v. UK* where the Court acknowledged that right to a fair hearing was meaningless without the means to gain access to a court.

[296] In terms of an independent and impartial tribunal established by law, the qualities of independence and impartiality are distinct characteristics. A tribunal established by law is one which has the powers to consider matters within its competence and has the power to make binding decisions. See: *Belilios v. Switzerland* ECHR (1988) Series A, No. 132, *Sramek v. Austria* [1985] 7 EHRR 351. The body should be established and regulated by law and the scope of discretion should be specified by law. See: *Lavents v. Latvia* (Application no. 58442/00) 28 November 2002, *Posokhov v. Russia* (2004) 39 EHRR 21. Independence typically refers to independence of both the parties in the case and the executive while impartiality involves considering subjectively whether the members of the tribunal are free of personal bias. See: *Belukha v. Ukraine* (Application no. 33949/02) 9 November 2006. Also, whether objectively there was sufficient appearance of impartiality and whether justice was seen to be done. See: *Piersack v. Belgium* (Application no. 8692/79) 1 October 1982.

[297] Fairness in the court process is regarded as covering the legal proceedings as a whole. It includes the right to observe and comment upon evidence produced by the other party. The nature of the evidence and the way in which it was taken are also relevant considerations for the Court. Inherent within the principle of fairness in the court proceedings, is the notion of procedural equality or 'equality of arms'. Fairness also encompasses the right to a public hearing which means the party should be present in court, able to participate in proceedings, to do so in public and for judgments to be made public. In terms of fairness, Article 6 is concerned with ensuring that the court process as a whole is fair and not with factual findings. This is why in some adoption cases, even though an appeal judge might disagree with the final outcome of the adoption process, the adoption order will be regarded as valid.

[298] The hearing must also take place within a reasonable time-frame to satisfy the requirements of Article 6(1). In determining what will be 'reasonable', this will depend on the facts of the case and the nature of the proceedings.

[299] *Buchberger v. Austria* [2001] ECHR 873.

[300] *L v Finland* [2000] 2 FLR 118.

included in the decision-making process, they have the right to legal representation[301] and the decisions must be free from bias.[302] Since the late 1980s the ECtHR has developed a procedural aspect to Article 8 which focuses on protecting the substantive rights which are encapsulated in Article 8 (the right to respect for private and family life). This was articulated in *W v. UK*[303] where the ECtHR stated that:

> '…the Court is entitled to have regard to that process by which it has been decided that an adoption order should be made, to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8'.[304]

W v. UK has created procedural safeguards for parents whose children are removed from them by the State[305] and the protection under Article 8(1), in this case, bears similarities to Article 6(1). This procedural component to Article 8 has received further elaboration in subsequent cases such as in *McMichael v. UK*[306] (on the need to release official documents to parents) and *T.P and K.M v. UK*[307] (on the need for local authorities to disclose information to parents and involve them in the decision-making process). In *X v. Croatia*[308] where a mother who lacked capacity was excluded from adoption proceedings, the Court emphasised that the applicant should have had the opportunity to be heard and that by being excluded from the proceedings leading up to the adoption, the State had violated her Article 8 right. Article 8 offers not only substantive protection of the right to respect for private and family life, but may in some cases offer procedural safeguards for those substantive rights. This can be seen in *P,C and S v. UK*, for example, where the applicants' lack of legal representation and the short period of time between the care and adoption hearing meant that the parents were unable to be involved in the decision-making process. This was held to be a breach of the parents' rights under Article 8 because there had been insufficient procedural protection of their right to respect for private and family life under Article 8.[309]

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[301] *P, C and S v UK* (Application no. 56547/00) 16 July 2002.
[302] *Buscami v. Italy* [1999] ECHR 70.
[303] Case no. 4/1986/102/150 8 July 1987.
[304] *W v. UK* (Application no. 4/1986/102/150) 8 July 1987 at para 62.
[305] Mowbray expresses his approval of this development. See: Alistair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oregon: Hart, 2004) p156.
[306] A.307-B (1995).
[307] [2001] 2 FLR 549.
[308] (Application no. 11223/04) 17 July 2008.
[309] See discussion in *P, C and S v. UK* (Application no. 56547/00) 16 July 2002 at paras 134-138.

3.3.2 The Relationship between Article 6(1) and Article 8: P, C and S v. UK

In *P, C and S v. UK,*[310] an important case concerning the procedural protection of family life, the applicant's child was taken into care and placed for adoption without the mother's consent. In the UK, P (the mother) had to bring her own case on behalf of herself, her husband and daughter, before the English court without legal representation, which was held by the ECtHR to violate Article 6(1). When P's legal representatives withdrew from her case, she requested an adjournment to find new counsel but this was denied by the Court. She was given a brief adjournment of four days and the High Court indicated that she would need to conduct her own case. P went ahead with the case with the assistance of a 'McKenzie's Friend'.[311] The Court held it was not in S's best interests to be returned to her parents because of the risk of harm and freed S for adoption.

The ECtHR held that there were violations of Articles 6 and 8. Article 6(1) was engaged because obtaining advice from a lawyer relates to the right of access to a court. The Court emphasised that the need for permanence did not justify the 'draconian' action of conducting complex care proceedings followed by an order freeing S for adoption just one week later. The ECtHR criticised the English Court's approach, describing it as a: 'somewhat inflexible and blanket approach, applied without particular consideration of the facts of this individual case'.[312] The Court also observed that despite being freed for adoption, it was five-and-a-half months later that S was placed with a family. The final adoption order was then made another six months after S's placement. Thus, the procedures used had been unfair and did not enable the applicants to participate in the decision-making process in an effective manner. The Court concluded that the applicant had not had fair and effective access to court and there had been an Article 6(1) breach of her right and the right of her child.[313]

The ECtHR took what Hewson *et al* have described as an 'unusual'[314] step by allowing the parents to argue on the child's behalf. In fact, most cases concerning the separation of parent and child tend to be brought by the parents in respect of violations of their own

[310] (Application no. 56547/00) 16 July 2002.
[311] This is the name of a non-lawyer who acts as a representative in court; it may be someone with some basic knowledge of the law and court proceedings.
[312] *P, C and S v. UK* (Application no. 56547/00) 16 July 2002 at para 98.
[313] *Ibid* at para 100.
[314] Barbara Hewson, Dermot Casey and Nuala Mole 'The Appearance of Fairness' 152 [2002] *NLJ* 1245.

rights. It has been described as 'striking'[315] by Hewson *et al* that the ECtHR stated that the child's Article 6 and 8 rights had been violated due to the fact that her parents were not legally represented, despite the fact that S was legally represented throughout the legal proceedings. However, the ECtHR's reasoning demonstrates how it can sometimes be genuinely difficult to separate the rights of the parents from those of the child. Although there was no direct violation of S's right it would have been difficult for S to maintain a legal tie with her parents and to have her Article 8 rights protected if her parents had not had adequate legal representation in the process of care and adoption proceedings. In order for S to obtain the best possible chance of having a relationship with her parents and having her Article 8 right protected, it would therefore be necessary for her parents to have proper legal representation (for further detail on this case, see Section 3.4.6). This section considered the procedural protection which may be provided to birth parents and children in non-consensual adoption cases. The following section considers how substantive rights may be protected under the ECHR.

3.4 The Protection of Substantive Rights in Care and Adoption Proceedings: ECHR Article 8

3.4.1 Article 8 Right to Respect for Private and Family Life: Overview

The discussion below will provide an overview of whose rights are protected by Article 8 and in what circumstances these rights will be protected. In particular, the following sections will consider cases where Article 8 has been argued in care and adoption proceedings. Although different issues may be raised in care proceedings when compared with adoption proceedings; the focus of this chapter is on whether the initial removal was a justified interference with parents' Article 8 rights and whether children's continued presence in care is a necessary and proportionate interference with parents' Article 8 rights. There are similarities between care and adoption proceedings cases which justify examining ECtHR cases on care proceedings. Typically, care proceedings precede the making of adoption orders without parental consent and (as seen from *P, C and S v. UK*[316] above) arguments raised in Article 8 cases, alleging that non-consensual adoption is not a proportionate measure, may require a consideration of whether the nature of the State intervention was a necessary and proportionate measure. Furthermore, both care and

[315] Barbara Hewson, Dermot Casey and Nuala Mole 'The Appearance of Fairness' 152 [2002] *NLJ* 1245.
[316] [2002] 35 EHRR 31.

adoption proceedings cases raise issues concerning if and when children ought to be reunited with their parents and if and when it is appropriate for children to have contact with their parents. These issues are important, in the context of this thesis, which focuses on when less restrictive (but equally effective measures) to non-consensual adoption may be available.

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (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.

Article 8 is not an absolute right but a 'qualified' right. Article 8(2) provides that in specified circumstances it may be justifiable and proportionate for a State to interfere with individual rights and thus impose limits on them. Under Article 8(2), the Court performs an analysis to determine whether a rights violation is necessary and proportionate. An adoption order which amounts to an interference with the parents' rights under Article 8(1) may be justified under Article 8(2) by reference to the child's best interests. For instance, in an adoption case, the family court may decide that the child has suffered such terrible abuse that he or she should be placed for adoption without parental consent.

A significant part of this chapter is devoted to Article 8. This is because Article 8 is frequently argued in non-consensual adoption cases either in relation to the adoption itself or to the measures which preceded the adoption such as the removal of a child into care or a reduction in or termination of contact. It is in the context of Article 8 where issues of proportionality typically arise. This chapter will consider when Article 8 may be argued and when interference with this right may constitute a necessary and proportionate measure from the perspective of the ECtHR. Although the State has a negative obligation not to unnecessarily intervene in family life, it also has a positive obligation towards the child to intervene to prevent neglect or abuse and to prevent further neglect or abuse from occurring.[317] According to the ECtHR there must be pressing reasons for the interference

[317] (Application no. 29392/95) 10 May 2001.

with family ties[318] and intervention must be necessary in a democratic society and proportionate to the legitimate aim of child protection. This means that the State has to strike a fair balance between the interest of protecting children on the one hand and protecting family life on the other.[319] Any State intervention which takes place should be sufficient to protect the child's best interests and be proportionate. The discussion in the next section will consider the content of Article 8(1) and the process whereby rights argued by parents and/or other individuals, may be limited by reference to Article 8(2).

3.4.2 Article 8 Right to Respect for Private and Family Life: Interpretation and Definition

Respect for a private and family life means that the State is under a duty to take positive steps to protect these rights.[320] Under 'family life' a range of different relationships are protected.[321] This includes, for example, relationships between children and birth parents[322] and other 'de facto "family ties" where sufficient constancy is present'.[323] The jurisprudence of the ECtHR emphasises the importance of the 'reality' of family life rather than the strict legal and/or biological relationships which exist between parties and therefore foster parents,[324] adoptive parents[325] and prospective adoptive parents who have developed a relationship with a child can also fall within the scope of family life.[326] The ECtHR has, in some cases, also protected the relationship between children and other family members, including siblings,[327] relationships with aunts and uncles[328] and grandparents.[329]

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[318] *X & Y v. Germany* (Application no. 8059/77) 3 October 1978.
[319] *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) 6 July 2010.
[320] *Sheffield and Horsham v. United Kingdom* [1999] 27 EHRR 163.
[321] See, for example: *Johnston v Ireland* (Application no. 9697/82) (1987) 9 EHRR 203 and *X, Y and Z v United Kingdom* (Application no. 21830/93) [1997] 24 EHRR 143,
[322] *Hokkanen v. Finland* [1996] 1 FLR 289.
[323] *Mikulić v. Croatia* [2002] 11 BHRC 689 at para 51 and *Kroon v. Netherlands* [1994] ECHR 18535/91 at para 30.
[324] *X v. Switzerland* (Application no. 8257/78) EComHR 10 July 1978, *Moretti and Benedetti v. Italy* (Application no. 16318/07) 27 April 2010, *Kopf and Liberda v. Austria* (Application no. 1598/06) 17 January 2012.
[325] *Ageyevy v. Russia* (Application no. 7055/10) [2013] ECHR 122.
[326] *Harroudj v. France* (Application no. 43631/09).
[327] *Boughanemi v. France* (1996) 22 EHRR 228 and *Moustaquim v. Belgium* (1991) 13 EHRR 802
[328] *Boyle v United Kingdom* (Application no 16580/90) (1995) 19 EHRR 179.
[329] *L v Finland* (Application no. 25651/94) (2001) 31 EHRR 30.

Private life is a broad concept which refers to 'aspects of an individual's physical and social identity,'[330] 'personal development'[331] and 'the right to establish relationships with other human beings'.[332] This means that in adoption cases, where fathers find themselves unable to establish the right to 'family life' with their child, it may nonetheless be possible to instead to argue that there is a right to a 'private life'.[333] The right to a private life is important for the child too as it covers the extent to which an adoption order can impact on the child's own social and personal identity as the child[334] will join another family and may have his or her surname and even forename changed.

The right to respect for private and family life also protects a person's physical and psychological wellbeing.[335] A sound mental state is also included within the scope of 'private life'.[336] It has been held by the ECtHR that measures which affect an individual's physical integrity or mental health must reach a certain degree of severity to amount to an interference with the right to private life.[337] However, even minor interferences which are against a person's will may fall within the scope of Article 8.[338] In evaluating physical integrity within Article 8, there is a clear overlap with Article 3. The distinction between the two seems to be with the severity of the interference. Therefore, even where the alleged child abuse or neglect may not be grave enough to reach the threshold required to engage Article 3, it may nevertheless come under Article 8. For example, Article 8 may be engaged where a child is not washed, sleeps in soiled sheets, is not appropriately dressed or receives inadequate nourishment as such treatment interferes with the child's right to respect for his or her physical integrity.[339]

In practice, the birth mother will typically have a right to family life engaged in relation to her child regardless of whether she has ever raised the child.[340] In *X v. Croatia,*[341] the

[330] Including various aspects of one's sexual life and sexual orientation – see *Dudgeon v. UK* (Application No. 7525/76) 22 October 1981 and *EB v. France* (Application no. 43546/02) 22 January 2008.
[331] *X v. Iceland* (Application no. 6825/74) [1976] 5 DR 86.
[332] *Mikulić v. Croatia* [2002] 11 BHRC 689 at para 53.
[333] *Anayo v. Germany* (Application no. 20578/07) 21 December 2010.
[334] *Odièvre v. France* (Application no. 42326/98) 13 February 2003 at para 29.
[335] *X and Y v. The Netherlands* [1985] 8 EHRR 235; *Glass v. UK* (Application no. 61827/00) March 9, 2004.
[336] *Bensaid v. UK* (Application no. 44599/98) 6 February 2001 at para 47.
[337] *Ibid*, para 46.
[338] *Storck v. Germany* (Application no. 61603/00) 16 June 2005 at para 143.
[339] *X and Y v Netherlands* [1985] 8 EHRR 235
[340] *P, C and S v. UK* (Application no. 56547/00) 16 July 2002.
[341] (Application no. 11223/04) 17 July 2008.

applicant suffered from schizophrenia and gave birth to a daughter. She was divested of her legal capacity because of her mental illness. It was found that she would be unable to care for the child because of this illness and her drug addiction, neither of which had showed signs of improvement. She agreed to being placed under guardianship, regarding it as in her own best interests and those of her child. The legal consequence of being divested of capacity was that she was also deprived of her parental rights. A decision was made that the child should be placed in foster care and that the applicant was in need of a carer. Although the applicant was deemed to be unfit to care for her child, contact was arranged between them by the national authorities. Proceedings for adoption were commenced without the applicant's knowledge. Under Croatian law, as she had been divested of her capacity, she was not a party to the adoption proceedings and authorities had no obligation to inform her about the adoption.

The applicant alleged a violation of Article 8 because her daughter had been placed for adoption without her knowledge, consent or participation in the adoption proceedings. There were no domestic remedies available to her under Croatian law, because the law was such that once she was regarded as lacking mental capacity, under Croatian law her acts were incapable of producing legal effects. The Croatian government argued that Article 8 did not apply because the relationship between mother and daughter had deteriorated to such a level that it no longer represented family life and that a blood relationship was insufficient for this. The ECtHR disagreed and held that, under Article 8, the applicant had the right to family life with her daughter. This case shows that the right to a family life under Article 8, is not lost due to lack of mental capacity.

The ECtHR has stated that a biological relationship between father and child is insufficient to establish the existence of family life[342] but the Court will often recognise the existence of a right to private life.[343] This can be seen in *Anayo v. Germany*,[344] where the applicant had fathered twins with a married woman, who had raised the children with her husband but had not allowed the applicant to have contact with his children. The Court held that it could not 'exclude' the possibility of a family tie since it was not the applicant's fault that he did not have a relationship with the twins. However, it focused

[342] *Lebbink v The Netherlands* (2004) 40 EHRR 417; *M v. The Netherlands* (1993) 74 DR 120.
[343] *Mikulić v. Croatia* [2002] 11 BHRC 689 and *DO v Switzerland* (Application no. 24545/94) EComHR 31 August 1994.
[344] (Application no. 20578/07) 21 December 2010.

primarily on the applicant's right to a private life, observing that having contact with his children still formed an important part of the applicant's identity and thus, his right to a private life.

The Court has previously recognised family life between fathers and their biological children, even where the father has not developed a relationship with his child (or children).[345] Thus in *Keegan v. Ireland*,[346] the claimant was an unmarried father whose child was placed for adoption without his knowledge or consent. The Court held that, under Article 8, family life could be established between a father and child even where he was not married to the mother and was no longer in a cohabiting relationship with the mother at the time of the child's birth. The Court held that the father's Article 8 right was engaged and that Irish law enabling the adoption to take place in secret, amounted to an interference with his Article 8 rights.

As considered in the paragraph above, in family proceedings including adoption proceedings, fathers will be able to argue that their right to a 'family' or 'private' life is engaged under Article 8. Similarly, in cases where a mother has not raised her child, it is likely that she will be able to argue that a right to a private life has been engaged, even if the right to a family life is not applicable. In *I.S v. Germany*,[347] for example, the mother argued that her right to 'family life' was engaged when she sought contact with and information about her children who were placed for adoption. The Court held that although she had previously had a 'family life' with her children, the act of voluntarily giving up her newborn children meant that family life had ceased and that a claim under the right to 'private life' was more appropriate. The cases considered above are important because they demonstrate that birth parents can argue that non-consensual adoption may violate their Article 8 right, regardless of whether they have managed to establish a relationship with their child. This means, for example, that in cases where children are removed from their parents immediately after birth, the birth parents can nonetheless assert that they have rights under Article 8.

3.4.3 Proportionality Criteria in the European Court of Human Rights

[345] *Ahmut v The Netherlands* (1997) 24 EHRR 62 at para 60.
[346] [1994] EHRR 342.
[347] (Application no. 31021/08) 5 June 2014.

As was considered in the introduction of this thesis, proportionality refers to whether or not a measure taken in the furtherance of a State objective is commensurate to that objective.[348] When a violation under the ECHR Article 8(1)[349] right to respect for private and family life is alleged, the ECtHR determines whether State interference is 'necessary in a democratic society' under Article 8(2). Although the terminology used sometimes differs, there is broad agreement among academics that there are four stages or tests in the proportionality process: a 'legitimate objective'; a 'rational connection'; a 'minimal impairment' and an 'overall balance'.[350] The application of these tests serves to establish whether it can be justifiable to limit rights. Each of these tests can be regarded as distinct steps in determining the proportionality of measures including adoption orders. Considering the fact that the ECHR is a binding Convention and decisions of the ECtHR are binding upon the UK, it is helpful to explain the criteria applied by the ECtHR in determining whether measures, such as adoption orders, are necessary and proportionate.

A legitimate objective means that there needs to be a sufficiently important reason to justify a limitation of a right under Article 8(2). For example, an interference with the birth parents' rights under Article 8 due to non-consensual adoption may, in some cases, be justified on the basis of the need to protect the child's rights, health or morals. Removal of the child into care and placement for adoption are measures which have the aim of protecting the child in question. The European Court has stressed that taking a child into care for the child's own protection may be legitimate but that it ought to be a temporary measure, to be discontinued as soon as possible. This demonstrates that the State cannot use an objectively legitimate goal to justify all of its conduct. In respect of non-consensual adoption, for example, it can be argued that just because such adoption satisfies a legitimate objective, it does not mean that it will be regarded as a proportionate measure. This is where the next aspect of the proportionality analysis becomes important.

A rational connection means that there has to be a link between the objective and the measure taken by the State in pursuit of that objective. *R.K and A.K v. UK*[351] suggests that

[348] Nigel Forman, *Constitutional Change in the United Kingdom* (London: Routledge, 2002) p263.
[349] Articles 8-11 are constructed similarly and justify State interference if it is 'necessary in a democratic society'.
[350] Alan Brady, *Proportionality and Deference under the UK Human Rights Act*, (Cambridge: Cambridge University Press, 2012) p7. Also see generally: Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012).
[351] (Application no. 380001/05) 30 September 2008.

when children are taken into care, the imposition of a care order by a domestic court will be rationally connected to the State's aim of protecting the child. The same could be said to be true for adoption orders which may in many cases protect the rights and freedoms of the child. This could be argued, for example, in the case of *Aune v. Norway*[352] where the child had been settled with his prospective parents for several years and regarded them as his parents.

Brady has observed that very few cases have hinged upon establishing rational connection but he has suggested that in order to satisfy this limb, the proposed measure must actually be capable of satisfying the objective pursued.[353] Certainly, in some cases adoption will be capable of meeting the objective pursued; namely to protect the health and morals of the child or indeed the child's best interests. The difficulty is, that an objective of protecting the health and morals and the overall best interests of the child, is such a vague yet all-encompassing objective, that adoption is likely to automatically satisfy this limb. In other words, while adoption may be rationally connected to the aim of protecting a child's long-term welfare, there may be other measures which are rationally connected to the State's aim but which are less intrusive. This is why the next limb of the proportionality analysis ('minimal impairment') is of particular importance to this thesis.

A minimal impairment means that the measure taken (i.e. adoption) did not go further than necessary to meet the State's objective. This is sometimes referred to as the 'least restrictive alternative test' and it can be regarded as the most onerous form of review available to the Court since it requires that the State take the least restrictive alternative available to it,[354] which will be an equally effective means of achieving the State's aim. Adoption may mean, for example, that children not only lose legal ties with their parents and other birth family, but that they also lose the opportunity to develop or to continue to develop relationships with their birth parents, grandparents, siblings and other family members. In *Pontes v. Portugal*,[355] the Court considered that alternatives to non-consensual adoption might have been available (including returning the child home) and

[352] (Application no. 52502/07) 28 October 2010.
[353] Alan Brady, *Proportionality and Deference under the UK Human Rights Act*, (Cambridge: Cambridge University Press, 2012) p54.
[354] Yutaka Arai-Takahasi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Intersentia, 2002) p88.
[355] (Application no. 19554/09) 10 April 2012.

that these alternatives should have been considered because they would have been just as effective ways of protecting the welfare of the child.

It is suggested that, in fact, there may be cases (such as *Zhou v. Italy*,[356] *R.M.S v. Spain*[357] *and SH v. Italy*[358]), where a child's best interests appears to dictate providing assistance to the parent instead of placing the child for adoption, for example. If children have not been neglected or abused by their parents (as in the aforementioned cases), children express a desire to remain with their parents (e.g. see *Y.C. v. UK*[359]) or parents have changed their circumstances dramatically in a short period of time (see *R and H v. UK*[360]), then these are factors which may suggest that adoption does not serve children's best interests and that the least restrictive alternative to adoption has not been chosen.

The difficulty with ensuring that the least restrictive alternative to adoption is chosen is that, while this may protect the parents' rights, the least restrictive alternative will not necessarily be in the child's best interests. This can be seen in *Aune v. Norway*, considered briefly above. Considering the severity of the consequences of adoption, it is arguably important to ensure that a measure which is less intrusive than non-consensual adoption, is also at least as effective at ensuring a child's welfare is protected in the long-term. In adoption cases, however, it is argued that less restrictive alternatives which are equally effective at meeting children's needs, including the need for stability and permanence, can be found. These alternatives to taking a child into care and placing a child for adoption could include, for instance, sole care by one parent,[361] kinship care (care by relatives), special guardianship orders or assistance including financial help, counselling and advice (see further in Chapter 5). Also, as adoption orders rarely make provision for contact, and, if so, only indirect contact then adoption with direct contact may be a less restrictive alternative. It is arguable that any measure which prevents parents from raising their children could still have the potential to violate parental rights. However, this thesis examines whether measures of intervention which are less restrictive

[356] (Application no. 33773/11) 21 January 2014.
[357] (Application no. 28775/12) 18 June 2013.
[358] (Application no. 52557/14) 13 October 2015.
[359] (Application no. 4547/10) 13 March 2012.
[360] [2011] ECHR 844.
[361] This tends to be suggested where the concern is with the conduct of one parent only, e.g. in *P, C and S v. UK* (Application no. 56547/00) 16 July 2002 and *Y.C v. UK* (Application no. 4547/10) 13 March 2012.

than adoption are more likely to protect parental rights and whether alternatives to adoption may be equally effective in protecting children's best interests.

An 'overall balance' involves examining the rights of the individual and weighing them against the interests of the community and/or the rights of other individuals. An example of how this operates can be seen in *Harroudj v. France*.[362] In this case, it was held that there was no violation of Article 8 when the French authorities refused to allow a French national to adopt a child who was already in her care under an Islamic form of guardianship known as 'kafalah'. The Court held that the balance had been struck in recognising the public interest in pluralism and integration of children under kafalah, without severing ties with the children's country of origin. This case demonstrates that a balance can be achieved through acknowledging the de facto relationship between an adult and child, without the need for an adoption to take place. In this case, adoption would not have been a proportionate measure. In a non-consensual adoption case, an overall balance would potentially involve balancing parental rights against children's rights and best interests.

Choudhry and Herring have argued that, rather than providing a formal analysis of whether or not Article 8 has been violated (which is based on a legitimate objective, a rational connection, a minimal impairment, a least restrictive alternative and overall balance), the ECtHR should instead apply one of three analytical approaches based on these stages. They have suggested that the Court should apply either the least restrictive alternative test or the overall balance test or consider whether or not the reasons used to justify the State's measure (i.e. removal of the child from his or her parents or non-consensual adoption) were 'relevant' and 'sufficient' as a whole.[363] Choudhry and Herring have suggested that this is sometimes referred to as the 'sufficiency' standard which is usually applied by the Court in Article 8 cases concerning family law matters; especially as far as children are concerned.[364]

[362] (Application no. 43631/09) 4 October 2010.
[363] Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law*, (Oxford: Hart Publishing, 2010) See pages 28-34 for further discussion.
[364] Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law*, (Oxford: Hart Publishing, 2010) at p31.

This 'sufficiency' standard is regarded as being less rigorous than the minimal impairment or least restrictive alternative test because the Court need not consider whether equally effective but less restrictive methods could have been used, other than removal from the home or even adoption, to best serve the children's needs. There is however, an insufficient body of case law on adoption in the ECtHR, to draw any firm conclusion on the type of analysis favoured by the Court in adoption proceedings. In general, the Court appeared to have focused on whether or not adoption has struck the overall balance.[365] However, in cases where poverty and insufficient housing has led to adoption the Court appears to have focused on minimal impairment whereas, in other family law cases, the Court has applied the 'sufficiency' standard. It is suggested that the serious and irreversible consequences of adoption are such that the existence of a less restrictive alternative to adoption, which may perhaps be equally effective when compared with adoption, ought to be taken into account not only by the Court of Human Rights but by the family courts in England and Wales.

3.4.4 The Margin of Appreciation

The margin of appreciation is the latitude or discretion[366] enjoyed by the government in its decision-making process.[367] It is sometimes said to stem from the principle of subsidiarity,[368] which means that the ECtHR acknowledges the diversity of national authorities, thereby deferring to them as best placed to make determinations on the needs of their own people.[369] The margin of appreciation amounts to an acknowledgement that although Member States will afford protection to Convention rights, they are able to take into consideration their own unique circumstances when balancing the different interests at stake.

In determining the scope of the margin of appreciation, the ECtHR is influenced by the nature of the right at stake. The more important the right, the narrower will be the margin

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[365] *Harroudj v. France* (Application no. 43631/09) 4 October 2010.
[366] E Macdonald, F Matscher and H Petzold, *The European System for the Protection of Human Rights* (The Netherlands: Martinus Nijhoff Publishers, 1993) p55, Gerda Kleijkamp, *Family Life and Family Interests* (London: Kluwer International, 1999) p52.
[367] Yutaka Arai-Takahasi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Intersentia, 2002) p2 (Also see generally for discussion on the margin of appreciation).
[368] E Macdonald, F Matscher and H Petzold, *The European System for the Protection of Human Rights* (The Netherlands: Martinus Nijhoff Publishers, 1993) p59.
[369] David Hoffman and John Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act* (Harlow: Pearson Education Ltd, 2006) p48-49.

of appreciation. The mutual rights of children and parents, to have a relationship with one another, are protected under ECHR Article 8. States may be permitted a wide margin of appreciation when a child is initially taken into care, even though this may violate parents' and children's Article 8 rights.[370] In general, the Court tends to afford Member States a wide margin of appreciation in respect of children's welfare and in determining what will be in children's best interests[371] including taking a child into care if the child has suffered or is at risk of suffering significant harm[372] and in determining when children may be placed for adoption.[373]

In adoption cases, however, the wide margin of appreciation is tempered by a more intense standard of proportionality. This can be seen in *Keegan v. Ireland,*[374] where an adoption order had been made without the natural father's knowledge or consent. Here, the ECtHR stated that notwithstanding the wide margin of appreciation, a high level of proof was needed to establish that there were relevant reasons for the adoption. An application of this high level of proportionality can also be seen in *Johansen v. Norway*.[375] In this case, the Court acknowledged that a wide margin of appreciation existed when the child was taken into care but that it had been disproportionate to remove the parental rights of the mother and place her child in a foster home, with a view to an adoption order being made. Despite the Court's rulings in *Keegan* and *Johansen*, the Court of Human Rights does not always apply a high standard of proportionality in adoption cases which have originally been heard in the UK.[376]

O'Halloran has stated that non-consensual adoption is increasing in England and Wales but that it is an unusual[377] approach when compared with the rest of Europe, where adoption is typically a 'consensual process'.[378] This is significant since the width of the

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[370] *L v Finland* [2000] 2 FLR 118; *Johansen v. Norway* (Application no. 17383/90) 7 August 1996.
[371] Yutaka Arai-Takahasi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Intersentia, 2002) p64, Ursula Kilkelly, *The Child and the European Convention on Human Rights*, (Aldershot: Dartmouth Publishing Company, 1999) p10.
[372] *L v. Finland*, (Application no. 25651/94), 27 April 2000.
[373] *Keegan v. Ireland* [1994] 18 EHRR 342 at para 47.
[374] [1994] 18 EHRR 342.
[375] (Application no. 17383/90) 7 August 1996 at para 78.
[376] For further discussion, see: Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015).
[377] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015). Also see: *N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112 at para 7, *per* Munby P.
[378] *Ibid* at p110.

margin of appreciation may be influenced by the level of consensus amongst Member States about a particular issue. Non-consensual adoption may, in practice, be permitted in many Member States but it is less commonly used by other States.[379] According to Jones, the application of the consensus principle can be unpredictable in practice and may ultimately grant States a wide freedom of action.[380] The ECtHR has also been criticised for lack of sufficient comparative research, which is problematic since the Court often uses the consensus criterion as a means of determining what the margin of appreciation will be.[381] However, both scholars[382] and judges[383] have acknowledged that the UK's policy on non-consensual adoption is out of line with the rest of Europe. In fact, the ECtHR has yet to directly address the fact that the UK's policy of adoption for children in care is inconsistent with the rest of Europe, despite the fact that several non-consensual adoption cases flowing from the UK, have been heard by the ECtHR.[384]

3.4.5 State Intervention to Assist Families: ECHR Article 8

It can be argued that, in some cases, the State may have a positive obligation under ECHR Article 8 to provide assistance to families before placing a child for adoption. In cases where children are at risk of harm but have not been harmed by their parents, it is arguable that with appropriate practical and/or financial assistance from the State, it may be possible for children to remain with their parents. In other words, the availability and provision of less restrictive measures to adoption may be equally effective and less likely to violate the Article 8 rights of children and their parents.

There are cases which suggest that there may be a positive obligation under Article 8 to provide practical and/or financial assistance to help children and parents stay together. One such case is *Wallova and Walla v. Czech Republic*[385] In this case, the parents were

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[379] Claire Fenton-Glynn, 'The Child's Voice in Adoption Proceedings: A European Perspective' [2014] 22 *International Journal of Children's Rights* 135.
[380] Timothy H Jones 'The Devaluation of Human Rights under the European Convention' [1995] *PL* 430 at 441.
[381] Ignacio de la Rasilla Del Moral, 'The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine' [2006] 7 *German Law Journal* 611 at 618.
[382] For general discussion see: Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015) and
[383] *Down Lisburn Health and Social Services Trust and another v H and another* [2006] UKHL 36 at para 34, *per* Baroness Hale and *D (A Child)* [2014] EWHC 3388 (Fam) at para 35, *per* Mostyn J.
[384] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015) and Claire Fenton-Glynn, 'The Child's Voice in Adoption Proceedings: A European Perspective' [2014] 22 *International Journal of Children's Rights* 135.
[385] [2006] (ECtHR) 130.

unemployed and as the State authorities regarded their housing as being unsuitable, they put in place a supervision order so as to encourage the parents to find suitable housing. When the parents failed to do so, their children were taken into care. The parents alleged violations of Article 8 because they had been separated from their five children and because the State had failed to assist them. The Court held that the separation had been caused by difficulties which the authorities could have addressed in another way, which would have avoided having to split up the family. The Court suggested alternatives (such as monitoring the applicants' living and hygiene conditions and providing advice) but which the State had failed to consider. The Court found that, although the reasons provided by the State were relevant to warrant intervention, these reasons had not been sufficient to justify the removal of the children into care. Accordingly, it held that there had been a violation of the applicants' Article 8 rights. Potentially, this case could be used to support the notion of a wider positive obligation under Article 8 to keep families together.[386]

It can also be argued that Article 8 should be interpreted more expansively so as to protect children and parents' rights to continue to live together or at least to be able to retain relationships with one another. As considered above in the context of Article 2 (the right to life) and Article 3 (the right to freedom from torture or inhuman or degrading treatment), the State has a positive obligation to intervene to safeguard life and to protect children from harm. However, the scope of the positive obligation under Article 8 to help keep birth families together remains unclear.[387] What is clear, however, is that there are often social problems which lie behind the need for State intervention in the first place. There are cases, for example, where poverty leads to neglect[388] and in such cases, timely State assistance may have prevented children from being harmed. It has been argued by Kilkelly that if Article 8 was interpreted widely requiring State intervention to assist families, this would make protection for children and their families, practical and effective.[389] Expanding the scope of Article 8 could have the potential to decrease neglect and abuse and lead to greater utilisation of measures which might be just as effective as

[386] *Redefining and Combating Poverty: Human Rights, democracy and common goods in today's Europe* (Strasbourg: Council of Europe Publishing, 2012) p137.
[387] *Ibid.*
[388] Ursula Kilkelly, *The Child and the European Convention on Human Rights*, (Aldershot: Dartmouth Publishing Company, 1999) p174.
[389] Ursula Kilkelly, *The Child and the European Convention on Human Rights*, (Aldershot: Dartmouth Publishing Company, 1999) p174.

non-consensual adoption, but less restrictive. There is increasing evidence of this type of approach being taken in European jurisprudence which may, in time, influence the law on non-consensual adoption in England and Wales.

In *R.M.S v. Spain*,[390] for example, the Court needed to consider the extent to which the scope of the positive obligation under Article 8 extends towards the provision of State assistance. In this case, a child had been removed into care and placed for adoption because of her mother's poverty and uncertain living arrangements. The Court stated that whereas in some cases children in poor living conditions or suffering from material deprivation have been removed into care, this had never been the sole reason.[391] Such removal was only justified alongside other factors, such as the parents' psychological state or inability to provide their children with emotional and educational support.[392]

Other factors which, by themselves, could justify intervention could include physical or psychological ill-treatment,[393] sexual abuse,[394] lack of emotional development,[395] the child having health problems or psychological instability of the parents.[396] The removal and adoption of the child in *R.M.S* was, therefore, held by the Court to be a disproportionate interference with the mother's Article 8 right to respect for private and family life as the State had failed to take sufficient and appropriate measures to secure the mother's right to live with her child. The Court held that the State could have taken less restrictive alternative measures such as advising the mother on how to obtain benefits and to secure social housing. The decision in *R.M.S* indicates that poverty and uncertain living arrangements are on their own insufficient grounds for taking a child into care and placing the child for adoption. Some other factor such as abuse or neglect is needed to justify a measure like adoption, which may be a serious interference with the Article 8 rights of the birth parents.

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[390] (Application no. 28775/12) 18 June 2013.
[391] *R.M.S. v. Spain* (Application no. 28775/12) 18 June 2013, at para 84.
[392] *Rampogna and Murgia v. Italy* (Application no. 40753/98) 11 May 1999, *M.G. and M.T.A. v. Italy* (Application no. 17421/02) 28 June 2005.
[393] *Dewinne v. Belgium* (Application no. 56024/00), *Zakharova v. France* (Application no. 53706/00).
[394] *Covezzi and Morselli v. Italy* (Application no. 52763/99) 9 May 2003.
[395] *Kutzner v. Germany* (Application no.46544/99) 26 February 2002.
[396] *Bertrand v. France* (Application no. 57376/00) 19 February 2002 and *Couillard Maugery v. France* (Application no. 64796/01) 1 July 2004.

A similar approach was taken in *Zhou v. Italy* where the Court again needed to consider whether there were sufficient grounds to justify interference with parental rights under Article 8.[397] Here, the mother was working mother who had placed her child in the care of a neighbouring couple while she went to work. As Social Services did not regard the couple as suitable carers for the child, the child was taken into care and placed for adoption. Because of the choices the mother had made, she was regarded as being incapable of exercising her parental role and fostering the development of her son's personality. The Italian Court subsequently made an adoption order. The mother argued that placing her child for adoption and preventing her from seeing her child had violated her right to respect for private and family life under Article 8. The ECtHR held that the mother's Article 8 right had been violated and that the State ought to have taken tangible measures to attempt to reunite the mother with her son, before placing him for adoption.

In *SH v. Italy*,[398] the State intervened and removed three children into care whose mother was suffering from depression and was struggling to raise her children. The parents accepted that they needed assistance from the child's grandfather and the Italian social services but maintained that it was not necessary for the children to be taken into foster care. The Italian equivalent of a children's guardian recommended, in the light of the strong emotional bond which existed between the mother and her children and the fact that the mother was willing to have psychotherapy, that the children ought to be reunited with their parents. The children were returned to their mother but were removed into foster care again because the mother was hospitalised and the grandfather was too ill to assist the family. Despite a court-ordered expert report suggesting that the children should remain in care and that contact between the children and their parents ought to continue (albeit with a support package from Social Services in place), the Italian Court ordered that contact should cease and that the children ought to be placed for adoption, on the basis of the mother's mental health problems and the father's inability to show his children affection.

After having appeals rejected by the superior Italian courts, the mother argued before the ECtHR that her Article 8 right had been violated as the Italian authorities had failed to satisfy their positive obligation to provide support in order to keep the family together.

[397] (Application no. 33773/11) 21 January 2014.
[398] (Application no. 52557/14) 13 October 2015.

The three children were placed separately which meant that, not only did they lose their relationships with their parents, but that they also lost the opportunity to maintain relationships with each other. The Court considered that Member States must equip themselves with legal powers to ensure compliance with their positive obligations under Article 8.[399] The Court observed that, despite the existence of emotional bonds, the family's willingness to collaborate with Social Services and the existence of an expert report recommending that the family should be kept together, the Italian Court had ordered the adoption of the three children.[400] The Court determined that the Italian Court's failure to consider less radical solutions, such as the support package recommended by expert testimony, demonstrated that the national authorities had not made sufficient attempts to protect the mother-child bond and thus, the mother's Article 8 right had been violated. The Court also emphasised that State agencies must, in particular, protect, guide and advise vulnerable persons such as those suffering from mental health problems.[401] An interesting aspect of this decision is that the Court emphasised the importance of intervention in this case, despite the resource implications of providing such support to families.

The ECtHR is increasingly emphasising the importance of the need for States to use less restrictive measures than non-consensual adoption but which may be equally effective. A wider implication of these decisions, in particular, the recent decision in *SH v. Italy*, is that the positive obligation owed by the State to families may mean that it will become necessary for State authorities to attempt to reunite families by means of less restrictive alternatives to non-consensual adoption. This decision may have a wider impact in non-consensual adoption cases in England and Wales, where the State has not sufficiently explored the possibility of keeping families together via State assistance (see the discussion in Chapter 5, for further detail).

3.4.6 Removing Children from the Family Home: Article 8

Regardless of the State's positive obligation to assist children and their parents, interference with parents' rights may sometimes be justified under Article 8(2), for example, in cases of severe neglect and abuse (see Section 3.2). These circumstances will

[399] *SH v. Italy* (Application no. 52557/14) 13 October 2015 at para 41.
[400] *Ibid* at para 47.
[401] *Ibid* at para 54.

make it necessary for the State to take action,[402] and potentially remove a child from his or her family home. Any interventionist measure must, however, be proportionate[403] and arguably there may be cases where measures (which are less restrictive and thus less of an interference with children's and parents' rights under Article 8(1)) may be used to protect children's rights under ECHR Articles 2 and 3 and their best interests.

In practice, measures of intervention could include the provision of additional help or support for the family unit where required,[404] the reduction and/or the termination of contact,[405] the termination of parental responsibility/rights[406] and ultimately even adoption. There are a number of cases, however, where State measures have been held not to be proportionate and the Court has found violations of Article 8.[407] The cases typically challenge the initial separation of the parent and child and any subsequent measures which adversely impacted on the ongoing relationship between parent and child and the likelihood of them being reunited in the future.

It is helpful to examine some key cases where initial State intervention under Article 8(1) has been justified but further measures, such as removal of the child from the family home or adoption, have not. In *Kutzner v. Germany,*[408] the children were taken into foster care because the applicants were not considered to have the requisite intellectual capacity to raise their children and because there was emotional under-development in the children. The children had been provided with educational support measures which were considered to be inadequate and the authorities determined that further intervention was required. The Court questioned whether Social Services and the judiciary had given sufficient consideration to additional measures of support as an alternative to the more serious measure of separating the children from their parents. The parents were not permitted to have contact with their children for six months and, although they were eventually granted the right to have contact, they were still only allowed to see their children twice a month for an hour.

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[402] *K and T v. Finland* (Application no. 25702/94) 12 July 2001.
[403] *Saviny v. Ukraine* (Application no. 39948/06) 23 December 2008, *Pontes v. Portugal* (Application no. 19554/09) 10 April 2012.
[404] *Kutzner v Germany* (Application no. 46544/99) 26 February 2002.
[405] *Ibid.*
[406] See the discussion in Chapter 2.
[407] *Eriksson v. Sweden* [1989] ECHR 10, 23 June 1989, *Kutzner v Germany* (Application no. 46544/99) 26 February 2002, *Saviny v. Ukraine* (Application no. 39948/06) 23 December 2008.
[408] (Application no. 46544/99) 26 February 2002.

The actions taken by the State were held to have been disproportionate, with the Court disapproving of the State's decision to make a care order and, in particular, the manner in which it was implemented.[409] The Court observed that it might have been possible to have protected the children's welfare by offering additional practical support to the family from Social Services, rather than taking 'by far the most extreme measure'.[410] It also suggested that the limitations on contact would only have served to add to the alienation between the children and their parents.[411] The Court therefore held that even though the reasons for intervention were legitimate, they were insufficient to justify such a serious interference with family life. The Court therefore found that there had been a violation of the parents' Article 8 rights.

The decision in *Kutzner* is an example of a State failing to satisfy the proportionality test by not considering less restrictive alternatives which would have provided sufficient protection for the children's welfare.[412] *Kutzner* shows that where children are removed from parents with learning disabilities, then the relevant authorities must consider whether it would be appropriate to provide the family with additional support.[413] A failure to give sufficient consideration to alternative methods of family support which would thereby enable children to remain in the family home would be a disproportionate interference with parental rights. *Kutzner* also serves as a warning that it is not justifiable to remove children from their parents just because they could be raised in a more beneficial environment than that which their parents could provide.[414] A similar message can be found in *Haase v Germany*[415] where the Court held that:

> 'The fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the 'necessity' for such an interference with the parents' right under Art 8 to enjoy a family life with their child…[B]efore public authorities have recourse to emergency

[409] *Kutzner v Germany* (Application no. 46544/99) 26 February 2002 at para 70.
[410] *Ibid* at para 75.
[411] *Ibid* at para 79.
[412] See the discussion in: Cristina Hoss, 'Family Matters: European Court of Human Rights Finds German Parenting Rights Decisions to be in Violation of Article 8' *German Law Journal* http://www.germanlawjournal.com/article.php?id=146 and Julie Wallbank, Shazia Choudhry and Jonathan Herring, *Rights, Gender and Family Law* (New York: Routledge, 2010).
[413] See the discussion in Abigail Bond, *Care Proceedings and Learning Disabled Parents: A Handbook for Family Lawyers*, 2nd edn (Bristol: Family Law, 2014) p3.
[414] *Kutzner v Germany* (Application no. 46544/99) 26 February 2002 at para 69.
[415] [2004] 2 FLR 39 at para 95.

> measures in such delicate issues as care orders, the imminent danger should be actually established. It is true that in obvious cases of danger no involvement of the parents is called for. However if it is still possible to hear the parents of the children and to discuss with them the necessity of the measure, there should be no room for an emergency action, in particular when, like in the present case, the danger had already existed for a long period'.

There are cases where State intervention may be regarded as being justifiable so as to assist parents in raising their children, but not the removal of a child from his or her parents. In *Saviny v. Ukraine*, four children were removed from their blind parents on the basis that the children were in 'danger'. The reason for their removal was that the environment the children were living in was regarded as unsatisfactory by the authorities because where the children lived was cold, dirty and untidy. The Court held that the parents' Article 8 right had been violated by removing the children into care and that, while the reasons for removal were relevant, they were insufficient to justify compulsory removal. The Court emphasised that there must be 'weighty considerations in the interests of the child'[416] which would justify the children being taken into care. Establishing that the child would be removed into a 'more beneficial environment'[417] did not justify the State's action. The Court said that financial assistance and social counselling could have been helpful for the parents in this case and it stressed the importance of sufficiently exploring 'less far-reaching alternatives'[418] before removing the children into care, a measure which was disproportionate under the circumstances.

As considered above, State intervention may be justified to protect children's welfare under Article 8(2) but in some cases, care orders may not be a proportionate measure. In other cases, care orders may well be proportionate but the ECtHR takes the view that care orders ought to be a temporary measure[419] and that the State ought to take active steps to reunite children with their parents. The State's positive obligation may extend to reuniting parents and children, even where separation has been justified under Article 8(2).[420] *Olsson v. Sweden (No 2)*[421] is an example of a case where the Court has stated that such a positive obligation exists. *Olsson* concerned three children who were taken into care, separated from each other and housed a considerable distance from their parents

[416] *Saviny v. Ukraine* (Application no. 39948/06) 23 December 2008 at para 49.
[417] *Ibid* at para 50.
[418] *Ibid* at para 58.
[419] *K and T v. Finland* (Application no 25702/94) 12 July 2001.
[420] *KA v Finland* (Application no. 27751/95) ECtHR 14 January 2003.
[421] (No. 2) A.250 (1992).

which made it difficult for regular contact to take place. The initial removal of the children was held not to be a violation of Article 8(1) but the restrictions on access between 1987 and 1990 were, as at that time, there was no legal provision upon which the restriction of access could be based.[422] However, the Court took into consideration the lengthy period of separation between the children and their parents and also the children's objections to being reunited and held that the restrictions on access from 1990 onwards did not violate the parents' rights.

This case is an important demonstration of how the separation of parents and children and infrequent contact can make reuniting children and parents difficult or even impossible. As the Court stated in *Ignaccolo-Zenide v. Romania*[423]: 'the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them'.[424] The reasoning in cases like *Olsson* and *Ignaccolo-Zenide* is important when assessing the proportionality of adoption orders, since increased efforts by the State to reunite children with their parents prior to adoption is less likely to violate the rights of children and their parents under Article 8(1). Nonetheless, it is essential for the State to strike the appropriate balance and not make endless attempts to reunite children with their parents since this could lead to unnecessary delay in the adoption process.

P,C and S v. UK[425] is one of the most critical judgments that the ECtHR has delivered on the UK's application of procedures on child protection and adoption and was described by Hewson *et al* as a 'groundbreaking'[426] case. This judgment makes it clear that the immediate removal of a newborn child at birth is potentially a violation of Article 8 and a draconian measure, which will rarely be justified. The removal of S at birth was subjected to close scrutiny by the Court which stated that such removal at birth required 'exceptional justification' as it is:

> '…a step which is traumatic for the mother and places her own physical and mental health under a strain, and it deprives the new-born baby of close contact with its birth mother…'[427]

[422] *Olsson v. Sweden* (No. 2) A.250 (1992) at para 81.
[423] [2000] ECHR 25, 25 January 2000.
[424] *Ignaccolo-Zenide v. Romania* [2000] ECHR 25, 25 January 2000 at para 102.
[425] [2002] 2 FLR 631.
[426] *P,C and S v. UK* [2002] 2 FLR 631.
[427] *Ibid* at para 131.

The Court accepted that the local authority was entitled to apply for an emergency protection order,[428] as there were relevant and sufficient reasons for doing so (i.e. the fact that P had been convicted in the USA for harming her son raised doubts about the welfare of her unborn child). The intervention and action had been 'necessary in a democratic society to safeguard the health and rights of the child'.[429] However, the Court determined that the removal of S at birth was not supported by relevant and sufficient reasons. There was no suspicion that S would be in danger from her mother immediately after birth. According to the Court, it was unnecessary to remove S immediately after birth, and supervision would have been sufficient to protect S from harm. Thus, the Court concluded that the national authorities had not acted in a manner which was proportionate and it was held that there had been a breach of P and C's Article 8 rights. Even though Member States have a wide margin of appreciation in taking measures to protect the welfare of children, an intense standard of proportionality will be applied when a 'draconian'[430] measure, such as the removal of a newborn baby occurs. Thus, without compelling reasons for the removal, less restrictive alternatives should be used to protect the child's welfare.

Despite the emphasis the Court placed on the draconian nature of the removal of a child at birth, cases like this continue to be heard in the courts in England and Wales.[431] Mothers have had their babies removed at birth, or shortly after birth, when there is no evidence that the child is at immediate risk of harm or that his or her Article 2 (the right to life) or Article 3 (the right to freedom from torture or inhuman or degrading treatment) rights are likely to be violated (see the discussion in Section 4.4.2 and Section 5.2.2). In *P, C and S v. UK*, a sad aspect of the final decision was that contact between S and her parents was stopped. It will be argued in Section 5.5 that non-consensual adoption with direct contact may be a less restrictive but equally effective alternative to non-consensual adoption without direct contact. This thesis will now go on to consider how the ECtHR has addressed the issue of contact between children and parents prior to and after an adoption has taken place.

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[428] See the Children Act 1989, s44.
[429] *P,C and S v. UK* [2002] 2 FLR 631 at para 130.
[430] *Ibid* at para 98.
[431] For example: *X Council v. B* [2004] EWHC 2015 (Fam) [2005] 1 FLR 341; *R (G) v. Nottingham City Council* [2008] EWHC 152 (Admin); *Re NL (A Child) (Appeal: Interim Care Order: Facts and Reasons)* [2014] EWHC 270 (Fam).

3.4.7 Contact between Children and Birth Parents

The ECtHR has emphasised the importance of contact being maintained between children and parents, and that State authorities should give adequate consideration to the question of whether contact is in a child's best interests.[432] In such cases, the principle of 'stricter scrutiny'[433] applies and dictates that whereas initial removal of a child will warrant a wide margin of appreciation, any further measures imposing restrictions on the parental-child relationship (such as by reducing/terminating contact) must be subject to stricter scrutiny and consequently a corresponding narrow margin of appreciation will exist since the removal of contact would mean that: 'the possibilities of reunification will be diminished and eventually destroyed'.[434] The Court has thus acknowledged that once a child has been removed from his or her parents, any further restrictions on their relationship (e.g. reduction/termination of contact) may weaken the bond between them and lessen the likelihood of them being reunited.[435]

In *Eriksson v. Sweden,*[436] the child was placed in a foster home one month after birth because the mother had been sentenced to 14 months in prison for dealing in stolen goods and for the possession of narcotics. In this case, it was undisputed that the child needed to be in care during this time. However, according to the Court, the 'severe and lasting restrictions'[437] on contact violated the mother's right to respect for private and family life under Article 8. Although the initial intervention had been necessary, the restrictions on contact were disproportionate in the light of the aim of protecting the child from harm. Another example of the Court expressing its disapproval of the State's limitation of contact between a parent and child can be seen in *Andersson v Sweden*.[438]

In this case, a boy was taken into care because the authorities had concerns about his social and emotional development, which, despite being brought to the attention of his mother, had not been addressed by her. While in care, he was unable to see his mother because contact was prohibited by the authorities as it was regarded as 'necessary in order

[432] *Anayo v. Germany* [2010] ECHR 2083; *R and H v. UK* [2011] ECHR 844.
[433] *Johansen v. Norway* (Application no. 17383/90) 7 August 1996.
[434] *Görgülü v. Germany* (Application no. 74969/01) 26 February 2004 at para 46. Also, see *K and T v. Finland* (Application no. 25702/94) 12 July 2001 at para 175.
[435] *Scozzari and Giunta v. Italy* (Application no. 41963/98) 13 July 2000.
[436] [1989] ECHR 10, 23 June 1989.
[437] *Eriksson v. Sweden* [1989] ECHR 10, 23 June 1989 at para 71.
[438] (Application no. 12963/87) 25 February 1992.

to achieve the purposes of the care order'[439] which were adversely affected by his mother's attempts to encourage him to run away from care and the fact that he had actually run away on several occasions. The mother had been limited to contact by telephone and letters (which had also been terminated for a certain period). She and her son were successful before the ECtHR in arguing that these restrictions on contact violated their Article 8 rights and the Court held that, although national authorities had provided general reasons for these measures, the measures were so far-reaching that there was a need to provide strong reasons for them to be justified under Article 8(2). As the Court found that there were no such reasons, it held that the national authorities had failed to establish it was necessary to deprive the applicants of contact and had failed to show that these measures had been consistent with reuniting the family. The Court therefore held that there had been a violation of Article 8(1) as the restrictions were disproportionate and could not be held to be necessary in a democratic society.

ECtHR case law emphasises that the State must endeavour to foster the reunification of parents and children, but that this obligation is not absolute.[440] In some cases before the ECtHR, State restrictions on contact between child and parent have been justified under Article 8(2). In *Levin v. Sweden,*[441] for example, the Court suggested that the parents' right to contact could be restricted depending on the 'nature and seriousness of children's interests'.[442] In *Levin*, the national authorities were held to be justified in limiting contact because of the distress the children suffered when contact took place. Distress suffered by the child and an express wish not to have contact appears to be given weight by the Court and will justify limiting parents' rights under Article 8(2). The dissenting judgment of Judge Forde in *Levin* does, however, suggest caution in finding an interference of parents' rights to be proportionate based on a child's distress at seeing a birth parent when in care. Judge Forde suggested that while it may be relevant to take into account a child's distress, the manner in which the State facilitates contact may create distress not the contact *per se*. She said that the speed and extent to which the contact was reduced was not proportionate. In her opinion, the national authorities had failed to discharge their duty to reunite the children with their birth parents.[443]

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[439] *Andersson v. Sweden* (Application no. 12963/87) 25 February 1992 at para 16.
[440] See, for example: *Hokkanen v. Finland* [1996] 1 FLR 289 at para 55.
[441] (Application no. 35141/06) 15 March 2012.
[442] *Levin v. Sweden* (Application no. 35141/06) 15 March 2012 at para 64.
[443] *Ibid* at pages 17-19, at paras 7-8 of Judge Forde's dissenting judgment.

The ECtHR has also had to consider whether post-adoption contact ought to be provided, in order for the State to satisfy its obligation under Article 8. *Aune v. Norway*,[444] provides an example of circumstances where non-consensual adoption may be a necessary and proportionate measure. In this case, the child was removed from his parents due to the ill treatment he had received because of his parents' drug abuse problems. While in care, he developed a bond with his foster parents, who sought to adopt him. The birth mother argued before the ECtHR that her Article 8 right was violated because of the deprivation of her parental responsibilities and because of the State's consent to her son being adopted by the foster parents. Although the mother accepted that the child was to remain in foster care she expressed concern that there would be no guarantee of contact post-adoption.

The Court held that the boy's best interests were an overriding requirement which justified the making of the adoption order. In the light of the boy's interest in stability, the bonds he had formed with his prospective adoptive parents and the fact that they continued to facilitate contact between him and his birth mother, the Court held that it had been reasonable for the Norwegian authorities to decide that the interest in placing him for adoption outweighed the mother's interest in assured contact. The Court, therefore, held that the mother's Article 8 right had not been violated and it had been a proportionate step for the boy to be adopted. Having outlined the general principles of ECtHR case law, it is helpful to examine how they have been applied in UK cases on non-consensual adoption which have reached the ECtHR.

3.5 Guidance on Reuniting Children and Parents in Adoption Cases?

3.5.1 Overview

As the ECtHR jurisprudence considered above shows, national authorities must take reasonable and necessary steps to reunite and facilitate the reuniting of children with their parents.[445] Any measures which prevent children from being returned to and reunited with their parents or which reduce the likelihood of them being reunited can be justified

[444] (Application no. 52502/07) 28 October 2010.
[445] *Hokkanen v. Finland* [1996] 1 FLR 289; *Görgülü v. Germany* [2004] ECHR 74969/01; *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) 6 July 2010; *Pini and Others v. Romania* (Application no. 78028/01) 22 June 2014.

only in exceptional circumstances and where it is in the child's best interests.[446] As was stated in *Neulinger and Shuruk v. Switzerland,*[447] ties should be maintained with family members except where the family is shown to be particularly unfit. In other words, there must be exceptional circumstances before the State decides that children should be permanently removed from their parents. It can be argued that the ECtHR has not provided clear guidance on what steps might be 'reasonable' for State authorities to take in order to facilitate reunification between children and parents and what might constitute 'exceptional circumstances' justifying a permanent separation between children and parents. This thesis thus outlines what steps are likely to be, and ought to be, regarded as 'reasonable' for States to take in order to satisfy their positive obligation under Article 8 to reunite children and their parents. It is also helpful to clarify what might constitute 'exceptional circumstances' for justifying the making of an adoption order.

3.5.2 Reasonable Steps

It has been emphasised in this chapter that in cases where children have been removed from their birth parents by the State, particular in non-consensual adoption cases, that it is important to identify whether a State has taken any measures ('reasonable steps') to try and reunite the child concerned with his or her birth parents (or even to pursue other less restrictive alternatives to non-consensual adoption which may be just as effective, thereby ensuring a more proportionate response is taken).

It is argued that the courts ought to consider which measures had been taken by the State. This could include, for example, consideration of whether the family had regular visits from a social worker, whether the family was given the opportunity to and did actually participate in State programmes aimed at helping families, whether the child and parents were offered family therapy and/or whether additional financial assistance or housing were available for families living in poverty. In *R.M.S v. Spain*, for example, the Court of Human Rights held that insufficient efforts had been made on the part of the authorities to help the family obtain suitable housing (see further in Section 3.4.5).

If the State has tried different methods of helping to support the family but has nevertheless decided that non-consensual adoption is the best option, then it would be

[446] *Johansen v. Norway* (Application no. 17383/90) 7 August 1996.
[447] (Application no. 41615/07) 6 July 2010.

legitimate for the State to argue that reasonable efforts or steps had been made to reunite the parents and child. In *Johansen v. Norway*,[448] for example, the authorities had made numerous attempts to assist the mother in caring for her first child before he was taken into care. This information influenced the authorities in deciding to remove the mother's second child into care and to make arrangements for the child's adoption.

Another relevant case example is *Saviny v. Ukraine*. In this case, the Court advised that 'particular attention should be paid to difficult social and economic circumstances, which require more specific support'.[449] It was emphasised at the Conference on Child Removal Proceedings[450] in Prague in October 2014 that the authorities ought to be encouraged by the Council of Europe to be more pro-active in providing assistance to families in trouble. Reference to providing families with appropriate support and keeping families together where possible, can also be found in UNCRC Articles 7, 8 and 9 and in the UN Guidelines on the Alternative Care of Children. The difficulty is in determining how much assistance a State must supply before it decides to use a more restrictive measure such as non-consensual adoption.

It would also be helpful, when considering whether or not reasonable steps have been taken to reunite children with their parents, for the Court to consider whether contact had been supported prior to the adoption or the placement for adoption. The lack of contact between children and parents prior to adoption is an issue which has been viewed with concern by the Court. Despite the Court's disapproval, it appears to be accepted practice in English law to terminate or reduce contact between children in care and their parents[451] where adoption is regarded as being in the child's best interests. If contact between children and their parents was supported throughout the care process this would make it easier to argue that reasonable efforts to reunite children and parents had been made and that the decision to go ahead with a non-consensual adoption was a proportionate measure. In *Aune v. Norway*,[452] for example, the mother still had contact with the child but, because of the bond the child had developed with the prospective adopters, it was determined by the Court that it had been in the child's best interests to be adopted. The

[448] (Application no. 17383/90) 7 August 1996.
[449] *Saviny v. Ukraine* (Application no. 39948/06) 23 December 2008 at para 36.
[450] This conference was organised by Marica Pirosikova from the Slovak Republic.
[451] See the Children and Families Act 2014, s8(3).
[452] (Application no. 52502/07) 28 October 2010.

positive obligation to reunite children with their birth families under ECHR Article 8 and the importance of facilitating contact would, however, need to be balanced against the child's own rights under Articles 2, 3 and 8.

Authorities ought to investigate to discover whether alternatives to adoption may be available (e.g. kinship care, see Chapter 5). The greater the amount of work undertaken by authorities to assess and implement where necessary, alternatives to adoption makes it more probable that a final adoption decision will be regarded as a reasonable and proportionate measure by the ECtHR. In *Pontes v. Portugal*,[453] for example, the Court held that the authorities had violated Article 8 because as the many alternatives available to adoption had not been fully considered, the adoption was not justified. In the *Pontes* case, the parents had five children who were monitored by the Portuguese authorities because of the parents' drug use. Because of the parents' negligent care, the children were taken into care. Subsequently, the parents' home life improved and their children were returned to them except for their son P for whom they had their parental authority removed by the State and who was subsequently placed for adoption. The rationale of the national authorities was that P had spent three years in care and had developed a close relationship with his foster parents, with no ties with his siblings or biological parents.

The parents took their case to the ECtHR arguing that their Article 8 right to a private and family had been violated as: their son had never been allowed to spend holidays or weekends with his family; contact had been terminated in 2006; their parental authority had been removed and P had subsequently been adopted. The Court observed that the authorities had failed to consider less radical measures including returning the child to his parents and it drew attention to the inconsistency whereby all of the children except P had been returned to their parents. There appeared to be no justification for this. The Court doubted that it could be in P's best interests to break up the family or lose a relationship with his parents or siblings, when it was clear that he could have been reunited with his parents. The Court therefore held that Article 8 had been violated as the adoption had not been founded on relevant and sufficient reasons and was not proportionate. This case demonstrates that it is crucial that States carry out a thorough analysis of a child's best interests and provide sufficient justification for the termination of contact and subsequent

[453] [2012] ECHR 1573.

adoption. In *Pontes*, adoption was clearly not in the child's best interests because he had lost the opportunity to be raised by his birth parents and to develop a relationship with his siblings.

Also, as has been argued above, children's rights ought to be considered. This includes rights under the UNCRC (see Chapter 2) and children's rights under ECHR Article 8 and any other relevant ECHR provisions. It is argued that children's rights are not routinely considered in adoption cases at ECtHR level and that they ought to be considered by the Court when determining whether or not State authorities have undertaken reasonable steps, to reunite the child with his or her birth parents. In general, the Court of Human Rights focuses on the rights of the parents and the best interests of the child but gives little consideration to the actual rights of the child, for instance the child's right to have his or her voice heard. Thus, although in principle the child's Article 8 right to respect for private and family life is also engaged, and in some cases, the child's Article 2 right to life and Article 3 right to freedom from torture or inhuman or degrading treatment may be relevant, these children's rights are not typically discussed by the ECtHR in adoption cases.[454] Similarly, although there are certain UNCRC rights which may also be relevant for the Court to consider in the context of adoption, these are not examined. For instance: Article 7 (the right to know and be cared for by one's parents), Article 8 (the right to identity; specifically, the right to family relations) and Article 9 (concerning parental separation).

In adoption cases before the ECtHR, the focus tends to be on the parents' rights, not those of the child and on whether the actions or omissions of the State leading to the non-consensual adoption or the adoption itself violates parental rights. When deciding whether or not reasonable steps have been taken to reunite children with their parents, it is suggested in this thesis that the court should place greater emphasis on the length of time the child has been raised by his or her birth parents, the quality of the relationship between the child and his/her parents and the wishes and views of the child in question. Parental-child relationships may range from parents who are unable to provide good quality care for the children but who may still have a well-developed bond with the child

[454] *P, C and S v. UK* (Application no. 56547/00) 16 July 2002 is a rare case where the child's rights under Article 6 and 8 were put to and ultimately considered by the Court.

(this was observed in *Y.C v. UK*[455] for example) to those at the other end of the spectrum, who have severely abused their children and/or do not have strong bonds (e.g. in *Aune v. Norway*[456]).

There may be cases where children expressly state that they do not want to maintain relationships with their birth parents or demonstrate visible signs of distress or regression in behaviour, when in their parents' presence. In such cases, this might be a factor which justifies making less strenuous efforts to attempt to reunite a child with his or her parents and increases the likelihood that a non-consensual adoption would be a proportionate measure. However, this ultimately depends on the facts of the case. In *Levin v. Sweden*,[457] for example, Judge Forde has pointed out that sudden removal from a parent by the authorities may be distressing and may contribute to a child's distress at having contact with his or her parents. Thus, while the child's own explicit and implicit response to his or her parents is an important factor which ought to be considered by the Court, it should not be determinative.

It is relevant for the Court to consider the reasons for removing a child into care in the first place, in other words, prior to adoption. Children may be removed from the family home because their parents have neglected and/or abused them and, in such cases, this may have a bearing on the proportionality of non-consensual adoption. The factors which could be examined by the Court of Human Rights could include, for example, the reason for the child's initial removal into care, whether the removal was based on risk of harm or actual harm, the number of occasions the child has been harmed and the severity of the harm that may have taken place. In cases where severe abuse has taken place and no effort on the part of parents has been made to address their own behaviour which has led to such abuse (drug or alcohol addiction, for example) then it should not be incumbent on States to make strenuous efforts to reunite children with their parents. Indeed, as stated above, it is suggested in such cases that no further consideration of reuniting the family would protect the child's rights under Article 2 (the right to life) and Article 3 (the right to freedom from torture or inhuman or degrading treatment) and would potentially justify no further attempts to reunite the family.

[455] (Application no. 4547/10) 13 March 2012.
[456] (Application no. 52502/07) 28 October 2010.
[457] *Levin v. Sweden* (Application no. 35141/06) 15 March 2012 at pages 17-19, paras 7-8 of Judge Forde's dissenting judgment.

However, in cases where parents' circumstances have affected their ability to raise their child, then this should be a relevant consideration as to whether or not non-consensual adoption complies with human rights. In *R.M.S v. Spain,*[458] the Court observed that the child who had been removed into care and placed for adoption had not been subjected to physical or psychological harm, sexual abuse, had no serious health problems and her emotional development was normal. The main basis for taking the child into care was the parents' poverty and difficulty in finding accommodation. As a result, there was a breach of the mother's Article 8 right because of the State's failure to make adequate and effective efforts to explore whether or not it was possible to reunite parent and child. It is also helpful to consider Lady Hale's words *In the Matter of B,*[459] where she stated that:

> 'There are cases where the harm suffered or feared is very severe, but it would be disproportionate to sever or curtail the family ties because the authorities can protect the child in other ways… Conversely, there may be cases where the level of harm is not so great, but there is no other way in which the child can be properly protected from it'.[460]

In other words, it may be possible in some cases for the State to reunite a child with his or her parents and protect the child from the risk of harm or from further harm occurring. In such cases, then, it may be possible for children's rights under ECHR Articles 2 and 3 to be protected while also protecting the parents' and children's Article 8 rights. However, if permanent removal of a child from his or her home environment is essential to protect his or her rights under Article 2 and 3, then a non-consensual adoption is likely to be a proportionate measure which has the effect of protecting the children's Convention Rights and which does not breach parents' rights under Article 8. It is submitted that, although the ECtHR has to be careful not to substitute its view for that of the national court in any given case, it should nonetheless probe more deeply in non-consensual adoption cases which could, in turn, have a powerful impact on national adoption law.

3.5.3 Exceptional Circumstances

It is argued that the test of 'exceptional circumstances' which justifies removal of children from their family homes, and even adoption, has, in practice, not been a difficult

[458] (Application no. 28775/12) 18 June 2013.
[459] [2013] UKSC 33.
[460] *In the Matter of B (Children)* [2013] UKSC 33 at para 197 *per* Lady Hale.

hurdle for domestic authorities to overcome when justifying non-consensual adoption before the ECtHR. It has been suggested by Fenton-Glynn, for example, that the exceptional circumstances test will often be satisfied if the measure (e.g. an adoption order) is regarded by national authorities to be in the child's best interests.[461] At first glance this appears to have been borne out, for example, by the discussion in the adoption cases of *R and H v. UK* and *Y.C. v. UK*, considered in Section 6.2. The fact that this test is so easily satisfied may mean that, in some cases, parents' Article 8 rights are not well-protected when the State determines that it is in the child's best interests to be removed into care and placed for adoption. It may also mean that a child's ECHR Article 8 right to have a relationship with his or her parents may be violated. However, it should be observed that the Court of Human Rights appears to have taken a more deferential approach in non-consensual cases arising from England and Wales since the enactment of the Adoption and Children Act 2002, when compared with similar cases concerning non-consensual adoption originating from other European countries (see Chapters 3 and 6).

While a concrete definition of what amounts to 'exceptional circumstances' carries the risk of creating a straitjacket for Member States, it can be argued that the test is still too vague. Whereas on the one hand, it could be regarded as potentially providing protection for children by making it easier for the State to intervene to protect children's rights under ECHR Articles 2 and 3, on the other hand it could be argued that these rights could be protected via less restrictive alternatives to non-consensual adoption. Thus, it is argued that the test of 'exceptional circumstances' at present, provides insufficient protection for the rights of children and their parents in non-consensual adoption cases. Removal of children into care and placement for adoption are very serious steps which, in the case of adoption, have irreversible consequences.

As such then, children, parents and, in particular, Member States ought to have a clear idea of when the ECtHR will regard these steps as justifiable due to exceptional circumstances. This would be helpful not only at the ECtHR level but also at the domestic level since many challenges brought by parents (and sometimes also children) may not reach the Court of Human Rights. It is argued in this thesis that, although the determination of 'exceptional circumstances' requires a flexible approach, there is

[461] Claire Fenton-Glynn 'Adoption in a European Perspective' in Jens M Sharpe, *Research Handbook on European Family Law* (Cheltenham: Edward Elgar Publishing, 2016) p2.

nevertheless a need for greater clarification as to what sort of circumstances will be regarded as exceptional for the purposes of Article 8 and other Convention Rights. Articles 2 and 3, for example, could have a bearing on this analysis. It is argued that the 'exceptional circumstances' test ought to apply only where children's lives are endangered or they are at risk of serious physical or emotional harm.

In a case where a child was removed into care and placed for adoption due to severe neglect and/or abuse, this would have the effect of protecting the child's right under Article 3 to protection from torture or inhuman or degrading treatment. This can be seen in *Z v. UK*,[462] for example, where it was necessary to remove the children from their parents due to the severe neglect that the children had sustained. However, children may suffer emotional harm under Article 3 if they are removed from parents, and they have strong bonds with their parents. The emotional harm may be particularly severe in cases where children are removed based on the risk of significant harm to their welfare (or a court finding that significant harm has, in fact, occurred).
If the parents' treatment of the child has engaged children's rights under Article 3, then this may amount to 'exceptional circumstances' which justify removal of a child into care and the subsequent placement of that child for non-consensual adoption. However, this must still be weighed against the potential emotional harm of removing children from their parents and placing them for adoption. It can be argued that in *Y.C. v. UK*, for example, the separation of 8-year-old K from his mother could have engaged his right under Article 3. This case is significant because it is arguable the circumstances were exceptional enough to justify State intervention and removal of the child, but not so exceptional that non-consensual adoption was a necessary and proportionate measure (see further in Section 6.2.2). Similarly, in cases where the severity of the harm suffered by the child or that would be suffered by the child satisfied Article 2, such circumstances ought to be regarded as exceptional circumstances which justify non-consensual adoption.

In cases where a child's right to life under Article 2 and his or her right to freedom from torture or inhuman or degrading treatment under Article 3 were engaged as well as his or her parents' rights under Article 8, the child's rights under Articles 2 and 3 would

[462] [2001] 2 FLR 612.

outweigh those of the parents. Under those circumstances, taking a child into care and placing him or her for adoption may be justified in some cases. It is argued that the test of exceptional circumstances needs to be clear and ought to apply and provide justification for non-consensual adoptions only in circumstances where it can be demonstrated that the child's rights under Article 2 or 3 are under threat.

The Court has in some cases considered whether less restrictive measures could be taken which fall short of non-consensual adoption but which may be just as effective in terms of outcomes (i.e. protection of children's rights and best interests). It is suggested that, in all cases, there should be a thorough analysis of whether the State has taken reasonable steps to reunite children and their parents or whether other less restrictive alternatives which may be just as effective exist (as considered above). It is argued in this thesis that certain factors may be extracted from the case law considered in the previous sections of this chapter, and that the UNCRC rights considered in Chapter 2 may be relevant considerations when determining whether steps have been taken to reunite children with their parents and ultimately, to help States decide when non-consensual adoption may or may not be proportionate. This is particularly important in adoption cases because of the long-term, and in fact life-long, consequences adoption has for children and their birth parents.

3.6 Conclusion

The ECtHR has an important role to play in upholding Convention rights and in assessing the proportionality of State measures when children are removed from their parents and placed for adoption. The most relevant Convention rights in the context of adoption proceedings are Article 2 (the right to life), Article 3 (the right to freedom from torture or inhuman or degrading treatment), Article 6 (the right to a fair hearing) and Article 8 (the right to respect for private and family life).

It is apparent from ECtHR case law that the separation of children and parents is warranted only in exceptional circumstances and that national authorities must take reasonable steps to reunite children with their parents. If States fail to do so, then these are circumstances where adoption may violate the Article 8 right of parents and children. However, the State's positive obligation to reunite children with their parents is counter-

balanced by jurisprudence which justifies limiting the parent and the child's right to respect for private and family life in the name of the child's own best interests. Thus, in cases where neglect or abuse has occurred, or where children have been settled with other carers for years, it may not be in the child's best interests to be reunited with his or her parents.

It is apparent that where the neglect or abuse is serious enough to engage the child's rights under ECHR Article 2 or Article 3 a non-consensual adoption may, in some cases, not only be in children's best interests but will also protect children's rights. However, while a non-consensual adoption is, in some cases, the least restrictive measure available, there are cases where equally effective less restrictive alternatives are available, which would be less likely to violate children's and parents' rights under ECHR Article 8. It has been demonstrated from the case discussion in Sections 3.4.5 and 3.4.6, that the mere fact that a child could be placed in a more beneficial environment is insufficient to justify removal of the child from the family home, let alone non-consensual adoption. This chapter has also shown that there is a substantial body of case law (see Section 3.4.6) which suggests that the scope of the State's obligation under ECHR Article 8 to assist families prior to removal of the child from the family home or even non-consensual adoption may be widening.

Another important issue which has been highlighted in this chapter is the lack of consideration of children's rights in adoption cases. Thus, the alleged violations of Convention Rights, in adoption cases, are typically brought by the parents. Children's rights are more frequently argued, however, in the context of cases where States have failed to satisfy a positive obligation to intervene to protect children (as demonstrated by the discussion of Articles 2 and 3). When cases are brought by parents, rather than considering the rights of children, the ECtHR focuses on whether the best interests of the child can justify a violation of parental rights. While the Court is clearly not compelled to consider children's rights in these cases, it is suggested that some of these cases (especially those discussed in the context of Articles 6 and 8) demonstrate a missed opportunity for the development of children's rights and that focusing solely on children's best interests may serve to replicate some of the problems which exist in the law of adoption in England and Wales (see Chapter 2).

Because of the importance of the rights at stake and the permanent and irreversible nature of adoption, it has been argued that the Court could apply its existing case law in a more methodical way (see Section 3.5) when determining whether or not a non-consensual adoption is a proportionate measure. In performing this analysis, it has been argued that UNCRC rights (for example Articles 3, 5, 6, 7, 8, 9, 18, 19, 20 and 21) are all relevant. Having outlined the approach applied by the Court of Human Rights in care and adoption proceedings, this thesis next considers the relevant legislative frameworks in England and Wales and also adoption cases heard in the High Court and the Court of Appeal in England and Wales and the Supreme Court in the UK.

Chapter 4: Adoption Cases in the Courts in England and Wales

4.1 Introduction

This chapter focuses on the proportionality of non-consensual adoption in England and Wales under the Adoption and Children Act 2002, s52(1)(b). It considers how senior judges have interpreted and applied proportionality in non-consensual adoption cases and what steps might need to be taken prior to non-consensual adoption, for this type of adoption to be regarded as a proportionate measure. In order to assess the proportionality of the legislation itself and its application, this chapter looks at the ACA 2002, which is the focus of this thesis, and the Children and Families Act 2014.[463]

This chapter considers cases concerning non-consensual adoption in England and Wales, with a particular emphasis on Court of Appeal and Supreme Court cases. These cases have interpreted key provisions of the ACA 2002 and have provided guidance on concepts such as proportionality and rights under the European Convention on Human Rights and their relationship with non-consensual adoption in England and Wales. This chapter will first discuss the Court of Appeal decision of *Webster v. Norfolk County Council*[464] because it was a case which was, and still is, the subject of academic criticism and which highlighted difficult issues raised by non-consensual adoption based solely on a child's welfare rather than the rights of children and parents.

ANS and another v. ML[465] is a significant UK Supreme Court decision because it indirectly considers the proportionality of the ACA 2002 via its examination of similar Scottish legislation[466] on non-consensual adoption. *In the Matter of B (Children)*[467] is another important Supreme Court decision which will be discussed. Its significance lies in its consideration of how the principle of proportionality should be applied in non-consensual adoption cases. The chapter also discusses and analyses the Court of Appeal

[463] This Act came into effect on 22 April, 2014.
[464] [2009] EWCA Civ 59.
[465] [2012] UKSC 30.
[466] The Adoption and Children (Scotland) Act, s31(3)(d).
[467] [2013] UKSC 33.

decision of *Re B-S (Children)*[468] in which the President of the Family Division of the High Court provided important guidance to be applied by the lower courts in non-consensual adoption cases.

The chapter considers whether the legislation and courts' decisions on non-consensual adoption have managed to strike the appropriate balance in protecting the rights and best interests of children on the one hand and the rights of their parents on the other. This discussion does so by exploring whether the ACA 2002 (in particular, s52(1)(b)) can be reconciled with the UK's obligations to children and parents under the ECHR and the State's positive obligation to make efforts to reunite children with their parents where possible under Article 8 of that Convention.[469]

Academics have argued that the current adoption law in England and Wales fails to give sufficient consideration to parents' interests and, in particular, their right to respect for private and family life under ECHR Article 8.[470] Harris-Short has described adoption as the 'most drastic' and 'devastating' family law court order.[471] She has also expressed concern that the policy of encouraging adoption as quickly as possible can run counter to the attempt to reunite parents and children for the purposes of complying with Article 8.[472] Due to the gravity and irrevocability of adoption, there is understandable concern that in some cases non-consensual adoption may not be a proportionate measure. It is important therefore, to consider whether the legislation and case law in England and Wales provides sufficient protection for the rights of children and their parents in the context of non-consensual adoption.

4.2 The Adoption Legislation

4.2.1 The Adoption and Children Act 2002: An Overview

[468] [2013] EWCA Civ 1146.
[469] See for example: *Hokkanen v. Finland* [1996] 1 FLR 289; *K and T v. Finland* (Application no. 25702/94) 12 July 2001.
[470] Andrew Bainham, *Children: The Modern Law* 3rd edn (Bristol: Family Law, 2005) p266-267; Sonia Harris-Short, 'Making and Breaking Family Life: Adoption, the State and Human Rights' [2008] 35 *Journal of Law and Society* 28 at 30; Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law*, (Oxford: Hart Publishing, 2010); Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' [2013] 25 *CFLQ* 40.
[471] Sonia Harris-Short, 'Making and Breaking Family Life: Adoption, the State and Human Rights' [2008] 35 *Journal of Law and Society* 28 at 30.
[472] *Ibid* at p35.

The Adoption and Children Act 2002 came fully into force on December 30 2005.[473] It was introduced primarily to bring the law on adoption into line with the Children Act 1989, s1(1) and UNCRC Article 21 (the right to adoption) by making the child's welfare the paramount consideration in the adoption process[474] and by introducing a welfare checklist (see the ACA 2002, s1(4)) like that in the Children Act 1989. The Act also intended to encourage practitioners to engage in permanency planning and to increase the adoptions of children in care by tackling delays in the adoption process caused by the shortage of adopters, delays in matching children to prospective adopters and delays in the court system.[475] The reforms also sought to improve the support available to prospective adopters as increasing post-adoption support was regarded as a means of increasing the number of prospective adopters.[476] Another aim of the Act was: 'to put the child's rights more to the fore'.[477] The new law replaced the old system of freeing orders (under the Adoption Act 1976) with placement orders and amended the grounds under which a non-consensual adoption could be ordered by the courts. Furthermore, special guardianship orders were created by the ACA 2002 and inserted into the Children Act 1989, ss14A-G to act as an alternative to adoption, and to provide legal security for older children in foster care or those living with relatives while enabling such children to maintain legal ties with their birth parents (see further in Section 5.4).[478]

The New Labour government viewed adoption as the solution for the problems relating to children in care which had been highlighted by the Waterhouse Report. The Waterhouse Inquiry investigated the abuse of children in care and the deficiencies in the care provided in children's homes in Wales. Although as Allen has noted, there is arguably not an immediate connection between the abuse that these children suffered in children's homes

[473] It repealed and replaced the Adoption Act 1976.
[474] House of Lords Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, (TSO, 2013) p17.
[475] The House of Commons Library Research Paper 01/78: The Adoption and Children Bill, 26 October 2001, p13 and p33-34. On average, an adoption would take two years and nine months, see: Special Standing Committee Discussion on the Adoption and Children Bill, 29 November 2001. See also: Caroline Thomas, *Adoption for looked after children: messages from research – An overview of the adoption research initiative*, (London: BAAF, 2013) p3-4.
[476] Caroline Thomas, *Adoption for looked after children: messages from research – An overview of the adoption research initiative*, (London: BAAF, 2013) p3.
[477] Quotes from the Special Standing Committee discussion on the Adoption and Children Bill on the 19th November, 2001.
[478] For further discussion see: Ananda Hall, 'Special Guardianship: A Missed Opportunity – Findings from Research' [2008] *Fam Law* 148; Deborah Cullen, 'Adoption – a (fairly) new approach' [2005] 17 *CFLQ* 475.

and the intention to reform adoption law,[479] there is a clear rationale behind the legal reform. In fact, Thomas has observed that the Waterhouse Report stimulated further discussion on how to address other problems for children in care,[480] such as poor educational and social outcomes. Dey has suggested that the Waterhouse Report put pressure on the government to improve outcomes for children in care via legal reform[481] and the government identified adoption of children in care as a potential method of addressing the problems identified in the Report.[482]

Tony Blair, the Prime Minister at the time, announced that adoption reform would be a priority and that he would lead a major review of adoption law.[483] He stated that adoption was: '[L]ess about providing homes for relinquished babies and more concerned with providing secure, permanent relationships for some of society's most vulnerable children'.[484] The Labour government aimed to increase the number of adoption orders by at least 40 per cent by 2005 with the ultimate target of a 50 per cent increase in adoption overall.[485] Having outlined the motivations for and purpose behind the ACA 2002, the following section compares the existing law on adoption with the previous law on adoption under the Adoption Act 1976 to determine whether or not the new law strikes the appropriate balance in protecting children's best interests and rights on the one hand and parents' rights on the other in the context of non-consensual adoption.

4.2.2 The 'Old' Law and the 'New' Law

Under the Adoption Act 1976 children were 'freed' for consensual or non-consensual adoption via a 'freeing order'[486] under s18 before a final adoption order was made. Once a freeing order was made, a child no longer retained legal ties with his or her birth family.[487] The child became a statutory orphan in that he or she was left in a temporary

[479] Nick Allen, *Making Sense of the New Adoption Law* (Dorset: Russell House Publishing Ltd, 2003).
[480] Caroline Thomas, *Adoption for looked after children: messages from research – An overview of the adoption research initiative*, (London: BAAF, 2013) p3.
[481] I Dey, 'Adapting Adoption: A case of Closet Politics?' [2005] 19 *International Journal of Law, Policy and the Family* 293.
[482] Waterhouse Inquiry Report, 2000.
[483] Department of Health, *Adoption procedure: A new approach (Cm 5017)* (Department of Health, 2000).
[484] Caroline Bridge and Heather Swindells, *Adoption: The Modern Law*, (Bristol: Family Law, Jordan Publishing Limited, 2003) p30.
[485] Chris Barton 'Adoption Strategy' [2001] *Fam Law* 89.
[486] For a more detailed explanation of freeing orders see: *Down Lisburn Health and Social Services Trust and another (AP) v. H (AP) and another (AP)* [2006] UKHL 36.
[487] Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 11th edn (Oxford: OUP, 2015) p699.

legal limbo before an adoption order was made[488] and once freed for adoption, there was no guarantee of being adopted. After a freeing order, an adoption order could be made with parental consent under s16(b)(i) or, alternatively, parental consent could be dispensed with and an adoption order could be made under s16(b)(ii) if one of the grounds listed in s16(2) was proved, namely that the child's parent(s) could not be found or was incapable of giving agreement; was withholding agreement unreasonably; had persistently failed without reasonable cause to discharge parental responsibility for the child; had abandoned or neglected the child; had persistently ill-treated the child or had seriously ill-treated the child.

Under the ACA 2002, children are no longer 'freed' for adoption. Instead, a placement order under the ACA 2002, s18 precedes an adoption order and places a child with prospective adoptive parents. When a placement order is in force, parental responsibility is shared between the local authority, the prospective adopters and the birth parents, but will fully vest in the adopters once an adoption order is made by the court. Under the ACA 2002, s21(2) a placement order cannot be made unless one of the following applies: a) a child is subject to a care order, b) the conditions for making a care order are satisfied[489] or c) the child has no parent or guardian. If one of these conditions is satisfied, a placement order can be made under s21(3) if the parents consent to the adoption[490] or parental consent has been dispensed with under s52(1)(b) because the child's welfare requires it.[491] A placement order remains in place until it is revoked, or a final adoption order is made or if the child marries or reaches 18 years of age and as not been adopted.[492] According to Bridge and Swindells, the creation of placement orders sounded the 'death knell'[493] of the old adoption system, addressing the 'legal limbo'[494] that children previously faced with freeing orders.

[488] M Murch, N Lowe, M Borkowski, R Copner and K Griew, *Pathways to Adoption* (London: HMSO, 1993).
[489] Threshold criteria under the Children Act 1989 s31(2).
[490] Adoption and Children Act 2002, s21(3)(a).
[491] *Ibid*., s21(3)(b).
[492] *Ibid*., s21(4).
[493] Caroline Bridge and Heather Swindells, *Adoption: The Modern Law*, (Bristol: Family Law, Bristol, Jordan Publishing Limited, 2003) p160.
[494] Caroline Ball, 'The Adoption and Children Act 2002 A Critical Examination' [2005] 29 *Adoption and Fostering* 6.

Under the new law (the ACA 2002), once a placement order is in force, the birth parents are able to apply for leave to oppose an adoption order under the ACA 2002, s47(5). If parents do not oppose adoption or leave to oppose adoption is not granted, the Court then considers the grounds for making an adoption order. The ACA 2002, s52 amended the grounds for making an adoption order. One of the grounds from the Adoption Act 1976 was retained[495] under s52(1)(a). However, the other grounds were removed and replaced with s52(1)(b), namely that 'the welfare of the child requires consent to be dispensed with'. In *Re P*, Wall LJ explained the meaning of the word 'requires' in s52(1)(b):

> '[Requires] is a word which was plainly chosen as best conveying… the essence of the Strasbourg jurisprudence. And viewed from that perspective "requires" does indeed have the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable'.[496]

Wall LJ also stated it has to be shown that 'the child's welfare "requires" adoption as opposed to something short of adoption'[497] and that even where the child's welfare might require statutory intervention or indefinite removal of the child from his family, 'the same circumstances will not necessarily "require" that the child be adopted'.[498] The Adoption Act 1976, s6, in contrast, had focused on the 'welfare of the child throughout his childhood' but the ACA 2002, s1(2) states: 'The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life'. Wall LJ has described this as a 'vital'[499] difference. It is argued that basing non-consensual adoption on the child's welfare under the ACA 2002 s52(1)(b) and making the child's welfare the paramount consideration minimises the rights of birth parents in adoption proceedings. It is also preferable for child's interests to be primary and not paramount. Archard has highlighted the difficulty of making children's interests paramount:

> 'We should allow that the interests of parents and other adults within the child's society may sometimes outweigh those of the child. The implausibility of thinking that a child's interests are paramount extends to what amounts to a disguised discounting of a parent's interests'.[500]

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[495] Note that 'cannot be found' is generally interpreted to mean no practical means of communicating with the person whose consent is required. See: *Re R (Adoption)* [1976] 1 WLR 34.
[496] *Re P* [2008] EWCA Civ 535 at para 125 *per* Wall LJ.
[497] *Ibid* at para 126.
[498] *Ibid* at para 126.
[499] *Ibid* at para 127.
[500] David Archard, 'Children, adults, best interests and rights' [2013] 13 *Medical Law International* 55 at 60.

It can be argued that the 1976 Act provided more protection to parents' interests than the ACA 2002 does. For example, unlike the post-ACA 2002 climate, it was uncommon under the Adoption Act 1976 for judges to make adoption orders without parental consent.[501] A review of the case law on non-consensual adoption led Henricson and Bainham to conclude that when the 1976 Act was in force, there were many cases where a birth parent's objection to non-consensual adoption was upheld on the basis that consent was not unreasonably withheld. This was the case, they argued, even where social workers were in favour of adoption due to the need to promote the child's welfare.[502] Thus, it can be argued that the ACA 2002 has the effect of removing the protection of parental interests as the sole focus of the Act, when non-consensual adoption takes place, is the child's welfare not the parent's interests.[503]

In fact, the introduction of non-consensual adoption based solely upon the paramountcy of the child's welfare has been and continues to be controversial. Prior to the changes that the Labour government sought for adoption law, the Conservative government had also, in the early 1990s, considered similar reforms.[504] Thus, in 1992, *The Adoption Review* recommended that children's welfare should be the court's paramount consideration *except* in cases where adoption was taking place without parent consent. In the *Review* it was stated that only where adoption would 'be marginally better than another option' should the court 'allow the fact that a parent does not agree to adoption to tip the balance in favour of the other option'.[505]

The appropriateness of making the child's welfare paramount in non-consensual adoption cases has been questioned.[506] Sloan has observed that: 'A strict application of the welfare

[501] Caroline Bridge and Heather Swindells, *Adoption: The Modern Law*, (Bristol: Family Law, Jordan Publishing Limited, 2003) p15.
[502] For further discussion on this point, see: Clem Henricson and Andrew Bainham, *The child and family policy divide: Tensions, convergence and rights* (York: Joseph Rowntree Foundation, 2005). They cite the following cases as examples: *Re M [Adoption and Residence Order]* [1998] 1 FLR 570 and *Re B [Adoption Order*] [2001] 2 FLR 26.
[503] Clem Henricson and Andrew Bainham, *The child and family policy divide: Tensions, convergence and rights* (York: Joseph Rowntree Foundation, 2005).
[504] For discussion on adoption reform generally and in particular, discussion before the enactment of the Adoption and Children Act 2002 see: Nick Allen, *Making Sense of the New Adoption Law* (Dorset: Russell House Publishing Ltd, 2003).
[505] *Review of Adoption Law* 1992, para 12.8.
[506] The House of Commons Library Research Paper 01/78: The Adoption and Children Bill, 26 October 2001, p37.

principle could preclude a court from considering the interests of parents when making an adoption-related decision'.[507] This paramountcy of children's welfare in the adoption process, and the provision permitting non-consensual adoption solely on the basis of welfare has been controversial, because adoption orders are permanent and irrevocable. It has been pointed out, for example, by Herring *et al* that it is 'too low a hurdle'[508] because it might not be difficult to show that a child would be better off being raised by someone other than his or her birth parents.

Another change introduced by the ACA 2002 was the introduction of a welfare checklist. The Adoption Act 1976, s6, had provided that the court had a general duty to consider the welfare of the child, but the ACA 2002, s1(4) includes a welfare checklist which is similar to the welfare checklist under the Children Act 1989, s1(3). The factors in the adoption welfare checklist, however, differ from those in the CA 1989 checklist. Of particular importance for the purposes of the subject-matter of this thesis on non-consensual adoption is ACA 2002, s1(4)(c) which provides that the court can consider 'the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person'. No such provision existed under the Adoption Act 1976.

Section 1(4)(f) provides that the court must take into account 'the wishes and feelings of any of the child's relatives, or of any such person regarding the child'. The Select Committee on Adoption has stated that this provision secures the fair balancing of 'the rights and interests of the birth parents in maintaining their existing family life on the one hand and the conflicting rights and interests of the child in favour of adoption on the other'.[509] Under s1(4)(f), the courts may consider a range of different rights such as, for instance, those of the parents, siblings, grandparents or other family members. Sloan has argued that the 'extended meaning' of welfare may guard against precluding the interests of parents from adoption matters.[510]

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[507] Brian Sloan, '*Re C (A Child) (Adoption: Duty of Local Authority)* – Welfare and the Rights of the Birth Family in 'Fast Track' Adoption Cases' [2009] 21 *CFLQ* 87.
[508] Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (London: Palgrave, 2015), p144.
[509] Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, p17-18.
[510] Brian Sloan, 'Re C (A Child) (Adoption: Duty of Local Authority) – Welfare and the Rights of the Birth Family in 'Fast Track' Adoption Cases' [2009] 21 *CFLQ* 87. See also: P. Parkinson, 'Child Protection,

Nonetheless, there may be problems arising from not considering parents' interests independently from those of their children. Reflecting on *Re C (A Child) (Adoption: Duty of Local Authority)*,[511] for example, Sloan has observed that the Court of Appeal 'took a very individualistic view of child welfare, at the expense of a child's links with her biological father… and with her grandparents'.[512] An important issue then, is the extent to which the ACA 2002 is compatible with the requirements of ECHR Article 8, the right to respect for private and family life.[513] Wall LJ has stated that adoption under the 2002 Act must be necessary (defined as somewhere between indispensable on the one hand and useful, reasonable and desirable on the other)[514] and must also 'be proportionate to the legitimate aim of protecting the welfare and interests of the child'.[515]

Although the ACA 2002, s1(4)(f) indicates that children's relationships with their parents is a relevant factor under the welfare checklist, it may be argued that this sub-section does not provide sufficient protection to parental rights in the process of non-consensual adoption. It can be argued that the operation of the welfare checklist[516] should have been reviewed to ensure respect for other people's Article 8 rights; especially those of parents.[517] Harris-Short, for example, has stated that s1(4)(f) is not sufficient to meet the requirements of Article 8 because it does not require independent weight to be given to parents' rights.[518] These rights which should be considered, for example, are the rights children and parents have to develop and maintain relationships with one another (by children being raised by their parents or via direct contact) and for parents to be able to make decisions in relation to their children. In practice, when a court decides whether or not to make an adoption order, parental rights are not balanced equally with the child's rights. Relevant parental rights (such as ECHR Article 8, for example) are considered purely in the context of the child's welfare. When the Court performs its analysis, the

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Permanency Planning and Children's Right to Family Life' [2003] 17 *International Journal of Law, Policy and the Family* 147.

[511] [2007] EWCA Civ 1206.

[512] Brian Sloan, 'Re C (A Child) (Adoption: Duty of Local Authority) – Welfare and the Rights of the Birth Family in 'Fast Track' Adoption Cases' [2009] 21 *CFLQ* 87.

[513] For discussion, see: Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law*, (Oxford: Hart Publishing, 2010), chapter 10.

[514] *Re P* [2008] EWCA Civ 535 at para 120 *per* Wall LJ.

[515] *Ibid* at para 119.

[516] See Chapter 2 for discussion on the new welfare checklist under the Adoption and Children Act 2002.

[517] Judge John Mitchell, *Adoption and Special Guardianship: A Permanency Handbook* (Bristol: Jordan Publishing Ltd, Family Law, 2009), p6.

[518] Sonia Harris-Short, 'Adoption and Children Bill – A Fast Track to Failure?' [2001] 13 *CFLQ* 405. Also, see: Andrew Bainham, *Children: The Modern Law* 3rd edn (Bristol: Family Law, 2005) p266-267.

approach to adoption is similar to that taken in other cases where orders are made in respect of children. The approach, which was endorsed by Wall LJ in *Re P*,[519] can be highlighted by reference to *J v. C*,[520] in which Lord McDermott said:

> '[T]he child's welfare is to be treated as the top item in a list of items relevant to the matter in question… all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child'.[521]

The Court of Appeal decision in *The Matter of Q (A Child)*[522] has also emphasised that there is no enhanced welfare test in the context of non-consensual adoption cases even though the consequences are permanent and more serious, when compared with orders which may be made based on a child's welfare under the Children Act 1989. The above paragraphs have considered the reforms to the law made under the ACA 2002, which are relevant to the subject-matter of this thesis. The following section considers relevant reforms implemented by the Children and Families Act 2014.

4.2.3 The Children and Families Act 2014

The Children and Families Act 2014 came into force on April 22, 2014.[523] It has been described by Gilmore and Bainham as 'deeply ideological legislation'[524] which seeks to address various policy objectives including the reduction of delay in care and adoption proceedings.[525] It seeks to address these delays by imposing a 26 week limit on care proceedings under s14(2)(ii), and by widening the scope of the 'early permanence' principle, whereby children are placed for adoption as early as possible. It brings forward the point at which local authorities will have a duty to consider fostering for adoption under s22(9)(A), which consequently brings forward the point at which adoption will be

[519] *Re P* [2008] EWCA Civ 535 at para 114 *per* Wall LJ.
[520] [1970] AC 668.
[521] [1970] AC 668 at 710-711.
[522] [2011] EWCA Civ 1610 at para 58.
[523] Note that most provisions of the Children and Families Act 2014 came into force on April 22, 2014. However, s7 did not come into force until May 13, 2014 and Part 1 did not come into force until the July 25, 2014 (Part 1 only applied to England).
[524] Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' [2015] 46 *Victoria University of Wellington Law Review* 627 at 628. They point out that the legislation was based on the Family Justice Review and the Narey Report.
[525] See discussion in: Joint Committee on Human Rights, *Legislative Scrutiny: Children and Families Bill; Energy Bill, Third Report of Session 2013-14*, p9. The Act came into force on April 22, 2014. See also: Department for Education, *Further action on adoption: finding more loving homes* (Department for Education, 2013); Tim Ross and John Bingham, 'Speed up adoption process, David Cameron urges councils' (*The Telegraph*, 9 March 2012) http://www.telegraph.co.uk/news/politics/9132407/Speed-up-adoption-process-David-Cameron-urges-councils.html#

considered. This duty may exist in the first week a child is in care or even before the child has been born.[526] The Act also contains a statutory provision explicitly allowing local authorities to stop contact between children in care and their parents under section 8 and a provision allowing for post-adoption contact between children and parents under section 9. The reforms are wide-ranging and have been criticised for their lack of coherence. Gilmore and Bainham have described the legislation as a 'ragbag of apparently disconnected adoption provisions'.[527] Furthermore, Sloan has argued that these provisions on post-adoption contact may, in fact, jeopardise English law's compatibility with the ECHR and the UNCRC (for further discussion see Section 5.5).[528]

Section 7 of the CFA enabled prospective adopters to register their details and inspect a register to find a child 'for whom they could be appropriate adopters'.[529] The Action Plan[530] observed that, despite the reforms enacted by the ACA 2002, prospective adopters still received insufficient practical and financial support[531] during the adoption process and after the final adoption order.[532] Thus, the CFA 2014 has increased the funding and practical support for prospective adoptive parents. Section 5 provides financial support for adopters, after the adoption process has taken place. Under s6, Local authorities have a duty to provide information on assessment and post-adoption support to prospective adopters. Sections 5-7 not only speed up the process for prospective adopters but the provision of increased support is intended to encourage more prospective adopters to come forward. Having looked in the section above at the legislation relating to adoption, in particular to non-consensual adoption, the following section looks at the relevant case law and academic commentary relating to non-consensual adoption.

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[526] See discussion in: Joint Committee on Human Rights, *Legislative Scrutiny: Children and Families Bill; Energy Bill, Third Report of Session 2013-14*, p10.
[527] Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' [2015] 46 *Victoria University of Wellington Law Review* 627 at 637.
[528] Brian Sloan, 'Post-Adoption Contact Reform: Compounding the State-Ordered Termination of Parenthood?' [2014] 73 *CLJ* 378. Also see: Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' [2015] 46 *Victoria University of Wellington Law Review* 627 at 647.
[529] This register is referred to as the 'National Gateway'.
[530] Department for Education, *An Action Plan for Adoption: Tackling Delay*, (Department for Education, 2012).
[531] See: House of Lords Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny* (TSO, 2013), para 207.
[532] Department for Education, *An Action Plan for Adoption: Tackling Delay*, (Department for Education, 2012) p4. Also see: Children and Families Bill: Written Evidence from the British Association for Adoption and Fostering.

4.3 The Controversy of Webster and Norfolk County Council and others

4.3.1 Webster v. Norfolk County Council and others

Re J (A Child)[533] (considered in the introduction to this thesis) highlighted the need for public debate and the need for transparency[534] to avoid injustice in non-consensual adoption cases. The best example of such an injustice is *Webster v. Norfolk County Council and others*,[535] an important case which merits in-depth discussion because of the media attention and academic discussion which it has generated. This case demonstrates the injustice which may occur when a non-consensual order is made under the Adoption and Children Act 2002, s52(1)(b). In this case, the appellants, Mr and Mrs Webster, alleged that wrongful adoptions of three of their children had taken place and that in the process their rights under ECHR Article 8(1) had been violated.

In 2003, the Websters took their two-year-old son (Child 'B') to hospital because he had a swollen ankle. They visited two different hospitals which discharged him. They were still concerned and returned to the first hospital, where B was X-rayed and six bone fractures were discovered. The consultant radiologist suspected non-accidental injury (NAI) and informed Social Services who subsequently applied for a care order under the Children Act 1989. The court was satisfied, on the balance of probabilities, that the child had sustained non-accidental injuries and care orders were made in respect of all three of the couple's children.[536] The children were subsequently freed for adoption under the old legislation (the Adoption Act 1976) and were subsequently adopted under the ACA 2002, s52(1)(b) with the court dispensing with the Websters' consent on the basis of the children's welfare.

In 2006, when Mrs Webster became pregnant again she and her husband fled to Ireland for the child's birth as they feared that the finding in respect of Child B and the removal of all three of their children into care meant that Social Services would remove their fourth child and seek to place him or her for adoption. The child, Brandon, was born on

[533] [2013] EWHC 2694 (Fam). In particular, see para 29 *per* Munby P which refers to *Webster* and miscarriages of justice.
[534] For general discussion on transparency in the context of non-consensual adoption, see: Claire Fenton-Glynn, *Adoption without parental consent: Study for the Peti Committee* (European Union: Brussels, 2015), p42-45.
[535] [2009] EWCA Civ 59.
[536] The three children were born between 2000 and 2003.

27 June, 2007 by which time they had presented a testimony from a medical expert which proved that they had not harmed B. The report stated that B's injuries were caused not by NAI, but by iron deficiency and a rare condition known as scurvy caused by the child's unusual diet which consisted solely of soya milk. This evidence, coupled with a positive residential assessment[537] with Brandon, led Holman J to agree that care proceedings against them ought to be discontinued.

After this decision, the Websters appealed against the making of care and freeing orders in relation to their other three children, alleging that the adoptions amounted to a violation of their right to respect for private and family life which was not justified by Article 8(2).[538] They challenged a number of findings made by the judge at first instance, Judge Barham. In particular, they challenged the finding that the threshold criteria under the CA 1989, s31(2) had been satisfied on the basis of 'clinical and emotional harm,'[539] thereby enabling the judge to make care orders. They also argued that the judge had been wrong not to consider the lack of reference to reunification of the children with their parents in the care plan. They argued that the freeing orders would not have been made if the medical evidence had been available at that time. Although an adoption order is generally regarded as irrevocable, in rare cases of procedural irregularity an adoption order may be set aside.[540] Their counsel argued that the facts of the case amounted to exceptional circumstances'[541] which thus justified overturning the adoption orders and returning the children to their parents.

The judgment was delivered by the Court of Appeal in 2009. Despite acknowledging the potential for a violation of Article 8(1) and the evident injustice that had occurred, the Court refused to allow the appeal and revoke the adoption order for two reasons. First, on a public policy basis, the Court did not want to undermine the social importance of adoption. Secondly, the Court determined that it was in the children's best interests to remain with their adoptive parents because of the number of years that they had been separated from their parents and because of the emotional attachments they had formed, in the meantime, with their adoptive parents. The leading judgment was delivered by

[537] Residential assessments under the Children Act 1989, s38(6) are where, for example, a mother and newborn baby may live together and be observed by authorities in a specialised unit.
[538] *Webster and another v. Norfolk County Council and others* [2009] EWCA Civ 59 at para 65.
[539] *Ibid* at para 133.
[540] *Re K (Adoption and Wardship)* [1997] 2 FLR 221.
[541] *Webster and another v. Norfolk County Council and others* [2009] EWCA Civ 59 at para 64.

Wall LJ. In determining whether or not the adoption orders could be revoked, the Court of Appeal considered Swinton LJ's judgment in *Re B (Adoption: Jurisdiction to Set Aside)*[542] where he drew attention to the irrevocability and finality of adoption orders:

> 'There is no case in which it has been held that the court has the inherent power to set aside an adoption order by reason of misapprehension or mistake. To invalidate an otherwise properly made order would undermine the whole basis on which these orders are made, namely they are final and for life as regards to adopters'.[543]

Although the Websters initially sought to have the adoptions set aside and have their children returned to them, they later had a change of heart due to the passage of time. Wall LJ asserted that, if the parents had sought to have the adoption orders set aside, they would not have obtained this remedy, on the basis that reversing the adoption orders would run counter to the children's welfare. He asserted that, after four years with their adoptive parents, it would be disruptive to remove the children. While Wall LJ and Wilson LJ acknowledged that adoption orders could be reversed in rare cases where procedural irregularity had occurred, particularly where there had been a breach of natural justice, they would not revoke the adoption orders in this case and they took a public policy approach emphasising the social importance of adoption as well as its permanence.

Wilson LJ observed that it was too late for the Websters to appeal, emphasising that the three children had been settled in new homes for four years and had not seen their parents. He also emphasised the 'vast social importance of not undermining the irrevocability of adoption orders'.[544] Wall LJ acknowledged that the parents had been wrongfully accused of abusing one of their children and, as a result, three of their children had been wrongfully and permanently removed from the family home. Furthermore, he stated that the three children who had been placed for adoption and their brother Brandon, (whom the Websters had been allowed to keep), had missed the opportunity of growing up together as a family. He said that this was:

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[542] [1995] Fam 239.
[543] *Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239.
[544] *Webster and another v. Norfolk County Council and others* [2009] EWCA Civ 59 at para 204, *per* Wall LJ.

> '…deeply worrying, and, on the face of it, a clear breach of their rights to respect for their family life under Article 8(1) of the European Convention on Human Rights'.[545]

Although, Wall LJ referred to cases decided by the ECtHR,[546] he concluded that 'the European authorities [did] not assist Mr and Mrs Webster'.[547] The following section explores Wall LJ's judgment further and in more detail to see whether or not the decision can be regarded as proportionate (see below).

4.3.2 A Critical Analysis of Webster v. Norfolk County Council

The segment of Wall LJ's judgment on the applicability of the ECHR is, with respect, open to criticism. There is no explanation or reasoning with regard to his conclusion about the relevance of the ECHR.[548] Despite reference to the relevant ECHR rights, there is no analysis of the European cases and how they might apply to the facts in *Webster*. This author agrees with Herring who has observed that while the result in *Webster* might have been the correct one, 'the reasoning is not such that would convince the person in the street'.[549] Diver has also been critical of the decision and has observed that there was no attempt to weigh or balance the conflicting familial rights of the children and parents.[550] Thus, without a proper application of the European jurisprudence to the facts of the case, or an explanation as to why the authorities did not assist the Websters, it is difficult to agree with Wall LJ's conclusion.

In fact, although Wall LJ referred to *Görgülü v. Germany*[551] which cited *P, C and S v. UK*,[552] he did not consider the relevance of the facts and principles from *P, C and S* and whether they could be of assistance to the Websters. In *P, C and S*, the ECtHR held that the close alliance between the care and freeing orders decreased the likelihood that the mother would be reunited with her child and consequently, her right to respect for private and family life under Article 8(1) had been violated. Similarly, in *Webster*, the children

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[545] *Webster and another v. Norfolk County Council and others* [2009] EWCA Civ 59 at paras 2-3 *per* Wall LJ.
[546] *Görgülü v. Germany* [2004] 1 FLR 894; *Kearns v. France* [2008] 1 FLR 888; *Odièvre v. France* [2003] 1 FCR 621; *Evans v. UK* [2007] 2 FCR 5.
[547] *Webster and another v. Norfolk County Council and others* [2009] EWCA Civ 59 at para 175.
[548] J Herring, 'Revoking Adoptions' [2009] 159 *NLJ* 377.
[549] *Ibid.*
[550] Alice Diver, *A Law of Blood-Ties – The "Right" To Access Genetic Ancestry* (London: Springer, 2014) p276.
[551] [2004] 1 FLR 894.
[552] [2002] 2 FLR 631.

were taken into care in December 2003 and were freed for adoption less than a year later (in November 2004). Although a key distinction between *P, C and S v. UK* and *Webster* is that in the former case the mother lacked legal representation, it can be argued that it was nonetheless a relevant case for the Court of Appeal to have discussed in the context of the Article 8 issues raised in *Webster*. Wall LJ's judgment in *Webster* may be contrasted with his later judgment in *Re P*[553] in which he more thoroughly considered Article 8 and *P,C and S* while emphasising that the facts of the case were unusual, and stated that the 'juxtaposition'[554] of the care and placement orders warranted examining the cases with 'particular care'.[555]

In *Webster*, it was understandable that the Court refused to reverse the adoption order due to the length of time the children had been with their adoptive parents. However, it could be argued that the apparent 'vast social importance' of adoption orders is not a strong enough justification for not revoking adoption orders in an exceptional case like *Webster* and that adoption of the children was not necessarily a proportionate outcome. This case also provides a stark contrast to the Court's willingness (in rare circumstances) to revoke adoptions in rare cases where procedural errors have occurred.[556] DeBlasio has expressed concern about the ruling in *Webster*:

> 'There is something about this case and others like it that lack a missing component of justice. It thus raises the question as to whether mistakes which concern the separation of children from their parents are simply justified at law in this way; and that LAs and the courts can 'hide behind the law' in the ACA rather than admit mistakes'.[557]

Herring has argued that considering the fact that approximately 5,000 adoptions take place each year,[558] it is questionable whether adoption orders have such huge social importance that they ought not to be set aside in exceptional cases like *Webster*. The Council of Europe has expressed concern about the miscarriages of justice that have occurred, where children have been adopted without parental consent, particularly in

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[553] [2008] EWCA Civ 535.
[554] *Re P* [2008] EWCA Civ 535 at para 132.
[555] *Ibid.*
[556] See, for example: *Re M (A Minor) (Adoption)* [1991] 1 FLR 458 and *Re K (Adoption and Wardship)* [1997] 2 FLR 221. Also, see Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (London: Palgrave, 2015), p151-152.
[557] Lisamarie DeBlasio 'Hiding Behind the Law? A Critique of the Law and Practice under the Adoption and Children Act 2002' [2014] 1 *Plymouth Law and Criminal Justice Review* 148 at 164. Also, see: Trevor Buck, *International Child Law*, (New York: Routledge, 2011) p19.
[558] J Herring, 'Revoking Adoptions' [2009] 159 *NLJ* 377.

England and Wales. The Council of Europe said the fact that an adoption order made in England and Wales could not be reversed in any circumstances was 'a misunderstanding of the "best interests of the child" who actually has a right to return to his/her birth family'.[559]

A recent case which was similar to *Webster*, was the subject of media attention and, potentially, may be another example of a case where the social importance of the permanence of adoption may not outweigh an apparent injustice.[560] Karissa Cox and Richard Carter's six-week old baby was taken into care by Surrey County Council and placed for adoption without parental consent, on the basis of non-accidental injury. Expert evidence subsequently exonerated the couple as it transpired that the child had a rare blood disorder (Von Willebrands II) and a severe vitamin D deficiency. The parents were prosecuted for child abuse but the case against them collapsed when evidence of the child's medical condition was discovered. The parents have stated that they will appeal against the non-consensual adoption of their child and, if their child is not returned to them, they will urge Parliament to pass legislation which will take into account situations like theirs.

The *Webster* case and the above case demonstrate the difficult dilemma Social Services and the courts face in protecting children's rights under ECHR Article 2 (the right to life) and Article 3 (the right to freedom from torture or inhuman or degrading treatment), while balancing these rights against the rights of children and their parents to have a family life under Article 8. As considered in Chapter 2, for example, a welfare test applied in the context of adoption cases arguably ought to include a routine consideration of a wide range of children's rights (including but not limited to Articles 5, 6, 7, 8, 9, 12 and 18). While the removal of the children into care in these cases was evidently proportionate, it is questionable whether the courts struck the appropriate balance.

While the analysis here on *Webster* is based on an examination of the judgments, caution must be exercised in reaching definite conclusions about the Cox and Carter case (above)

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[559] Olga Borzova, *Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member states* (Council of Europe, 2015), para 74.
[560] Ian Johnston and Emily Dugan, 'Couple wrongly accused of abuse unlikely to see their child again' (The Independent, 8 October 2015) http://www.independent.co.uk/news/uk/crime/couple-who-were-wrongly-accused-of-abuse-unlikely-to-see-their-child-again-a6685471.html

because it is based on media, not court, reports. A difficulty in this thesis is that many adoption cases heard in the lower courts are unreported which makes it difficult to assess how many non-consensual adoptions are made where less restrictive but equally effective alternatives may have been available. It is important, in future research, to discover how often these types of cases occur. While one injustice may be regarded as one injustice too many, if, as John Hemming MP has claimed, cases like *Webster* are not uncommon and that more than 1,000 'wrongful' adoptions take place every year[561] this would provide a compelling justification for policy reform and even law reform to take place to ensure that viable alternatives to adoption (such as State assistance or kinship care) have been adequately considered while at the same time considering the child's rights under ECHR Articles 2 and 3. The difficulty is that there are few reported cases[562] where children have either been the subject of placement orders before being returned to their parents, or have been subject to placement orders and then non-consensual adoption.

Despite the extensive media reports on *Webster* and the similar case above, it has been difficult to gain reliable evidence and form a clear picture of the scale of the problem. Likewise, the Council of Europe, has also attempted to investigate the number of justified or unwarranted decisions and has concluded that it is not possible to provide an accurate estimation.[563] It can be argued, however, that although it may be difficult to make an accurate estimation, this is far from impossible to achieve. Considering the serious consequences of adoption and the potential injustice, more research needs to be undertaken to determine whether other cases like *Webster* may not have reached the

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[561] 'MP claims 1,000 children "wrongfully" adopted every year' (13 December 2011) http://www.bbc.co.uk/news/uk-politics-16157124

[562] *LB Islington v Al Alas and Wray* [2012] EWHC 865 (Fam). See: For a detailed summary of this case please see: Jo Delahunty and Kate Purkiss, 'The vitamin D and rickets case: *LB Islington v Al Alas and Wray'* [2012] *Fam Law* 659. Also see: Ian Johnston and Emily Dugan, 'Couple wrongly accused of abuse unlikely to see their child again' (The Independent, 8 October 2015) http://www.independent.co.uk/news/uk/crime/couple-who-were-wrongly-accused-of-abuse-unlikely-to-see-their-child-again-a6685471.html . Another commonly cited example of a miscarriage of justice is: *Sutton LBC v Gray and Butler'* [2012] *Fam Law* 1344. For further discussion, please see: Jo Delahunty and William Tyler, 'A 'miscarriage of justice' corrected: the difference expert evidence and a full re-hearing can make to the outcome: *Sutton LBC v Gray and Butler'* [2012] *Fam Law* 1344. One difficulty which plagues these types of cases is that it can be very difficult to establish whether or not non-accidental injury is attributable to parents. Ultimately, Gray and Butler was a sad case because years after the judgment the father was charged with the murder of his daughter: Anders, Anglesey, 'Murder accused Ben Butler represents himself in court' (*Sutton Guardian*, 2 June 2015) http://www.suttonguardian.co.uk/news/13219787.Murder_accused_Ben_Butler_represents_himself_in_court/

[563] Olga Borzova, *Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member states* (Council of Europe, 2015) at para 38.

superior courts and have consequently gone unreported. This would make it possible to assess the scale of the problem. Regardless of whether *Webster* can be regarded as a one-off case or indicates a systemic problem,[564] it can be argued that the Websters' rights under Article 8 did not receive sufficient protection. In other countries, their rights might have been better protected, and as Diver has argued, a case like *Webster* might have been treated differently in another jurisdiction:

> 'Had such a case [like *Webster*] perhaps occurred in a jurisdiction where the duty to preserve genetic ties was enshrined in statute, either on the basis of parental rights, paramountcy or constitutional protection of the family unit, the Webster children might well have been returned to their birth parents, or at least permitted to engage in some meaningful level of contact with them, perhaps on the basis of fresh, exonerating evidence subsequently arising over the issue of the alleged child abuse'.[565]

In *Webster*, the issue of proportionality was not considered by the Court of Appeal in the way that it has been in subsequent judgments such as in *Re B-S Children*.[566] It is argued in this thesis that a key issue which should have underpinned the Court of Appeal's decision-making is the extent to which the non-consensual adoption was a proportionate measure and whether or not the Webster children could have been protected from harm through less restrictive measures than non-consensual adoption. It was clear in this case, that the grandparents had put themselves forward as potential carers for the three children. However, as Section 5.3 of this thesis shows, other family members (such as grandparents) are sometimes ruled out as possible carers for children because of their unwillingness to recognise and accept that the birth parents have actually abused the children (something which would have proved to have been true in the *Webster* case). However, a failure to accept that the birth parents have abused their children is often a reason why birth relatives are ruled out as carers.

Webster also raises important questions about whether non-consensual adoption is proportionate when it results in a loss of contact between children and their parents (see further in Chapter 3). While with regard to *Webster*, it may be argued that the removal of their three children and their placement for adoption was not a necessary and

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[564] Finola Moss, 'Dangerous Consensus' [2009] *New Law Journal* (7 August, 2009) http://www.newlawjournal.co.uk/nlj/content/dangerous-consensus

[565] Alice Diver, *A Law of Blood-Ties – The "Right" To Access Genetic Ancestry* (London: Springer, 2014) p276.

[566] [2013] EWCA Civ 1146.

proportionate measure, in some cases an adoption order may be justified but termination of contact might not be. Thus, while State intervention and removal from the family home may have been justified to protect the children from harm, terminating contact between the Websters and their children was not. Herring has expressed similar reservations and has argued that the termination of the contact was a potential violation of the Article 8(1) rights of both the children and their parents.[567] Despite the clear potential for a breach of the children and parents' Article 8 rights, the lack of contact while the children were in care and lack of post-adoption contact were not analysed by the Court of Appeal. This is unsatisfactory as termination of contact will make it difficult to reunite children and their parents and may even lead to a non-consensual adoption being regarded as appropriate in the circumstances as the bond between parent and child will have been broken.[568]

Diver has been critical of the Court of Appeal's lack of reference to contact between members of the Webster family, observing that it was unclear whether two of the siblings who had been adopted were in contact with their other sibling, who had been adopted separately.[569] Contact between children and parents is an important component of children and parents' rights under ECHR Article 8 and ought to have been considered and analysed by the Court of Appeal in this case, even if it would have decided that contact was not in the children's best interests.

Another important issue raised by the *Webster* case which applies to other cases on non-consensual adoption is that adoption was arguably not the least restrictive measure available. One aspect in this case, which has not been the subject of academic comment, relates to the issue of whether the grandparents would have been suitable alternative carers instead of placing the children for adoption. However, although the grandparents were assessed as carers, placement with them was not permitted because they found it difficult to accept that the Websters had neglected their children. Social Services were of the view that the grandparents would be unable to meet the children's needs and that the arrangement would be 'confusing' for the children. It is not clear exactly why this arrangement was confusing or why it would not have been possible for sufficient

[567] J Herring, 'Revoking Adoptions' [2009] 159 *NLJ* 377.
[568] See, for example *Görgülü v. Germany* [2004] ECHR 74969/01 para 46. Also see: *K and T v. Finland* [2000] 3 FLR 248, para 175.
[569] Alice Diver, *A Law of Blood-Ties – The "Right" To Access Genetic Ancestry* (London: Springer, 2014) p275.

safeguards to have been put in place. Although this might have been true and the grandparents might not have been suitable kinship carers, there ought perhaps to have been a more thorough analysis of this possibility, as placement with the grandparents would have been a less restrictive alternative to non-consensual adoption. In fact, Bainham has also criticised the *Webster* decision as it demonstrates the dangers of making adoption orders too readily without first exploring alternative options.[570]

Cases such as *Webster* raise questions about the proportionality of non-consensual adoption. Bainham has argued that in the light of the *Webster* case: 'there should be urgent reconsideration of the doubtful official policy which prefers public law adoption as the best long-term option for "looked after" children'.[571] Delahunty and Tyler have stated that there may be cases where parents cannot accept a finding of fact that they have abused their children and may challenge a judgment, despite having neglected and/or abused their children. However, they have proposed that there is a need to 'weed out' cases where 'no realistic argument' exists but to welcome reconsideration of cases like *Webster* where 'there is a real possibility the system has previously got it wrong. No other approach will safeguard the affected children's interests'.[572]

In other words, in order to ensure that a non-consensual adoption order is a proportionate measure, it is necessary to conduct a more thorough scrutiny of cases of this nature.[573] This could be achieved by reference to principles from the ECtHR (considered in Section 3.5) and also by reference to children's rights in the UNCRC. A consideration and application of these factors in adoption cases would provide greater protection not only for parents' rights under ECHR Article 8 but also for children's rights under both the ECHR and the UNCRC (in particular, Articles 7, 8 and 9). Having considered the issues raised by the *Webster* case, it is important to examine how the law on non-consensual adoption and proportionality has been addressed by the Court of Appeal in England and

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[570] Andrew Bainham, 'The Peculiar Finality of Adoption' [2009] 68 *CLJ* 283.
[571] *Ibid.*
[572] Jo Delahunty and William Tyler, 'Re-litigation in family cases: the emerging law and practice' [2013] *Fam Law* 40.
[573] For example, see: *LB Islington v Al Alas and Wray* [2012] EWHC 865 (Fam). For a detailed summary of this case please see: Jo Delahunty and Kate Purkiss, 'The vitamin D and rickets case: *LB Islington v Al Alas and Wray'* [2012] *Fam Law* 659. Also see: *LB of Sutton v Gray and Butler* [2012] EWHC 2673 (Fam). For a detailed summary of the case please see: Jo Delahunty and William Tyler, 'A 'miscarriage of justice' corrected: the difference expert evidence and a full re-hearing can make to the outcome: *Sutton LBC v Gray and Butler'* [2012] *Fam Law* 1344.

Wales and the UK Supreme Court in subsequent cases. This is addressed in the pages that follow.

4.4 The Proportionality of Non-Consensual Adoption: Legal Challenges in the Supreme Court

4.4.1 ANS and another v. ML

ANS and another v. ML[574] is a UK Supreme Court decision which considers the proportionality of the Scottish equivalent of the Adoption and the Children Act 2002. While Scotland is not governed by the same law of adoption as England and Wales, the final appeal court in the land for Scottish cases is the Supreme Court of England and Wales, thus this judgment is relevant to all courts in the UK.[575] This case is significant because it considered whether the legislation on non-consensual adoption itself was proportionate.

In *ANS*, the appellant was a mother whose child has been placed for adoption without her consent. Here, the Supreme Court was invited to assess the compatibility of the Adoption and Children (Scotland) Act 2007, s31(3)(d) with ECHR Article 8, which was similar to and in fact based on the ACA 2002, s52(1). S31(3)(d) stated: 'where neither of those subsections [4 or 5] applies, the welfare of the child otherwise requires the consent to be dispensed with'. In contrast to *Webster*, where the parents challenged the reasons behind making the adoption orders, *ANS* involved a challenge to the adoption legislation itself. In *ANS*, the mother claimed that the effect of s31(3)(d) was that there could be permanent severance to the parent/child bond. She argued that, as this severance was based solely on the child's welfare, then the non-consensual adoption therefore violated her right under ECHR Article 8. The key issue was whether or not s31(3)(d) itself represented a proportionate interference with parents' rights under Article 8.

The Court's analysis rested on the presumption that the 2007 Act would not have been enacted to place the UK in breach of international obligations and that it was in keeping with international obligations[576] that the child's welfare was the paramount

[574] [2012] UKSC 30.
[575] Michelle Donnelly, 'The Supreme Court and the welfare ground for dispensing with parental consent to adoption: *ANS and another v ML (Scotland)*' [2014] *IFLJ* 110. For further information on the Scottish approach to children's rights generally, see: K. Tisdall, 'Children's Wellbeing and Children's Rights in Tension?' [2015] 23 *International Journal of Children's Rights* 769.
[576] Such as the UNCRC.

consideration.[577] The Court held that the statutory provision was compatible with the ECHR and wider international obligations (under the UNCRC, Article 21 the right to adoption, for example). In *ANS*, Lord Reed referred to the ECtHR in *YC v. UK*,[578] which had approved similar adoption legislation in England and Wales. In the European Court's judgment, it had indicated that there were a number of factors laid down in the checklist under s1(4) of the 2002 Act which reflect the various elements in assessing proportionality, e.g. the age, maturity and wishes of the child, the likely effect on the child of ceasing to be a member of his original family and the relationship the child has with relatives.

Lord Reed opined that the ECtHR had deemed the application of s1(4), in conjunction with s52(1)(b) to be in accordance with law. Thus, the reasoning of the Supreme Court appeared to be that since the European Court had accepted that s1(4) of the ACA 2002 was in accordance with law, and broadly reflected the elements required for proportionality, then so also was s31(3)(d). *Y.C. v. UK* ought not to have been used to support the lawfulness and the proportionality of s31(3)(d) since this provision was not equivalent to s1(4) and more importantly, in *Y.C. v. UK*, the ECtHR was not invited to question either whether s52(1)(b) was in accordance with law,[579] or whether the non-consensual adoption in that case was in accordance with law. The issues of the case focused on the necessity and proportionality of the State's actions (for further discussion of this case, see Chapter 6).

In *ANS*, the Supreme Court reflected on *Keegan v. Ireland*,[580] where the ECtHR had previously made it clear that adoption could only take place in 'exceptional circumstances'. Similarly, *Y.C. v. UK* emphasised that familial ties could not be severed unless there were 'exceptional circumstances' to justify permanent separation:

> '[F]amily ties may only be severed in exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family…'[581]

[577] *ANS and another v. ML* [2012] UKSC 30 at para 37.
[578] (Application no. 454710) 13 March 2012.
[579] *Y.C. v. UK* (Application no. 454710) 13 March 2012 at para 131.
[580] (Application no. 16969/90) 26 May 1994.
[581] *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) 6 July 2010 at para 136.

However, despite a repeated emphasis on the need for 'exceptional circumstances' where familial ties are to be severed, such as in the case of adoption, Lord Reed did not emphasise this important principle stemming from the European jurisprudence (see Chapter 3). Lord Reed asserted that 'exceptional circumstances' was not a 'legal test but an observation about the rarity of the circumstances in which the compulsory severing of family ties will be in accordance with article 8'.[582] With the greatest possible respect, it is argued that this is a misinterpretation of Strasbourg jurisprudence. Fenton-Glynn, for example, is of the view that 'exceptional circumstances' is very clearly a test, even though it may be one which is easy to satisfy on the basis of the child's best interests.[583]

An important part of the court's analysis in *ANS* rested upon its interpretation of what was meant by 'requires' in the context of dispensing with parental consent to adoption under s31(3)(d) of the Scottish adoption legislation. The leading judgment was delivered by Lord Reed who referred to the notion of proportionality and dispensing with consent to adoption:

> 'The court must be satisfied that the interference with the rights of the parents is proportionate: in other words, that nothing less than adoption will suffice. If the child's welfare can be equally well secured by a less drastic intervention, then it cannot be said that the child's welfare 'requires' that consent to adoption should be dispensed with'.[584]

The Supreme Court observed that the word 'requires' used in the Scottish legislation is used in the ACA 2002 s52(1)(b) and that it also reflected the language used by the ECtHR.[585] Furthermore, Lord Reed stated that, when the Scottish Act was drafted, the wording was based on the ACA 2002, s52(1)(b) but it was amended to reflect the fact that it ought to be subject to a necessity test equivalent to that in ECHR Article 8.[586] The Supreme Court also observed that Wall LJ, in a Court of Appeal decision, had previously held that the ACA 2002, s52(1)(b) was compatible with the ECHR.[587] Lord Reed opined that the 2007 Act conveyed 'the essence of the Strasbourg jurisprudence'[588] and as the less detailed provision of s52(1)(b) had been regarded by Wall LJ as compatible with

[582] *ANS and another v. ML* [2012] UKSC 30 at para 44.
[583] Claire Fenton-Glynn 'Adoption in a European Perspective' in Jens M Sharpe, *Research Handbook on European Family Law* (Cheltenham: Edward Elgar Publishing, 2016).
[584] *ANS and another v. ML* [2012] UKSC 30 at para 34.
[585] *Ibid* at para 35.
[586] *Ibid* at paras 19-21.
[587] See: *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535 at para 125.
[588] *ANS and another v. ML* [2012] UKSC 30 at para 35.

Article 8, the Supreme Court held that s31(3)(d) of the 2007 Act was also compatible with ECHR Article 8.[589]

It can be argued that the *ANS* decision does provide some protection for parents' interests[590] for two main reasons. First of all, because it acknowledges that a court ought to start with a less interventionist approach and secondly, because it places some emphasis on the Court of Human Rights' decision in *Y.C. v. UK*.[591] However, closer scrutiny of the decision reveals that, not unlike the *Webster* decision, there is a lack of in-depth analysis of the rights of children and parents that one might expect, considering the seriousness of the issue at stake. Thus, Ifezue and Rajabali, for example, have pointed out that while the Supreme Court takes in *ANS* into account parental interests, 'this is only done on a superficial basis'.[592] This is demonstrated, for example, in its analysis of the decision of *Y.C*, in which the ECtHR stated that the factors to be considered in adoption cases included the wishes of the child, the likely effect of ceasing to be a member of the original family and the child's existing relationships with family members. Despite this emphasis in *Y.C*, the paramountcy of the child's welfare in the adoption process and how this could justify overriding the interests of the parents was emphasised in *ANS*, thereby reducing the significance of parental rights.

The decision in *ANS* amounts primarily to a traditional black-letter law analysis of the law, despite increasing obligations to consider rights as required by the Human Rights Act 1998 (see Chapter 2 for further explanation). The Supreme Court focused primarily on analysing whether or not the legislation justified non-consensual adoption rather than on whether or not the mother's Article 8 right had been violated. While one might not disagree with the Court's interpretation of the legislation itself, and the Court may not have been compelled to provide further analysis of ECHR rights, the decision provided the Supreme Court with a perfect opportunity to explore the circumstances in which non-consensual adoption may or may not be a proportionate interference with parental rights and also to consider the role of children's rights in non-consensual adoption cases.
As was argued in Chapter 2, compliance with the best interests principle under UNCRC Article 3, applied in the context of adoption under UNCRC Article 21, may actually

[589] *ANS and another v. ML* [2012] UKSC 30 at para 43.
[590] Godsglory Ifezue and Maria Rajabali 'Protecting the interests of the child' [2013] *CJICL* 81 at 81-83.
[591] (Application no. 4547/10) 13 March 2012.
[592] Godsglory Ifezue and Maria Rajabali 'Protecting the interests of the child' [2013] *CJICL* 81 at 83.

require a more detailed analysis of factors which are relevant in a decision about whether or not a child should be adopted. *ANS* was an important case since it affirmed that the ACA 2002 was in fact Convention compliant. Subsequent case law in the Supreme Court and the Court of Appeal has started to consider what type of analysis needs to be undertaken and what measures ought to be taken for a non-consensual adoption to be regarded as a proportionate measure. In the following case, the UK Supreme Court had to consider whether or not the rights of the child and the parents had been violated under ECHR Article 8 in relation to a non-consensual adoption.

4.4.2 In the Matter of B (Children)

In the Matter of B (Children)[593] is an important case because it is the first time the UK Supreme Court has provided a detailed assessment of the significance of ECHR Article 8(1) and the principle of proportionality in a non-consensual adoption case. In this case, the Court considered whether the parents' and child's Article 8(1) right to respect for private and family life were relevant at the threshold stage of care proceedings under the Children Act 1989, s31(2). The Court also considered the applicability of the Human Rights Act 1998, s6 (under which public authorities are duty bound to act compatibly with Convention Rights). The Supreme Court had to decide whether it was required to carry out a fresh determination of the issues at stake, rather than a secondary review, in order to assess whether the non-consensual adoption had been a proportionate interference with the rights of a newborn baby ('Amelia') and her parents under ECHR Article 8.

The child, Amelia, was removed into care under the CA 1989, s31 and subsequently placed for adoption under the ACA 2002, s52(1)(b). Primarily because of the mother's factitious disorder, [594] but also because of the father's drug use, Social Services argued that Amelia was at risk of emotional harm and she was removed into care. While she was in care, both parents visited Amelia regularly and sought to be reunited with her. Social Services considered it would be in her best interests to be adopted and the High Court granted an adoption order. The parents appealed to the Court of Appeal which affirmed the trial judge's decision. They subsequently appealed to the Supreme Court which was invited to consider whether Article 8(1) was relevant at the threshold stage of care

[593] [2013] UKSC 33.
[594] This is where people fabricate false symptoms of illness and fabricate their medical history.

proceedings and whether, under the HRA 1998, s6, an appellate court needed to conduct a fresh determination instead of a secondary review when a violation of a Convention Right has been alleged.

The Supreme Court dismissed the appeal by a majority[595] of 4-1 (with Lady Hale dissenting). The Court held that the grounds for the care order had been made out and that, due to the mother's disorder and the risk of emotional harm to her child, Amelia should be placed for adoption. However, it was held that a high degree of justification would be needed under Article 8 for a child to be placed for adoption against the birth parents' wishes. In order for the adoption to take place, the child's interests must render this necessary. The Supreme Court held that Article 8 did not apply at the first stage when determining whether the s31 threshold for making a care order has been crossed, but it applied at the second stage when a court was conducting the welfare assessment.[596]

The Supreme Court thus considered whether or not the parents' Article 8 rights had been violated in the course of the welfare assessment. Lord Neuberger opined that 'no substantive order is made without all Convention rights being taken into account'.[597] Lord Neuberger cited English case law, drawing attention to the fact that it is recognised that it is best for children to be raised by their birth parents (see Section 2.4.1).[598] Despite the existence of this principle, the facts in this case justified departing from this assumption. Lord Neuberger concluded that the risk of the harm to the child amounted to defective parenting which satisfied the threshold under the CA 1989, s31(2). The Supreme Court thus held that the making of the care order did not violate Amelia's or her parents' rights under ECHR Article 8.

In terms of whether the non-consensual adoption violated the Article 8 rights of Amelia and her parents, Lord Wilson discussed *Y.C. v. UK*.[599] He considered how this case had a bearing on the proportionality assessment in non-consensual adoption cases. He observed that para 134 of the judgment in *Y.C* '…demonstrates the high degree of justification which article 8 demands of a determination that a child should be adopted or placed in

[595] Lord Neuberger, Lord, Wilson, Lord Clarke and Lord Kerr.
[596] *In the Matter of B (Children)* [2013] UKSC 33 at para 29 *per* Lord Wilson.
[597] *Ibid* at para 62 *per* Lord Neuberger.
[598] *Ibid* at paras 67-69 *per* Lord Neuberger.
[599] [2012] 2 FLR 332.

care with a view to adoption'.[600] Lord Wilson opined that European jurisprudence was 'parallel'[601] with domestic law which emphasises that it must be necessary to make an adoption order. In terms of the proportionality principle, Lord Wilson[602] considered *Kutzner v. Germany*[603] where it was stated by the ECtHR that the authorities had violated Article 8(1) where they had not 'given sufficient consideration to additional measures of support as an alternative'[604] to adoption. Lord Wilson stated that a three month adjournment to explore the possibility of reuniting Amelia with her parents might have been a proportionate response but accepted Judge Cryan's view that Amelia could not be reunited with her parents because further exploration would have been unsuccessful due to the 'barriers erected by the parents'.[605] In other words, the judge had concluded that the parents would be unwilling to cooperate with the relevant authorities (i.e. Social Services).

Lord Neuberger reached a similar conclusion but, in the course of his reasoning referred to the UNCRC[606] and emphasised that 'before making an adoption order in such a case, the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support'.[607] Despite the fact that the judgment was not favourable to Amelia's parents, Lord Neuberger's words may carry some weight in future cases. In fact, this judgment, along with UNCRC and ECtHR jurisprudence, could potentially be used to argue that authorities in England and Wales have a positive obligation under both the ECHR and the UNCRC to provide State assistance to keep families together.

Furthermore, the Supreme Court also held that the HRA 1998, s6 did not require the appellate courts to consider issues afresh which related to ECHR rights. Appellate courts were only required to review the lower court's decision. The majority of the Supreme Court held that, while the Court had a duty under the HRA 1998, s6, to ensure that there was no violation of Article 8, the appropriate test was to consider simply whether the

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[600] *In the Matter of B (Children)* [2013] UKSC 33 at para 34 *per* Lord Wilson.
[601] *Ibid.*
[602] *Ibid* at para 48 *per* Lord Wilson.
[603] [2002] 35 EHRR 653 at para 75.
[604] *Kutzner v. Germany* [2002] 35 EHRR 653 at para 75.
[605] *In the Matter of B (Children)* [2013] UKSC 33 at para 48.
[606] *Ibid* at paras 103-105.
[607] *Ibid* at para 105.

lower court exceeded its discretion and to determine whether the lower court was 'wrong' in its decision.[608] Lord Neuberger stated that:

> '[T]he fact that a Convention right is involved does not require an appellate domestic court to consider again the issue of proportionality for itself…. [T]he court system as a whole must fairly determine for itself whether the requirement of proportionality is met, but that does not mean that each court up the appeal chain does so'.[609]

Although Lord Kerr was in the majority and dismissed the appeal, he disagreed with the majority on the second argument in relation to the need for appellate courts to consider issues afresh. He argued that under the HRA 1998, s6, appellate courts might be required to perform their own assessment of proportionality. He opined that:

> '[A]n appellate court cannot avoid the imperative of section 6 of HRA by viewing the matter of proportionality through the prism of the defensibility of the trial judge's decision. An appeal in an adoption case requires the appellate court to confront the possibility that its decision could involve the infringement of a Convention right. The duty not to act in a way which is incompatible with such a right gives rise to an inevitable, concomitant duty to inquire whether the order that the court makes would have that consequence. That is an inquiry which cannot be satisfactorily answered by the conclusion that another agency has so decided. The inquiry must require the appellate court to decide for itself if the freeing order is proportionate/necessary'.[610]

Lady Hale provided the sole voice of dissent, with an opinion which was a striking contrast to that of the majority.[611] Lady Hale agreed with the majority that the threshold had been crossed. Nonetheless, she held that this did not mean that nothing else but adoption would do for the child, as from her perspective, 'nothing else'[612] had been tried. She held that an adoption order was not a proportionate measure on the facts of the case; and that the potential for social workers to take other measures to protect Amelia which would have enabled her to have been returned to her parents had not been properly examined.[613] In other words, in her opinion, it would have been possible for a less restrictive measure to have been chosen instead of non-consensual adoption. Lady Hale accepted the threshold had been crossed in this case but stated that an adoption order was not justified. She disagreed with the majority of the Supreme Court and, like Lord Kerr, indicated that the Court had the jurisdiction to do more than merely review the decision

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[608] *In the Matter of B (Children)* [2013] UKSC 33 at paras 47, 91-92, 139.
[609] *Ibid* at para 85.
[610] *Ibid* at para 121.
[611] Julie Doughty, 'Re B (A Child) (Care Order) [2013] UKSC 33' [2013] *35 Journal of Social Welfare and Family Law* 491.
[612] *In the Matter of B (Children)* [2013] UKSC 33 at para 223.
[613] *Ibid*.

of the lower court when performing a proportionality analysis. According to Lady Hale, the Court had the discretion to reconsider the issue on the basis of the material put before it.

Despite referring to Amelia's Article 8 rights and a 'relatively rare'[614] reference to the UNCRC, there was no analysis of what these rights were (except for a brief reference to Article 21 and its emphasis on paramountcy[615]). Furthermore, there was no reference to how such rights could be weighed and whether or not such rights were relevant considerations in the welfare assessment under s31, which preceded the adoption. It could be said, for example, that Amelia's right under UNCRC Article 7 (to know and be cared for by her parents) and her right under UNCRC Article 9 (not to be separated from her parents) are rights which could have been referred to in the Court's analysis of the case. Amelia lost the opportunity to be raised by or at least maintain contact with her parents, even though contact, had taken place since her birth and had been positive.

In contrast to *ANS*, the UK Supreme Court in the case of *In the Matter of B (Children)* gave a more detailed analysis of proportionality and of non-consensual adoption and a more in-depth discussion of relevant ECHR rights. However, one aspect of the decision which is disappointing is that the Supreme Court gave limited attention to the child's rights (despite the fact that the parents argued that not only had their Article 8 right been violated, but so had the Article 8 right of their daughter). Overall though, this case can be used to support arguments made in both Chapters 2 and 3 which have emphasised that the State has a positive obligation not only to respect and protect the rights of children and parents in adoption cases, but also to consider, and where appropriate, apply less restrictive alternatives before making an adoption order. Having outlined the significance of the Supreme Court jurisprudence on non-consensual adoption, the following section considers the guidance on non-consensual adoption which has been provided by the Court of Appeal in England and Wales.

4.5 Court of Appeal Guidance on Non-Consensual Adoption: Re B-S (Children)

4.5.1 The Guidance

[614] Brian Sloan, 'Adoption decisions in England: Re B (A Child) (Care Proceedings: Appeal) and beyond' [2015] *Journal of Social Welfare and Family Law* (online: 27 December, 2015).
[615] *In the Matter of B (Children)* [2013] UKSC 33 at para 104.

Re B-S (Children)[616] concerned an appeal by a mother whose two children had been removed into care in 2011 and in respect of whom care and placement orders were made. The mother's consent to adoption was dispensed with and she applied under the ACA 2002, s45(7) for leave to oppose the adoptions, arguing that her circumstances had changed. At first instance, her claim was refused by Parker J on the basis that, even though her circumstances had changed, her application to oppose the adoption would not have succeeded because of the bonds that the children had formed with their prospective adopters.

The mother appealed to the Court of Appeal on seven different grounds which included arguments based on ECHR Article 6 (the right to a fair hearing) and ECHR Article 8 (the right to respect for private and family life). Munby P rejected the mother's appeal on all seven grounds but laid down important guidelines for adoption proceedings in the lower court. At a NAGALRO[617] Conference held in Birmingham in March 2015, Munby P described the case as one of the most 'important' in terms of practice. In *Re B-S (Children),* Munby P acknowledged his 'misgivings'[618] about how lower courts had been addressing non-consensual adoptions and criticised them for their 'lack of attention'[619] to previous judgments and provided guidance on the matter.

Munby P stated that, where there had been no welfare analysis considering realistic options and no evaluation of the proportionality of the adoption, then the decision-making would be 'flawed'[620] because an interference with Article 8 would not be justified. Munby P referred to the importance of ECtHR jurisprudence and the need to ensure that the State satisfied its obligation under Article 8 so as to ensure that legal ties between children and parents were severed only in exceptional circumstances and reasonable efforts were made to rebuild these relationships.[621] Munby P's judgment was highly critical of the inadequacy of the analysis of the lower courts with reference to four cases where failures to provide leave to challenge adoption without parental consent had been based on what he regarded to be inadequate judicial analysis. Furthermore, he was critical

[616] [2013] EWCA Civ 1146.
[617] National Association of Guardians Ad Litem and Reporting Officers.
[618] *Re B-S (Children)* [2013] EWCA Civ 1146 at para 15.
[619] *Ibid* at para 17.
[620] *Ibid* at para 21.
[621] The Court referred to *K and T v. Finland* [2001] 2 FLR 7 and *Y.C v. UK* (Application no. 4547/10) 13 March 2012.

of the courts' tendency to place too much reliance on the evidence of Social Services, which is often insufficient and which he described as 'sloppy practice'.[622]

In *Re B-S*, the Court held that a high threshold would need to be reached before it could be determined that the child's welfare 'requires' parental consent to be dispensed with. In *Re B-S*, reference was made to Lady Hale in *Re B (A Child) (Care Proceedings: Threshold Criteria)*[623] where she stressed that application of the ACA 2002 and ECHR Article 8 require dispensing with parental consent only if 'nothing else will do'. Reference was also made to *Re P (Placement Orders: Parental Consent)*[624] where Wall LJ stressed that to 'require' intervention or even long-term removal of a child did not necessarily mean that an adoption order would be required. In other words, just because a care order was necessary, would not mean that a non-consensual adoption would be necessary and proportionate.

In sum, the decision in *Re B-S* has provided very important guidance on how the courts should exercise their powers and conduct their reasoning when deciding whether or not to make an adoption order. Munby P said that, first of all, it would be necessary for the courts to conduct a proper weighing up of the pros and cons of each potential option for a child in what is known as a 'balance sheet'[625] approach (see Chapter 2). Secondly, the courts should provide a reasoned judgment which should demonstrate a 'global holistic' approach whereby it considers the different options available to meet the child's needs. The decision in *Re B-S* therefore requires the consideration of at least one less restrictive than adoption and the balance sheet approach assists in determining whether the alternative is equally effective.

4.5.2 Change of Circumstances

Re B-S (Children)[626] has also had an impact on the legal test to be applied when parents apply for leave to revoke a placement order and when they oppose the making of a final adoption order. It is important to consider this aspect of the decision as it increases the protection of parents' rights under ECHR Article 8, in that it provides parents with a

[622] *Re B-S (Children)* [2013] EWCA Civ 1146 at para 40.
[623] [2013] UKSC 33.
[624] [2008] EWCA Civ 535.
[625] First proposed by Thorpe LJ in *Re A (Male Sterilisation)* [2000] 1 FLR 549 at 560.
[626] [2013] EWCA Civ 1146.

meaningful form of legal recourse where their circumstances have changed and they seek to be reunited with their children.[627] The ACA 2002, s24(2) provides that: 'an application may not be made by a person other than the child or local authority' to revoke a placement order unless (a) the court has given leave to apply and (b) the child is not placed for adoption by the authority. Under the ACA 2002, s24(3) the court cannot revoke a placement order 'unless satisfied that there has been a change in circumstances since the order was made'. In order to obtain leave to revoke a placement order, the birth parents must prove that a change of circumstances has occurred within the family. Where an application for an adoption order has been made, parents can no longer submit an application under s24 but instead have the opportunity to challenge the making of the adoption order itself. The ACA 2002, s47 states the conditions for making an adoption order. S47(3) and s47(3) provide that parents (or guardians) may not oppose the making of an adoption order without the court's permission. In determining whether or not to permit parents to oppose the making of an adoption order, the court will consider whether or not there has been a change of circumstances.[628]

In assessing whether or not there has been a change of circumstances, the court has to consider whether the applicant (typically one or both of the birth parents) has a real prospect of success in their application. In deciding whether or not to give permission to an application, the welfare of the child must be considered and a two-stage test is applied.[629] First, the court asks if there has been a change in circumstances. If not, this is the end of the court's analysis and the application is dismissed. If the answer is yes, the court must ask if leave to oppose the placement order should be given by evaluating: '…whether the parent's prospects of success are more than just fanciful, whether they have solidity'.[630] The child's welfare will be the paramount consideration and in evaluating welfare, the court will consider the current state of affairs and what may happen in the future. If the child's welfare will be adversely affected by an application to oppose adoption, permission will not be granted.[631]

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[627] It has been observed that a notable aspect of the decision in Re B-S, is its emphasis on human rights. See: Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (London: Palgrave, 2015), p146.
[628] *Re B-S (Children)* [2013] EWCA Civ 1146 at paras 72-74
[629] *Re W & Re H* [2013] EWCA Civ 1177.
[630] *Ibid* at para 20, *per* Munby P.
[631] *Re W & Re H* [2013] EWCA Civ 1177.

In *Re W (Adoption: Set aside and leave to Oppose)*,[632] Thorpe LJ stressed that only 'exceptionally rare circumstances'[633] would justify disrupting a placement for adoption. In *Re B-S (Children)*,[634] McFarlane LJ's perspective was that the approach outlined by Thorpe LJ was untenable after the Supreme Court's decision in *Re B*, because the jurisdiction under the ACA 2002, s47(5) was only triggered when children had been placed for adoption and in such a placement for a minimum of 10 weeks. He viewed s47(5) as intended to provide parents with a meaningful remedy against the making of an adoption order. *Re B-S* shows that a change of circumstances need not be 'significant'[635] for permission to be granted to oppose a placement or adoption order. This is because permission does not guarantee that parents will succeed in their application and prevent an adoption order from being made; it merely provides them with an opportunity to challenge it. The way in which a 'change of circumstances' may be interpreted by the courts is significant since a restrictive interpretation of 'change of circumstances' means that few parents would be able to appeal against a non-consensual adoption. The conclusion in *Re B-S*, however, arguably increases the likelihood that parents may be able to successfully argue that their circumstances have changed. The impact of this decision then, is that it provides more protection to birth parents in the context of non-consensual adoption in both cases where parents seek leave to revoke placement orders and to oppose adoption orders.

4.5.3 A Change of Approach?

At first glance, the decision in *Re B-S* appears to encourage caution in making adoption orders[636] and to emphasise thorough exploration of alternatives to adoption. Arguably, *Re B-S* also increases the protection of parents' rights in relation to the opposition of adoption orders, since the courts may be more willing to grant permission to oppose an adoption order.[637] Sloan has suggested too, that the decisions in *Re B* and *Re B-S* have

[632] [2010] EWCA Civ 1535. Also see: *Re C (A Child)* [2013] EWCA Civ 1431 which suggested circumstances which might justify leave to appeal against adoption would be 'stringent'.
[633] *Re W & Re H* [2013] EWCA Civ 1177 at para 17.
[634] [2013] EWCA Civ 1146.
[635] *Re B-S (Adoption: Application of s 47(5))* [2013] EWCA Civ 1146, [2014] 1 FLR at para 8.
[636] Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (London: Palgrave, 2015), p146.
[637] Kim Holt and Nancy Kelly, 'When adoption without parental consent breaches human rights: implications of Re B-S (Children) [2013] EWCA Civ 963 on decision making and permanency planning for children' [2015] 37 *Journal of Social Welfare and Family Law* 228.

increased the likelihood of the judiciary's approach in non-consensual adoption cases being compatible with the UNCRC.[638]

The emphasis on legislative provisions (both in the ACA 2002 and the CFA 2014) to decrease delay in the adoption process and the government's clear commitment to adoption policy suggest that adoption is the government's preferred choice for permanence for children in care. In *Re B-S* the Court has firmly stated that there ought not to be a presumption about what option is in the child's best interests. In fact, the Court in *Re B-S* has emphasised that adoption ought to be a last resort rather than a first consideration. Sloan has thus argued that there may be some conflict between the government's pro-adoption policy as seen within the legislation and the courts' approach to adoption.[639]

According to Bainham and Markham until the decision in *Re B-S*, the lower courts have often paid only 'lip service' to human rights requirements in adoption cases. They have suggested that this ruling puts pressure on judges to make balanced decisions based on proper evidence, for otherwise their decisions may be appealed by parents.[640] Although the High Court, Court of Appeal and the Supreme Court decisions have also emphasised that adoption ought to be a measure of last resort, the lower courts have not always treated it as such.[641] *Re B-S* is likely to have a considerable influence on the lower courts as it has laid down specific guidance on non-consensual adoption.

Sprinz has argued that a possible result of the guidance in *Re B-S* is that there may be fewer adoptions with the consequence that more children will remain in long-term foster care in order to ensure that ties with birth parents are not severed and that children remain in direct contact with them.[642] Despite the existence of Court of Appeal guidance, Sprinz has observed that the High Court has re-stated the key principles from *Re B-S* in many cases, because the Family Proceedings (Magistrates) Courts and County Courts are still

[638] Brian Sloan, 'Adoption decisions in England: Re B (A Child) (Care Proceedings: Appeal) and beyond' [2015] *Journal of Social Welfare and Family Law* (online: 27 December, 2015).
[639] Brian Sloan, 'Loving but potentially harmful parents in the Supreme Court' [2014] 73 *CLJ* 28 at 30. Also, see: Julie Doughty, '"Where nothing else will do": Judicial approaches to adoption in England and Wales' [2015] 39 *Adoption and Fostering* 105.
[640] Andrew Bainham and Hannah Markham, 'Living with Re B-S, Re S and its implications for parents, local authorities and the courts'[2014] *Fam Law* 991 at 998.
[641] Lucy Sprinz, 'Adoption in 2014' [2014] *Fam Law* 335.
[642] *Ibid* at 336.

not following the authority of *Re B-S*.[643] This is cause for concern as it may mean that some non-consensual adoptions are still taking place when less restrictive alternatives are available. In other words, some adoptions may not be human rights compliant in that they are not necessary and proportionate, and some children and parents may have had their legal and family ties unfairly and unnecessarily severed.

Another consequence of *Re B-S* is that there has been a significant increase in litigation by birth parents opposed to the adoption of their children.[644] In fact, there have been many subsequent cases where the Court of Appeal has allowed parents' appeals against adoption orders.[645] In *Re E*,[646] for instance, a mother appealed against care and placement orders. The Court of Appeal applied the test enunciated by the Supreme Court in *Re B*[647] and looked at the proportionality of the outcome, based on the evidence in the case. The child had been removed because of a finding of fact that the mother's boyfriend had caused harm to the child. The mother had continued to live with her boyfriend, before finding alternative suitable accommodation. The Court held that the adoption of a young child who was securely attached to the mother (who was seen as a loving and capable mother) was not a proportionate outcome.

In another case, *Re J*,[648] the Court of Appeal considered a grandmother's appeal against care and placement orders in respect of a 21 month old child. The Court stressed ECHR Article 8 was important in this context and it had to be shown that the adoption was 'necessary'. The Court allowed the appeal, since on the facts it was not clear why it was necessary for an adoption to take place or why the child could not have been placed with the birth family. These decisions demonstrate that the courts are recognising the requirements of proportionality, a legal principle which has long existed but which has not always been considered by the lower courts.

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[643] Lucy Sprinz, 'Adoption in 2014' [2014] *Fam Law* 335. See, for example: *Re V (Long-Term Fostering or Adoption)* [2013] EWCA Civ 913, [2014] 1 FLR (forthcoming); *K v London Borough of Brent* [2013] EWCA Civ 926, [2014] 1 FLR; *Re G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965, [2014] 1 FLR; *Re P (Care Proceedings: Balancing Exercise)* [2013] EWCA Civ 963, [2014] 1 FLR; *Re B-S (Adoption: Application of s 47(5))* [2013] EWCA Civ 1146, [2014] 1 FLR. Also, see: *Re D (A Child)* EWCA 1150. In contrast, see: *Local Authority A v N & Ors* [2015] EWHC 1301 (Fam) (02 April 2015) which makes explicit reference to terminology from the decision in *B-S*.

[644] Julie Doughty, '"Where nothing else will do": Judicial approaches to adoption in England and Wales' [2015] 39 *Adoption and Fostering* 105.

[645] For example, see: *Re W (Children)* [2015] EWCA Civ 403.

[646] [2013] EWCA Civ 1614.

[647] [2013] UKSC 33.

[648] [2013] EWCA Civ 1100.

In *Re Y (Children),*[649] Ryder LJ suggested it is not necessary for the Family Court to undertake a separate human rights proportionality evaluation balancing the effects of the interference on each individual's Article 8 right in private law cases, where there are no public law consequences. This is unlike adoption cases where there is public authority involvement as the HRA 1998, s6 provides that: 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right'. By implication then, Ryder LJ's judgment has the potential to be used as authority for the proposition that when making adoption orders, which *do* have public law consequences, then the courts must consider the rights of children and their parents so as to determine the proportionality of the adoption order.

The present position of the Court of Appeal, in the light of the decision in *Re B-S,* is that a holistic approach taking into consideration a range of different options does not require the courts to consider every possible option, but simply options which are 'realistically possible'.[650] Despite appearing to advocate the need for more stringent judicial control over when non-consensual adoption ought to take place in *Re B-S,* in *Re R (A Child)*[651] Munby P addressed 'myths' which might ultimately lead to fewer adoptions being made. These included the idea that there might be a higher threshold to satisfy than there had been prior to the decision in *Re B-S* before a child could be placed for adoption or that more assessments would be needed before kinship carers could be ruled out. He asserted that despite the importance of his judgment in *Re B-S,* that he had not intended to discourage the making of adoption orders. Munby P thus emphasised that local authorities 'must not shy away from seeking, nor courts from making'[652] adoption orders where it was necessary to do so.

Despite the welcome clarification that *Re B-S* provided, (namely that adoption should be regarded as a last resort and that the quality of social work assessments and judicial reasoning needed to improve), concern has been expressed that the judgment in *Re B-S* has been used inappropriately to criticise social workers and local authorities.[653] Thus for

[649] [2014] EWCA Civ 1287.
[650] *Re R (A Child)* [2014] EWCA Civ 1625 at para 53 *per* Munby P.
[651] [2014] EWCA Civ 1625.
[652] *Re R (A Child)* [2014] EWCA Civ 1625 at para 44 *per* Munby P.
[653] Adoption Myths Busted [2015] 45 *Fam Law* 105.

instance, Holt and Kelly have argued that social workers' decisions are under scrutiny in the wake of *B-S.*[654] Furthermore, Masson has pointed out that it is not just local authorities, but also judges, who are under pressure because of the additional hearings which now take place after *B-S* and because higher standards of judicial reasoning are now expected.[655] The biggest impact, however, is the fact that 47 per cent fewer children were placed for adoption in the months following the decision.[656] For the first time since 2011, the annual statistics from the Department for Education, demonstrate an overall decline in the number of children who are being placed for adoption (i.e. placement orders have been made).[657]

While the number of children who have been adopted has since increased, the rate of the increase was only 5 per cent between 2014 and 2015, compared with 26 per cent between 2013 and 2014.[658] The National Adoption Leadership Board has attributed the decrease in the number of adoptions to the decisions in *Re B* and *Re B-S*.[659] NAGALRO has suggested that pre-*B-S*, special guardianship and kinship carers were ruled out as carers for 'quite spurious reasons'[660] without being afforded the chance to make representations to the court. Now, more special guardianship orders are made (see further discussion in Section 5.4). It is apparent then, that the *Re B-S* decision has had a considerable impact on the number of adoptions which have been made and challenges existing government policy on adoption. This following section considers some specific issues which have been raised by the legislation and the case law on non-consensual adoption.

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[654] Kim Holt and Nancy Kelly, 'When is it too late to oppose an adoption order? A and B v Rotherham Metropolitan Borough Council' [2015] 45 *Fam Law* 349.
[655] Judith Masson 'Third (or fourth) time lucky for care proceedings reform?' [2015] *CFLQ* 3. An example of such a judgment is *Re DE (A Child)* [2014] EWFC 6. For commentary, see: Claire Fenton-Glynn, 'The Rise of Strict Scrutiny: Extending Re B-S to changes in care plans' [2015] 37 *Journal of Social Welfare and Family Law* 105.
[656] National Adoption Leadership Board, 2014 figures suggest that 1,830 children were placed for adoption between July and September 2013 and this figured decreased to 960 between April and June 2014.
[657] Department for Education, *Children Looked After in England (including care leavers) year ending 31 March 2015* (Department for Education, 2015).
[658] *Ibid.*
[659] National Adoption Leadership Board, *Impact of Court Judgments on Adoption, What the judgments do and do not say* (National Adoption Leadership Board, 2014).
[660] NAGALRO, *Nagalro Response to the Government Consultation on Special Guardianship 15 September 2015* (NAGALRO, 2015) p4.

4.6 Adoption law – more adoptions and more quickly

4.6.1 Overview of more adoptions and more quickly

This section considers three issues which impact on the proportionality of non-consensual adoption and which, it is argued, have increased the likelihood that non-consensual adoption orders will take place in circumstances where less restrictive alternatives might have been available. These issues are: the potential for social engineering to occur in the context of non-consensual adoption; the impact of the 26-week limit in care and adoption proceedings; how new provisions which explicitly limit contact between children in care and their parents and how pre and post-adoption proceedings may impact on the proportionality of non-consensual adoption.

4.6.2 Non-Consensual Adoption: A Proportionate Measure or Social Engineering?

Chapter 3 of this thesis discussed the importance of European jurisprudence which, under the Human Rights Act 1998, s2, must be taken into account during court decision-making in England and Wales. In *Pontes v. Portugal*,[661] *R.M.S. v. Spain*,[662] *Zhou v. Italy*[663] and *S.H. v. Italy*,[664] for example, the ECtHR has held that Member States ought to seek less restrictive alternatives to non-consensual adoption. In *Kutzner v. Germany*[665] and *Haase v. Germany*,[666] the ECtHR emphasised that merely showing a child could be placed in a 'more beneficial environment for his or her upbringing'[667] would not, in and of itself, justify the compulsory removal of a child and thus arguably, would not justify an even more serious intervention with children's and parents' ECHR Article 8 rights to respect for private and family life, such as a non-consensual adoption. In other words then, the ECtHR is against social engineering (i.e. deciding that a child would be better off living away from his or her birth parents). A similar perspective can be found from case law in England and Wales. Lady Hale, for example, has stated that social engineering must not lead to the removal of children from their parents:

> '…it is not enough that the social workers, the experts or the court think that a child would be better off living with another family. That would be social engineering of a

[661] [2012] ECHR 1573.
[662] (Application no. 28775/12) 18 June 2013.
[663] (Application no. 33773/11) 21 January 2014.
[664] (Application no. 52557/14) 13 October 2015.
[665] (Application no. 46544/99) 26 February 2002 at para 69.
[666] [2004] 2 FLR 39 at para 95.
[667] *Haase v. Germany* [2004] 2 FLR 39 at para 95.

> kind which is not permitted in a democratic society. The jurisprudence of the European Court of Human Rights requires that there be a 'pressing social need' for intervention and that the intervention be proportionate to that need…'[668]

Prior to the enactment of the Adoption and Children Act 2002, Barton argued that the Adoption and Children Bill's emphasis on the child's welfare (see the ACA 2002 s52(1)(b)) over adoption based on failings of the parent had the potential to encourage social engineering.[669] After the enactment of the ACA, others expressed similar concerns. DeBlasio, for instance, has argued that: '[E]ven with the 'balancing' of rights by way of the welfare checklist, there is no doubt that the provisions [of the ACA 2002] live dangerously close to legitimising social engineering'.[670] Dale has also claimed that non-consensual adoption has 'significant human rights and social engineering implications'.[671]

The concern about social engineering in non-consensual adoption cases is not merely an academic concern. This is an issue which has also been raised in the Court of Appeal[672] and the Supreme Court. This can be seen in *Re A (A Child)*,[673] for example. In this case, a boy was removed into care and was due to be adopted because the father was considered an unsuitable role model and was unable to raise his child due to his previous convictions. The Court of Appeal acknowledged that the concerns expressed by social workers were relevant but that there was a need for a careful analysis of the information. Non-consensual adoption was not regarded to be a proportionate response to the concerns about the father's ability to parent. In *Re A (A Child)*[674] Sir James Munby, the President of the Family Division of the High Court, expressed concern about social engineering and approved of the judgment in *North East Lincolnshire Council v G & L*[675] where Jack J stated that:

> '[T]he courts are not in the business of social engineering. The courts are not in the business of providing children with perfect homes. If we took into care and placed for adoption every child whose parents had had a domestic spat and every child whose parents on occasion had drunk too much then the care system would be

[668] *Re S-B (Children)* [2009] UKSC 17 at para 7 *per* Lady Hale.
[669] Chris Barton, 'The Adoption Bill – The Consultative Document' [1996] *Fam Law* 43.
[670] Lisamarie DeBlasio 'Hiding Behind the Law? A Critique of the Law and Practice under the Adoption and Children Act 2002' [2014] 1 *Plymouth Law and Criminal Justice Review* 148 at 162.
[671] Dr Peter Dale, 'The Department of Education Contact Arrangements for Children: A Call for Views' 2012, p15 - http://www.peterdale.co.uk/downloads/
[672] For example, see: *N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112 at para 10 *per* Munby P.
[673] [2015] EWFC 11.
[674] [2015] EWFC 11.
[675] [2014] EWCC B77 (Fam).

> overwhelmed and there would not be enough adoptive parents. So we have to have a degree of realism about prospective carers who come before the courts'.[676]

Munby P reminded the lower courts of the key principle laid down in *Y.C. v UK*[677] which is that:

> 'Family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained.'

Lady Hale has expressed similar concerns about social engineering in her powerful dissent in the UK Supreme Court decision of *In the Matter of B (Children)*[678] which demonstrates the relationship between care and non-consensual adoption orders.[679] An issue in care proceedings, which impacts on adoption proceedings, is that there is a fine line between necessary intervention and social engineering. In *B (Children)* she made it plain that parents' negative character traits and behaviour would not always justify removal of their children from the family home:

> 'We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children. But the State does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, who suffer from physical or mental illnesses or disabilities, or who espouse anti-social political or religious beliefs'.[680]

Furthermore, Porter has expressed wider concerns that social engineering may have played a role in the increasing number of care proceedings involving children from Eastern Europe,[681] some of whom may be placed for adoption.[682] Eastern European children sometimes come from countries where poverty is endemic and, while these standards of living may be acceptable in those countries, they may not be regarded as acceptable in England and Wales. As a result, it may be difficult for some parents to reach the expected standards of living and parenting which are regarded as acceptable in

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[676] *Re A (A Child)* [2015] EWFC 11 *per* Munby P.
[677] [2012] 2 FLR 332 at para 134.
[678] [2013] UKSC 33.
[679] Brian Sloan, 'Loving but potentially harmful parents in the Supreme Court' [2014] 73 *CLJ* 28.
[680] *In the Matter of B (Children)* [2013] UKSC 33 at para 143.
[681] Joanne Porter, 'Families from Eastern Europe and care proceedings' [2014] *Fam Law* 183.
[682] *LA v DG & Ors* [2013] EWHC 734 (Fam), *Kent County Council v IS & Ors* [2013] EWHC 2308 (Fam*); CB (A Child)* [2015] EWCA Civ 888. See also: Claire Fenton-Glynn, *Adoption without parental consent: Study for the Peti Committee* (European Union: Brussels, 2015).

England and Wales.[683] Porter has argued that there is a perception by countries such as Slovakia[684] that the English authorities are taking into care and holding onto 'white' children who are adoptable.[685] Furthermore, in recent years, there has been increasing media attention given to cases concerning children placed for adoption, born to parents who are not of English origin[686] and there has also been increased litigation on this subject in England and Wales, with some children being returned to their parents while others have been placed for adoption. The issue of if and when it will be appropriate for children born to parents of different nationalities to be adopted has been raised before the Council of Europe[687] and the European Parliament. Fenton-Glynn has drawn attention to this:

> 'The English adoption system has caused tension between the government and several other EU Member States, in particular Latvia, Slovakia and Bulgaria. Concerns have also been expressed by Nigeria in this regard'.[688]

It is thus argued that social engineering is not merely an academic concern but is a real problem in non-consensual adoption cases, and a problem which may impact on whether or not the courts decide to choose a less restrictive (but equally effective) alternative to such adoptions. Where there is concern about parents' ability to raise their children due to different perceptions of parenting standards, then assistance from the State might be a more appropriate and less restrictive form of intervention. In other words, it would be a more proportionate response. Such situations raise the potential for parents and children

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[683] For example, see: *LA v DG & Ors* [2013] EWHC 734 (Fam), *Kent County Council v IS & Ors* [2013] EWHC 2308 (Fam).

[684] See a case concerning a child from Slovakia and Munby P's discussion about care and adoption proceedings in relation to children from other countries: *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), [2014] 2 FLR 151 at paras 13-15. Also Latvia, see: *Re CB (A Child)* [2015] EWCA Civ 888.

[685] Joanne Porter, 'Families from Eastern Europe and care proceedings' [2014] *Fam Law* 183. See also: Christopher Booker, "Slovaks protest at Britain's 'illegal child snatching' (*The Telegraph*, 22 September 2012) http://www.telegraph.co.uk/comment/9559657/Slovaks-protest-atBritains-illegal-child-snatching.html
Owen Bowcott, 'Latvia complaints to UK parliament over forced adoption' (*The Guardian*, 9 March 2015) http://www.theguardian.com/uk-news/2015/mar/09/latvia-complains-to-ukparliament-over-forced-adoptions
Felicity Capon, 'Baltic States say Norway, UK and Finland have stolen their children' (*Newsweek*, 23 April 2015) http://europe.newsweek.com/baltic-states-say-norway-uk-andfinland-have-stolen-their-children-324031.

[686] See, for example: *N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112; *Re CB (Adoption and Children Act 2002)* [2015] EWHC 3274 (Fam).

[687] Olga Borzova, *Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member states* (Council of Europe, 2015).

[688] Claire Fenton-Glynn, *Adoption without parental consent: Study for the Peti Committee* (European Union: Brussels, 2015), p25.

to argue that their rights under ECHR Article 8 have been violated, particularly in cases where insufficient assistance has been provided by the State (see the discussion in Chapter 3, for example).

4.6.3 The 26 Week Limit on Care Proceedings: More Non-Consensual Adoptions?

An important aim behind adoption legislation in England and Wales (i.e. the Adoption and Children Act 2002 and the Children and Families Act 2014) is to reduce delay in the adoption process, so as to reduce the length of time that children remained in care and in a state of uncertainty. The UK government has engaged in a pro-adoption policy, which aims to speed up the adoption process. This may be well-intentioned and beneficial for some children but there is a danger that some children will be rushed into adoption without less draconian alternatives being explored and implemented (e.g. reuniting children with their birth parents or placing them with other birth relatives). Section 14(2)(ii) of the CFA 2014 is worthy of further scrutiny because the 26-week limit in care proceedings has the potential to decrease delay in adoption proceedings, but it may lead to children in care being placed for adoption, when they could have been returned to their families or placed with birth relatives. In general, academic opinions on the 26-week limit have been mixed.[689] It is argued that the change in the law, while intended to protect children's best interests, may not achieve the intended effect and may even have the potential to violate children and parents' ECHR Article 8 rights.[690]

The CFA 2014, s14(2)(ii) states that care proceedings must be concluded within 26-weeks of the date of the initial application. Although this time limit concerns care proceedings, not adoption proceedings, it is relevant to the proportionality of non-consensual adoption because swifter care proceedings means that adoption proceedings are also likely to be concluded at a much earlier stage. Masson has acknowledged that while delays reduce the likelihood of finding and settling children into a new family, in some cases delay may be 'constructive' as it may provide parents with times to resolve

[689] See, for example: Kim Holt and Nancy Kelly, 'When adoption without parental consent breaches human rights: implications of Re B-S (Children) [2013] EWCA Civ 963 on decision making and permanency planning for children' [2015] 37 *Journal of Social Welfare and Family Law* 228; Judith Masson 'Third (or fourth) time lucky for care proceedings reform?' [2015] *CFLQ* 3; Julie Doughty, 'Care proceedings – is there a better way?' [2014] *CFLQ* 113; J. Harwin, K. Broadhurst, S. Kershaw, M. Shaw, R. Alrouh, and C. Mason, 'Recurrent care proceedings: Part 2: Young motherhood and the role of the court' [2014] 44 *Journal of Family Law* 1439

[690] See, for example: Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' [2015] 46 *Victoria University of Wellington Law Review* 627.

their problems and enable social workers to fully explore different care options that may be available.[691] In other words, this in-built delay allows for potentially equally effective, but less restrictive alternatives to non-consensual adoptions, which are less likely to violate parents' and children's ECHR Article 8 rights, to be used. Thus, removing delay in care proceedings and, potentially, in adoption proceedings may mean that children are placed for adoption when additional time may have enabled them to be returned to their parents or for birth relatives to have been identified as carers.

Furthermore, Holt and Kelly have argued that working with families might be more beneficial for children than removing delay in care proceedings via statutory reform.[692] They have argued that 'the focus appears to be increasingly upon achieving targets rather than engaging in face-to-face contact with children and their families'.[693] Gilmore and Bainham have argued that care proceedings involve matters which have great importance to parents and ought not be rushed. They have argued that speeding up the process may not give parents sufficient time to come to terms with their children being take into care and may lead to an increase in contested care proceedings.[694]

Holt and Kelly have also raised concerns that this statutory limit may simply mean that the delay may occur much earlier in the process and that children could be left with their parents and remain at risk of harm while local authorities build their case.[695] Holt *et al* have argued that delay in taking a child into care may have the knock-on effect that children then wait longer for a permanent adoptive placement once the proceedings have been concluded.[696] If such consequences were to occur because of the 26-week limit, children may be able to argue that their rights under Article 3 (the right to freedom from torture or inhuman or degrading treatment) have been violated.

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[691] Judith Masson 'Third (or fourth) time lucky for care proceedings reform?' [2015] *CFLQ* 3.
[692] Kim Holt and Nancy Kelly, 'The emperor has no robes: Is the judiciary in the most complex of child-care cases, abandoning a sinking ship' [2014] *Fam Law* 1421.
[693] *Ibid.*
[694] Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' [2015] 46 *Victoria University of Wellington Law Review* 627 at 639. They also argue for a focus on addressing delay which is caused by incompetence, rather than delay in general.
[695] K Holt and N Kelly, 'Why parents matter: exploring the impact of a hegemonic concern with the timetable for the child' [2014] *Child and Family Social Work Journal* DOI 10.111/cfs 12125).
[696] K Holt, N Kelly, P Doherty and K Broadhurst, 'Access to Justice for families? Legal advocacy for parents where children are on the "edge of care": an English case study' [2013] *Journal of Social Welfare and Family Law* 1.

4.6.4 The Relationship between Human Rights, Parental Contact and Non-Consensual Adoption

It is important to consider sections 8-9 of the Children and Families Act 2014 and assess the impact that they may have on non-consensual adoption cases. It has been seen from the case law above that it is typical for contact between children in care and their parents to dwindle prior to adoption and it is unusual for post-adoption contact to occur. It is argued, in this section, that the new statutory provisions on contact in the CFA 2014 may further decrease the likelihood of contact between children and parents pre and post-adoption proceedings. This is undesirable, since reducing contact prior to a non-consensual adoption order weakens the bonds between children and their parents, thereby making it easier to justify a non-consensual adoption order. Furthermore, in circumstances where non-consensual adoption is a necessary and proportionate measure, it can be argued that this does not necessarily mean that terminating contact between children and their parents will also be a proportionate measure. In fact, it is suggested that in cases (such as in *Aune v. Norway*,[697] for example) that permitting contact between children and their parents increases the likelihood that non-consensual adoption will be a proportionate measure.

Although section 8 of the CFA 2014 on parental contact with children in care does not overtly refer to adoption, it does have a bearing on the adoption process and amends the Children Act 1989, s34. The CFA 2014, s8 concerns contact between children in care and their birth parents which may take place prior to the adoption process and provides that local authorities are 'authorised to refuse to allow contact between the child and a person mentioned…' and that local authorities are not required '…to endeavour to promote contact between the child and that person'. This means that it is not necessary for a local authority to promote contact between a child and its birth parents. Reduced contact between a child and his or her birth parents means it is likely to weaken the relationship between them. This may, in some cases, make it easier to justify making an adoption order and raises questions as the proportionality of the legislation.

Interestingly, while section 8 permits explicit limitation of contact between children and parents, it does not elaborate on the types of situations in which it will be appropriate to

[697] (Application no. 52502/07) 28 October 2010.

refuse to allow contact. Furthermore, it is suggested that a requirement that local authorities do not need to 'endeavour to promote contact' is vague in nature, since it is unclear what local authorities' duties are in relation to contact between children and their parents. It can also be argued that section 8 appears to contradict ECtHR jurisprudence on contact between children and parents, which emphasises that restrictions on contact may in some cases violate the ECHR Article 8 rights of children and parents (see Chapter 3, Section 3.4.7 for further discussion). The ECtHR has, for example, made it apparent that once a child has been removed from his or her parents, reduction or termination of contact may weaken the bond between them and lessen the likelihood of them being reunited which may, constitute a violation of Article 8.[698]

In contrast to section 8 of the CFA 2014, section 9 of the Act explicitly recognises post-adoption contact within English law. It allows for making a contact order which can be enforced against adopters under s9(2)(a) in favour of the following persons listed under s9(3) which include: a blood relative, former guardian, someone who has had parental responsibility for the child, any person entitled to make an order under s26 or anyone with whom the child has lived for a period of at least one year. Under s 9(2)(b), however, the court can make an order prohibiting any of these persons from having contact with a child.

These provisions do not appear to confer additional powers on the courts, since the courts have long been empowered to make orders in relation to contact or to prohibit contact under the Children Act 1989, s8, (via a no contact order or a prohibited steps order, prohibiting contact, for example). However, the courts have tended not to do so because of concerns about the impact it would have on adoptive parents, who would need to facilitate contact arrangements.[699] Section 9 is thus seen by Dodgson as a 'symbolic'[700] acknowledgement of the importance of maintaining relationships with birth family in the wake of adoption. However, the simultaneous strengthening of local authorities' powers to prevent contact, arguably, may make this provision on post-adoption contact meaningless since if contact is stopped between children and parents prior to adoption, it

[698] *Scozzari and Giunta v. Italy* (Application no. 41963/98) 13 July 2000.
[699] See discussion in: Murray Ryburn, *Contested Adoptions: Research, law, policy and practice* (Hants: Ashgate Publishing, 1994).
[700] Lance Dodgson – 'Post-Adoption Contact: All Change or More of the Same?' http://www.familylawweek.co.uk/site.aspx?i=ed136606

will be more difficult to argue that contact then ought to take place after the adoption order has been made. It will be interesting to see whether the CFA 2014, s9 will in fact encourage the courts to make more post-adoption contact orders in favour of birth parents or whether it will make no practical difference to the courts' apparent reluctance to make orders enforcing post-adoption contact.

The House of Lords Select Committee on Adoption Legislation has identified a problematic aspect of s8. Many children are not adopted with their siblings and in such cases, direct contact may be important to maintain these relationships. The Committee has expressed concern that the new clause has the potential to operate as 'a barrier to maintaining such contacts'.[701] It has identified that under the new clause, parents and also siblings, would need to seek permission from the court to make a contact application. It has drawn attention to the fact that in practice, the ability of children to seek contact with a brother or sister via a court order 'may be constrained in practice'.[702] However, the difficulty is that, in some cases, such contact may be burdensome on adoptive parents, as contact with siblings can make children's behaviour more difficult to manage.[703]

It will be interesting to see whether s8 will be the subject of future litigation under ECHR Article 8, since to say that local authorities do not have 'to endeavour to promote contact between the child and that person' appears to contradict the approach taken by the ECtHR, which stresses both the importance of protecting relationships between children and parents and enabling contact to take place (see the discussion in Chapter 3). A report by the Children's Commissioner of England observed that under the current law, post-adoption contact is neither encouraged nor discouraged, which is in line with UNCRC Article 9 which concerns the separation of children from his or her from parents.[704] The Commissioner has stated that the current law on contact is compliant with both the ECHR and the UNCRC, but has suggested that more emphasis should be placed on taking a 'full account' of children's wishes and feelings about contact[705] in line with the requirements

[701] Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, p64.
[702] *Ibid.*
[703] *Ibid.*
[704] Children's Commissioner, *A Child Rights Impact Assessment of Parts 1-3 of the Children and Families Bill (HC Bill 131)* 27 February 2013 p30.
[705] Children's Commissioner, *A Child Rights Impact Assessment of Parts 1-3 of the Children and Families Bill (HC Bill 131)* 27 February 2013 p13.

under UNCRC Article 3 on the best interests of the child and UNCRC Article 12 on the views of the child.[706] Therefore, in some cases, adoption without parental consent which does not provide for contact between children and their birth parents (and or their siblings), may not be proportionate.

4.7 Conclusion

This chapter has outlined and analysed the key legislation on non-consensual adoption and whether or not these provisions strike the appropriate balance in protecting the best interests and rights of children on the one hand and the rights of parents on the other. Analysis of the Adoption Act 1976, the Adoption and Children Act 2002 and the Children and Families Act 2014 has shown that there has been a shift away from protecting the rights of parents and towards protection of the best interests of children (rather than their rights). The current adoption legislation has the right aim; namely to create stability and permanence for children in care, at the earliest possible point in time. However, adoption will not always be in the best interests of children in care. Furthermore, as demonstrated by the discussion above, the CFA 2014 has some features which may be subjected to future challenges under the ECHR via the Human Rights Act 1998 and perhaps even before the ECtHR.

This chapter has also discussed adoption cases heard in the courts in England and Wales, with a specific focus on cases heard in the Court of Appeal and the Supreme Court. While the birth parents did not always manage to achieve a reversal of a non-consensual adoption, let alone have their children returned to them, these cases have nonetheless laid down important principles for the lower courts (such as the Family Proceedings Court, the County Court and the High Court) to follow when making an adoption order without parental consent. *Re B-S (Children)*[707] is an important Court of Appeal case which emphasised that non-consensual adoption ought to be a measure of last resort and that a balance sheet approach ought to be applied. It has been observed in this chapter, however, that despite being the persons most affected by adoption proceedings, children's rights are afforded very little direct consideration in the courts' judgments. Even where

[706] *Ibid* at p30.
[707] [2013] EWCA Civ 1146.

reference is made to children's rights in adoption cases heard in England and Wales,[708] the courts tend to perform a limited analysis of what these rights are and how they may be balanced against parents' rights, for example, under ECHR Article 8.

It has been observed that there is a potential clash between government policy which advocates adoption as the best option for children in care, while recent case law seems to emphasise adoption as a measure of last resort.[709] This raises the questions of how the potential clash between government policy and judicial principle will be resolved in the future. Despite the issues raised by the ACA 2002 and the CFA 2014 and potential incompatibility of some aspects of the CFA 2014 with ECHR Article 8 (and the UNCRC[710]), the pro-adoption trend appears set to continue. The Education and Adoption Bill 2015-16, which is passing through the UK Parliament is set to make another change under s15, which will require councils to combine their adoption functions with other councils, so as to increase the potential matches between prospective adopter and child. This is likely to mean that more adoptions would take place, more quickly. This is because, like the other measures enacted under the ACA 2002 and the CFA 2014, the EAB, s15 is another provision which aims to address delays in the adoption process.

The intention behind both the ACA 2002 and the CFA 2014 may have been to create stability and permanence for children in care, who may otherwise face uncertainty and poor prospects in the future. The changes enacted by the CFA 2014, Part 1 provide support to prospective adoptive parents, increase the number of prospective adopters and aim to decrease delay in the adoption process. However, it is argued in this thesis that the UK government ought to assess whether or not reducing delay and promoting adoption serves the best interests of all children in care. In doing so, the government could examine whether a different approach considering alternatives to adoption might better serve children's best interests and protect the rights of children and their birth parents

[708] In particular, see the following Supreme Court decisions: *ANS and another v. ML* [2012] UKSC 30; *In the Matter of B* [2013] UKSC 33.
[709] Andrew Bainham and Hannah Markham, 'Living with Re B-S, Re S and its implications for parents, local authorities and the courts'[2014] *Fam Law* 991. Also, see a similar observation from the following: Brian Sloan, 'Loving but potentially harmful parents in the Supreme Court' [2014] 73 *CLJ* 28 at 31; Brian Sloan, 'Fostering and Adoption as a Means of Securing Article 6 Rights in England' [2015] 26 *Stellenbosch Law Review* 363 at 377. More generally, see: Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' [2015] 46 *Victoria University of Wellington Law Review* 627.
[710] Brian Sloan, 'Fostering and Adoption as a Means of Securing Article 6 Rights in England' [2015] 26 *Stellenbosch Law Review* 363 at 377-378.

under ECHR Article 8. This thesis will now go on to consider less restrictive alternatives to non-consensual adoption which may, in some circumstances, be equally effective when compared with non-consensual adoption.

Chapter 5: Alternatives to Non-Consensual Adoption

5.1 Introduction

Chapter 4 showed that in some cases, English judges have expressed concern about the proportionality of non-consensual adoption.[711] For example, Sir James Munby, President of the Family Division of the High Court, has stated that non-consensual adoption should be a measure of 'last resort'.[712] He has also emphasised the need to consider alternatives to adoption which are 'realistically possible'[713] and has reminded the lower courts that they should consider such alternatives. Also, Lady Hale, a member of the UK Supreme Court, has emphasised that any order (including an adoption order) should be proportionate to the needs of the child.[714]

A similar message has also been conveyed in the jurisprudence of the ECtHR which was considered in Chapter 3. The Court has emphasised that some work must be undertaken by the State to keep families together because of the State's positive obligation under Article 8 to make reasonable efforts to reunite children with their parents.[715] The failure of Member States to use alternatives to adoption led the ECtHR in *Pontes v. Portugal*,[716] *R.M.S. v. Spain*,[717] and *Zhou v. Italy*[718] to conclude that the adoption orders made in these cases amounted to violations of the parents' rights under ECHR Article 8.

This thesis is based on the premise that a proportionality analysis undertaken by the domestic courts in England and Wales (and by the ECtHR) should consider whether less restrictive but equally effective alternatives to non-consensual adoption are available. If so, then it may be concluded that non-consensual adoption cannot be a necessary and proportionate measure. Thus, this chapter considers less restrictive alternatives to non-consensual adoption, which achieve the same objective of ensuring stability and

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[711] *Re B-S (Children)* [2013] EWCA Civ 1146. Also see *In the Matter of B* [2013] UKSC 33, the dissenting opinion of Lady Hale.
[712] *Re B-S (Children)* [2013] EWCA Civ 1146.
[713] *Re R (A Child)* [2014] EWCA Civ 1625 at para 53 *per* President of the Family Division of the High Court, Sir James Munby.
[714] For example: *Re O (Supervision Order)* [2001] 1 FLR 923 at 928; *Oxfordshire County Council v. L (Care or Supervision Order)* [1998] 1 FLR 70 at 74; *In the Matter of B (Children)* [2013] UKSC 33; *In the Matter of J* [2013] UKSC 9.
[715] *Johansen v. Norway* (Application no. 17383/90) 7 August 1996; *Hokkanen v. Finland* [1996] 1 FLR 289; *Görgülü v. Germany* [2004] ECHR 74969/01; *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) 6 July 2010; *Pini and Others v. Romania* (Application no. 78028/01) 22 June 2014.
[716] [2012] ECHR 1573.
[717] (Application no. 28775/12) 18 June 2013.
[718] (Application no. 33773/11) 21 January 2014.

permanence for children in care, thereby protecting their best interests and reducing the likelihood of violating the rights of children and parents. This chapter will consider the different long-term alternatives to adoption such as State assistance, kinship care, special guardianship orders or adoption with direct contact. In doing so, it will analyse whether it can be said that these less restrictive alternatives are in fact equally effective when compared with non-consensual adoption and if so, in what types of cases or situations these alternatives might be appropriate.

It will be argued that these alternatives to non-consensual adoption may, in some circumstances, be equally effective and be less restrictive and thus less likely to violate children's and parents' ECHR Article 8 rights. Furthermore, this chapter will also consider and assess the potential resources implications of using less restrictive alternatives to non-consensual adoption. In the course of this discussion, consideration will be given to whether or not these alternatives are cost-effective and less expensive than non-consensual adoption since even if these measures may be regarded as more proportionate, economic factors may mean that the State is reluctant to use these alternatives.

5.2 State Assistance in England and Wales

5.2.1 Overview of State Assistance

It is important to consider State assistance (i.e. social care services enabling children to remain in their parents' care) as an alternative to adoption, because there may be cases where early intervention reduces the likelihood of children being taken into care in the first place. Bainham has argued that although child protection and family autonomy appear to be conflicting ideas, they are not necessarily conflicting as public involvement of a supportive nature may assist both children and parents.[719] In fact, intervention (which is less restrictive than adoption) may protect children and parents from potential violations of their ECHR Article 8 rights. State assistance, which may be temporary or permanent and financial or practical, has the benefit of protecting family groups who are likely to be affected by the law on non-consensual adoption. In particular, it can help vulnerable groups of persons, such as those living in poverty, individuals with a learning disability, physical disability, mental illness or some other type of impairment which may

[719] Andrew Bainham, *Children, Parents and the State* (Somerset: Sweet and Maxwell, 1988) p77.

impact on their ability to raise their children.[720] Financial and practical assistance from the State may also potentially help kinship carers in situations where birth parents are unable to raise their children (see Sections 5.3.3 and 5.6).

It is clear from the Strasbourg jurisprudence on Article 8 that there may be cases where the State is under a positive obligation to make reasonable efforts to reunite children with their parents, which may include the need to provide State assistance.[721] There is, however, a need to ensure that assistance to the family unit is not at the expense of the child's welfare. The House of Lords Select Committee on Adoption, for example, has acknowledged that there is a tension between the time spent helping parents address their problems (such as drug or alcohol addiction) and the negative impact on the child of delay in a final decision about whether he or she can be raised safely by his or her parents or should be placed for adoption. Certainly, if the State does not make reasonable efforts to attempt to reunite children with their parents then it may fail to satisfy its positive obligation under ECHR Article 8. However, if the State invests too much time in trying to reunite children and parents in order to avoid adoption it may breach the child's rights. Thus, in some cases, leaving a child with or returning a child to abusive or neglectful parents may not be appropriate at all, and may potentially violate the child's rights under Articles 2 and 3 of the ECHR.

5.2.2 Types of State Assistance

The Children Act 1989 aims to protect both the rights of parents and children in England and Wales. Part III of the Act recognises the importance of support services for children and families so that court intervention will be a last resort. Such support could, for instance, include home-based assistance, day care,[722] placement with a child-minder,[723] kinship care or payments to the family.[724] Provision of assistance from the State is

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[720] *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, (HM Government, March 2013).
[721] See, for example: *R.M.S. v. Spain* (Application no. 28775/12) 18 June 2013; *Zhou v. Italy* (Application no. 33773/11) 21 January 2014.
[722] UN General Assembly 64/142 Guidelines for the Alternative Care of Children 24 February 2010, IV A38; Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (Geneva: United Nations Publications, 2007), p237; Gerison Lansdown and Peter Newell, *UK Agenda for Children* (London: Child Rights Development Unit, 1994) p25.
[723] Department of Health, *Framework for the Assessment of Children in Need and their Families*, (HMSO, 2000) p8-9.
[724] Peter Selman and Kathy Mason, *Alternatives to Adoption for Looked After Children* (University of Newcastle, 2005). Also, more generally for the role in the effect of income on family well-being, see: Fred

potentially a less restrictive alternative to non-consensual adoption and there is considerable support in favour of promoting measures which help families stay together. Thoburn, for example, has argued that providing intensive services to address parental problems results in speedier outcomes for children, regardless of whether the final outcome is rehabilitation with the birth family or placement for adoption.[725] Similarly, Munro has stated that:

> 'with good practice and trying to help families you can reach a quicker decision about whether they can use help, whereas if you are not actively trying to engage them in change, then you cannot work out whether they can change or not'.[726]

In other words, early State intervention may avoid children being taken into care and being adopted without parental consent. This is particularly relevant for mothers of newborn babies as research by Broadhurst *et al* demonstrates that there has been a significant rise in the number of newborns subject to care proceedings in England. In 2008, 802 newborn babies were removed into care but in 2013, this figure had increased to 2,018.[727] While it is unknown what percentage of these babies were adopted, Broadhurst *et al* identified that adoption was one of the options available to the State and that if a mother had previously had a child placed for adoption, this increased the likelihood that any subsequent children she had would also be adopted. It is clear that newborns are vulnerable and are in the most need of protection from the State,[728] so the State must intervene to protect their rights under ECHR Articles 2 and 3.

However, early State intervention which is less restrictive than non-consensual adoption decreases the likelihood of babies and children being subjected to neglect and abuse.[729] State intervention, even prior to the child's birth, in the form of practical assistance from Social Services such as parenting classes or other forms of therapeutic intervention (such as counselling or psychotherapy) could increase the likelihood that a parent or parents

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Ssewamala, Lindsay Stark and Mark Canavera, 'Economic dimensions of child protection and well-being' [2014] 47 *Children and Youth Services Review* 103.

[725] House of Lords Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, (TSO, 2013).

[726] *Ibid*. Also see: Munro Review of Child Protection (Final Report May 2011).

[727] Karen Broadhurst, Bachar Alrough, Emily Yeend, Judith Harwin, Mike Shaw, Mark Pilling, Claire Mason and Sophie Kershaw, 'Connecting Events in Time to Identify a Hidden Population: Birth Mothers and Their Children in Recurrent Care Proceedings in England' [2015] 45 *British Journal of Social Work* 2241.

[728] Chris Cuthbert, Gwynne Rayns and Kate Stanley, *All Babies Count: Protection and Prevention for Vulnerable Babies* (NSPCC Report, November 2011).

[729] Ravi Chandiramani, 'Bang for the buck' [2012] *Children and Young People Now* 25.

will develop the parenting skills required for raising the child. This type of intervention could have enabled Amelia, in the case of *In The Matter of B*[730] (see Section 4.4.2), to have been raised by her birth parents. The difficulty is that while the scope of the State's positive obligation to provide assistance under ECHR Article 8 is widening (see Section 3.4.5), it is unclear what assistance would need to be provided in individual cases so as to satisfy this obligation. It seems likely, however, that the positive obligation only exists in respect of children who have already been born. Social Services may advise that a child ought to be removed at birth but arguably the State has no legal obligation to intervene to assist pregnant women in becoming better parents to their unborn children when they do not, in the eyes of the law, have children in need of protection.[731]

Despite the pro-adoption policy in respect of children in care, there are several different programmes in England and Wales to assist parents whose children are at risk of being taken into care and, in some circumstances, may potentially be placed for adoption without parental consent.[732] For example, the Family Nurse Partnership programme, established in 2007, provides specially trained nurses to help families from early pregnancy until the child is two years old.[733] Research has shown that, where professionals work with parents and assist them via education, training or therapeutic intervention (e.g. counselling), children are more likely to be returned home to their parents. Even in cases where this is not possible, subsequent siblings born to the same parents are less likely to be abused.[734] This is significant in circumstances where mothers have repeat pregnancies, for example. In such cases then, concurrent planning (see below) might be a way of protecting the best interests of children whom cannot be returned to their parents, while giving parents another opportunity to parent effectively in the future, thereby providing protection to parents' ECHR Article 8 rights.

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[730] [2013] UKSC 33.
[731] *Vo v. France* (Application no. 53924/00).
[732] See, for example: Salford City Council's 'Strengthening Families' project (Warrington, Gardner and Garraway, 2014) https://www.salford.gov.uk/familyintervention.htm and Suffolk County Council's 'Positive Choices' (Suffolk Children and Young People's Service, 2010) https://www.suffolk.gov.uk/council-and-democracy/council-news/show/programme-to-support-suffolks-vulnerable-recurrent-mothers-shows-real-success
[733] House of Lords Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, (TSO, 2013). Also, see: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_118530
[734] House of Lords Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, (TSO, 2013).

There is evidence which shows that State assistance helps families stay together. For example, a project undertaken by Barnados found that in 78 per cent of the cases that they looked at, children could be reunited with birth parents if parents were given adequate support in maintaining themselves, e.g. housing, education, residential units, child-minding, benefits, support networks, and/or a social worker.[735] This project suggests that, with support from local authorities, it is more likely that children will be able to continue to live with their birth parents, thereby protecting children and parents' ECHR Article 8 rights and also the child's UNCRC rights, namely under: Article 7 (to know and be cared for by his/her parents); Article 8 (to know his/her identity); and Article 9 (not to be unnecessarily separated from his/her parents).

However, despite the apparent benefits of the above-mentioned programmes, it is argued that limited State resources may affect the number of such schemes available to parents. Doughty, for instance, has observed that government funding is used to support the pro-adoption policy instead of helping vulnerable families.[736] In fact, the Adoption Reform Grant resulted in £150 million of funding being taken away from the Early Intervention Grant, which was aimed at keeping children and parents together.[737] The Select Committee on Adoption has warned that investment in adoption should not be at the expense of the financial resources used to help children remain with their birth families. The Committee has stated that where there is evidence of a parental capacity to change, financial investment in reuniting children with their parents reduces the number of children in care and the numbers of children waiting for an alternative placement.

The Committee emphasised the need to strike the appropriate balance between providing parents with enough time to address their problems and respecting the child's need for a secure attachment. According to the Committee, this balance could be achieved if social workers conducted a 'robust assessment of parental capacity to change'.[738] In written evidence presented to the Committee, TACT[739] and Action for Children[740] both

[735] Lyn Charlton, Maureen Crank, Kini Kansara, Carolyn Oliver, *Still Screaming: Birth parents compulsorily separated from their children*, (Manchester: After Adoption, 2008) p114.
[736] Julie Doughty, 'Care proceedings – is there a better way?' [2014] *CFLQ* 113.
[737] House of Lords Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, (TSO, 2013).
[738] House of Lords Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, (TSO, 2013) at p73.
[739] *Ibid* at p16. Written evidence of TACT (The Adolescent and Children's Trust). TACT is a fostering and adoption charity.

recommended more wide-ranging legal reforms to permanency for children in care. Action for Children argued in favour of a system whereby adoption is not regarded as being the preferred care option but instead 'a system which has at its heart a drive to find the right placement for each individual child, rather than creating a false hierarchy of care—where adoption is interpreted as being the preferred care option'.[741]

The Select Committee on Adoption has expressed concern that focusing solely on adoption may mean there is 'a real risk of overlooking the needs of the vast majority of children in care for whom adoption [was] not appropriate'.[742] This can be seen, for example, in respect of older children (for example, children aged between 10 and 15) who are less likely to be placed for adoption anyway and, for whom, options such as counselling, therapeutic family support, counselling, therapeutic family support or foster care will be more effective alternatives.[743] Therefore, it is clear that adoption is not the only route to permanence for children in care and that other equally effective options (such as long-term fostering, kinship care or special guardianship) are available for children who cannot be raised by their parents. Thus, less restrictive alternatives to non-consensual adoption, which may be equally effective, ought to be considered and implemented where appropriate.

In fact, the government ought to invest more financial resources in supporting families than in placing children for adoption, since doing so may prevent children from going into care in the first place.[744] The Select Committee on Adoption, for example, strongly recommended that adoption and all of its viable alternatives should be given equal attention and appropriate financial investment.[745] Similarly, Sloan has argued that applying State resources more widely instead of focusing solely on adoption could lead to better outcomes for the best interests and rights of children and the rights of their birth

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[740] *Ibid* at p16. Written evidence of Action for Children. Action for Children is a charity for vulnerable and neglected children.
[741] *Ibid* at p16. Written evidence of Action for Children.
[742] *Ibid* at p16.
[743] Janet Boddy, June Statham, Susan McQuail, Pat Petrie and Charlie Owen, *Working at the 'Edge' of Care? – European Models of Support for Young People and Families* (London: Department for Schools and Families, 2009).
[744] Peter Selman and Kathy Mason, *Alternatives to Adoption for Looked After Children* (University of Newcastle, 2005).
[745] Peter Selman and Kathy Mason, *Alternatives to Adoption for Looked After Children* (University of Newcastle, 2005) at p16.

parents.[746] Larizadeh has also advocated that more support ought to be available for parents on the basis that 'miracles do happen' where parents are provided with the tools to care for their children.[747] Arguably too, under UNCRC Article 20 (considered in Chapter 2), the State ought to assist families and provide the least restrictive alternative available to non-consensual adoption, where it is possible to do so.

The question then is what level of effort is needed by the State in order to satisfy its positive obligation under ECHR Article 8. Lord Scott said in *Re G*[748] that 'there was no article 8 right to be made a better parent at public expense'. Yet, it is arguable that s20 of the Children Act 1989, under which local authorities have a duty to provide accommodation for specific children in need, has relevance in this context. This provision could potentially be read in conjunction with Article 8 to require such State assistance so as to help children in need under s17 of the Children Act 1989.[749] Although *Re G* still amounts to good law, cases can be found where an emphasis has been placed on providing parents with assistance so as to help their children, even if the existence of or scope of such a right has not been fully considered. For example, the Court of Appeal in *EH v. LB Greenwich*,[750] allowed the parents' appeal against a care and placement order in relation to their child because they were given insufficient help with their child, despite evidence of good parenting.[751] Although the Court did not state that the parents had a right to assistance under Article 8, it stated that non-abusive parents ought to receive proper support at the earliest possible stage, provided they have 'sufficient qualities'[752] to be good parents. However, the Court did not refer to what sorts of qualities were 'sufficient' in order for parents to receive such support and assistance.

Larizadeh has persuasively argued that the decision in *EH* suggests that, even if the State does not have a positive obligation under Article 8 to help improve parenting, there is at

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[746] Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' [2013] 25 *CFLQ* 40. Also, see: Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015).
[747] Cyrus Larizadeh, 'Between a Rock and a Hard Place. 26 weeks and *Re B-S*: conflicting pressures for family courts.' NAGALRO Conference, 16 March 2015.
[748] [2006] 1 FLR 601.
[749] Helen Fenwick, Gavin Phillipson, Roger Masterman, *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007) at p327-328.
[750] [2010] EWCA Civ 344.
[751] *EH v. LB Greenwich* [2010] EWCA Civ 344 at para 13.
[752] *Ibid* at para 16.

least a 'social responsibility at public expense to support parents to improve'.[753] This is supported by the discussion in Chapter 3 of this thesis. In Section 3.4.5, for example, it was argued that recent case law decisions heard in the ECtHR show that the national authorities' positive obligation under ECHR Article 8 to reunite families (which may in some cases include the need to provide State assistance) is widening.[754] Furthermore, in *Re B-S (Children)*[755] (see Chapter 4) the Court of Appeal held that local authorities must, treat adoption as a last resort and use measures other than adoption to protect a child's welfare, where possible. It can be argued that the need to, where possible, use less restrictive alternatives to non-consensual adoption is becoming an important part of the proportionality process (see Chapter 3).

It can be argued that State assistance increases the likelihood that local authorities will have satisfied their positive obligation under Article 8 to undertake reasonable steps to reunite families.[756] If reasonable steps have been taken by the State to keep a family together but this has failed to improve children's well-being, then it may be necessary and proportionate for children to be placed for adoption without parental consent. For example, there may be cases where, despite the efforts of the State to intervene, the neglect or abuse suffered by children may have reached a stage at which Article 2 (the right to life) or Article 3 (the right to freedom from torture or inhuman or degrading treatment) is engaged and the State may violate these rights if the children are not removed from their parents (see discussion in Section 3.2). An example where it is suggested that reasonable steps were taken by the State to keep a family together, can be seen in *LA v DG & Ors*.[757] In this case, six children were taken into care, three of whom were placed for adoption because of neglect. In the care of their parents, the children suffered from emotional and intellectual delay and health problems because their parents did not always seek the medical treatment required. Their living conditions were poor and the parents suffered with financial problems.

[753] Cyrus Larizadeh, 'Section 38(6) Assessments: The Good, the Bad and the Ugly' (2011) http://www.familylawweek.co.uk/site.aspx?i=ed79118
[754] See, for example: *R.M.S. v. Spain* (Application no. 28775/12) 18 June 2013; *Zhou v. Italy* (Application no. 33773/11) 21 January 2014 and *SH v. Italy* (Application no. 52557/14) 13 October 2015.
[755] [2013] EWCA Civ 1146.
[756] See the discussion in Chapter 2.
[757] [2013] EWHC 734 (Fam).

The parents challenged the adoption orders but failed, because, despite 10 months of State assistance (including financial assistance and housing), the children still had delayed emotional and intellectual development. In the circumstances, it was held to be in the children's best interests to be permanently removed from their parents and placed for adoption. In this case, the parents themselves had stopped attending contact sessions with their children and left the country. Only one of the children appeared to express sentiments suggesting that she missed her parents but the others were described as being 'unduly concerned'[758] by the absence of their parents. Although the Family Division of the High Court did not refer to the ECHR in this case, it is arguable that the concrete steps that the State took to keep the family together in the form of financial and housing assistance amounted to reasonable efforts to keep the family together within the meaning of the State's positive obligation under Article 8. In fact, if the local authority had spent more time trying to keep the family together the children could have argued that their own rights under Article 3 had been violated (see Chapter 3 for further discussion).[759] Therefore, in this case, it can be concluded that the State had first attempted to explore less restrictive alternatives to non-consensual adoption and had made concerted efforts to keep the family together.

Although continued State assistance might not be appropriate in every case (as seen above) it is clear that State assistance may keep families together. The benefits of a greater emphasis on preventative work and putting resources into assisting birth families are also evidenced by the approach utilised by European countries which favour State assistance and preventative measures over adoption, including non-consensual adoption. Thus, a comparative international study by Warman, shows that other European countries, such as France and the Netherlands, devote more financial resources to family support and reunification in comparison to England and Wales.[760] However, France's preference for long-term fostering can be criticised, as it is favoured even in circumstances where serious neglect and abuse have occurred.[761] In some circumstances,

[758] *LA v. DG & Others* [2013] EWHC 734 (Fam) at para 53.
[759] See for example: *Z and others v. UK* (Application no. 29392/95) 10 May 2001.
[760] A Warman and C Roberts, *Adoption and Looked After Children: International Comparisons* (University of Oxford, 2002); Peter Selman and Kathy Mason, *Alternatives to Adoption for Looked After Children* (University of Newcastle, 2005).
[761] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015), p534 and p543. On France's approach towards adoption generally, see Chapter 13 of this book.

it might be in the best interests of some children if the authorities in France were more inclined to consider adoption and even non-consensual adoption where it is not possible for children to be reunited with their parents or placed with birth relatives.

In Nordic countries, one reason why non-consensual adoption is less prevalent in these countries is because their preventative services are much more advanced than elsewhere in Europe.[762] For instance, in Sweden,[763] Norway[764] and Denmark[765] the adoption of children in care is virtually unheard of[766] and resources tend to be set aside to help birth parents keep their children and to maintain the family unit.[767] In Norway, only 80-100 children are adopted annually and most of these are infants born to drug-abusing parents.[768] In Norway, the State has a guaranteed minimum standard of income, livelihood and housing accommodation for families,[769] all of which are likely to improve the standard of living of families, prevent children from being harmed and may regarded as less restrictive forms of intervention into family life when compared with non-consensual adoption.

In Sweden, a key difference between its care system and the care system in England and Wales, is not only that there is greater availability of preventative services, but very few children are taken into care via coercive intervention of the State. Most children in care

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[762] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015).
[763] Madeleine Cocozza and Sven Hort, 'The Dark Side of the Universal Welfare State? Child Abuse and Protection in Sweden' in Neil Gilbert, Nigel Parton and Marit Skivenes, *Child Protection Systems: International Trends and Orientations* (Oxford: Oxford University Press, 2011) p89.
[764] Marit Skivenes, 'Norway: Toward A Child-Centric Perspective' in Neil Gilbert, Nigel Parton and Marit Skivenes, *Child Protection Systems: International Trends and Orientations* (Oxford: Oxford University Press, 2011, p154.
[765] Anne-For the Hestbaek, 'Denmark: A Child Welfare System Under Reframing' in Neil Gilbert, Nigel Parton and Marit Skivenes, *Child Protection Systems: International Trends and Orientations* (Oxford: Oxford University Press, 2011, p131.
[766] A Warman and C Roberts, *Adoption and Looked After Children: International Comparisons* (University of Oxford, 2002); Peter Selman and Kathy Mason, *Alternatives to Adoption for Looked After Children* (University of Newcastle, 2005).
[767] Caroline Bridge and Heather Swindells, *Adoption: The Modern Law*, (Bristol: Family Law, Bristol, Jordan Publishing Limited, 2003) p33.
[768] Peter Selman and Kathy Mason, *Alternatives to Adoption for Looked After Children* (University of Newcastle, 2005).
[769] Marit Skivenes, 'Norway: Toward A Child-Centric Perspective' in Neil Gilbert, Nigel Parton, Marit Skivenes, *Child Protection Systems: International Trends and Orientations* (Oxford: Oxford University Press, 2011) p154 at 155.

are there with the consent of their parents[770] and while children may be placed away from home without parental consent under the Social Services Act 1980, the Swedish Board of Social Welfare has emphasised the importance of reunion between children and parents where possible.[771] However, the approach towards child protection in Sweden is not without criticism. For example, the Nordic Committee for Human Rights has expressed concern about the high numbers of children removed into care, in potential violation of children's right to respect for private and family life under ECHR Article 8.[772]

Furthermore, the Czech Republic and Lithuania have voiced similar criticisms about the Norwegian child protection system unnecessarily taking children into care.[773] It can be argued that these complaints are similar to those of Eastern European countries who have challenged the use of non-consensual adoptions in England and Wales (see Section 4.6.2). Thus, while other countries may favour less restrictive alternatives to non-consensual adoption and place an emphasis on State assistance, this does not mean that children's and parents' rights under ECHR Article 8 or the UNCRC are necessarily protected. Regardless of any criticism that may be made about State intervention in other European countries, this intervention is not as draconian as non-consensual adoption. While every European country has a mechanism for enabling non-consensual adoption, Fenton-Glynn has pointed out that other European countries do not exercise this power to the extent that the courts in England and Wales do.[774]

It can be concluded from the discussion above, that countries in Europe manage to protect children without resorting to non-consensual adoption. However, the examples of France and Sweden highlight that other European countries may face their own challenges in

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[770] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015), p505. To see Sweden's approach towards adoption generally, see Chapter 12 of this book.

[771] Peter Selman and Kathy Mason, *Alternatives to Adoption for Looked After Children* (University of Newcastle, 2005).

[772] Secretary General of the Council of Europe, *Child Removal Cases in Sweden and the neighbouring countries* (Nordic Committee for Human Rights, 2012). Also, see the Swedish cases discussed in Chapter 3, for example. Also, for further information on controversy in Swedish cases see: Richard A. Gardner, S. Richard Sauber and Demosthenes Lorandos, *The International Handbook of Parental Alienation Syndrome* (Illinois: Charles C. Thomas Publisher Ltd, 2006).

[773] Claire Fenton-Glynn, *Adoption without parental consent: Study for the Peti Committee* (European Union: Brussels, 2015), p26; ' "Similar to Nazi foster care": Czech president slams Norwegian child welfare' (*RT*, 10 February 2015) http://rt.com/news/230951-czech-president-norway-nazi/ ; Felicity Capon, 'Baltic States say Norway, UK and Finland have stolen their children' (*Newsweek*, 23 April 2015) http://europe.newsweek.com/baltic-states-say-norway-uk-and-finland-have-stolen-their-children-324031.

[774] Claire Fenton-Glynn, *Adoption without parental consent: Study for the Peti Committee* (European Union: Brussels, 2015), p27.

deciding how best to protect the welfare of children. The examples considered above demonstrate that it is not just England and Wales which struggle to ensure that children are protected from harm (and to protect their rights under ECHR Articles 2 and 3) while protecting children and parents' rights under ECHR Article 8. A method of State assistance, known as concurrent planning, has increased in popularity in England and Wales. This practice has the potential to strike the balance between protecting children's best interests and rights on the one hand and parental rights on the other. Concurrent planning is considered in the following section.

5.2.3 Concurrent Planning

One way in which the State can provide assistance to parents and protect their rights under ECHR Article 8, while avoiding the potential pitfalls of violating the child's rights under Article 2, 3 or 6(1) of the ECHR is through concurrent planning. Concurrent planning is where a local authority simultaneously plans for two possible options for the child. This could, for example, involve working towards returning children in care to their birth parents while at the same time establishing an alternative plan such as non-consensual adoption.[775] Concurrent planning has been used by local authorities for many years and was endorsed by the government in its *Action Plan For Tackling Delay in Adoption*.

An important case concerning concurrent planning was the Court of Appeal decision of *Re P (A Child)*,[776] in which the local authority considered two different options: non-consensual adoption and long-term foster care. In this case, the mother argued that dual planning was inconsistent with the framework of the ACA 2002, in particular s52(1)(b) and s22(1)(d). Wall LJ however, confirmed the appropriateness of dual planning since it shortens the period of time a child remains in limbo. He also confirmed that this approach is compatible with birth parents' Article 8 rights and Strasbourg jurisprudence generally. There are clear benefits in using concurrent planning, in particular that it enables different options to be explored early on and local authorities are likely to be more expedient in ensuring that a child's needs are met.[777] The House of Lords Select Committee on

[775] See *Re D and K (Care Plan: Twin-Track Planning)* [1999] 2 FLR 872, where the court considered return to the parents and adoption.
[776] [2008] EWCA Civ 535.
[777] Rachel Langsdale and James Weston, 'Guidance on the Adoption and Children Act 2002; Re P' [2008] *Fam Law* 769.

Adoption Legislation approved of concurrent planning, suggesting that it: 'provides significant benefits in terms of enabling early attachments, minimising disruption, and reducing delay'.[778]

It is helpful to consider the benefits of concurrent planning by referring to a concurrent planning project led by the charity Coram. Under the scheme, children in care were placed with prospective adoptive parents but had frequent contact with their birth parents. This scheme was typically used by parents with mental health problems and drug addictions. The parents were provided with assistance in developing parenting skills and, if they managed to turn their lives around within a year, the children were returned to them. Extended family members who might be able to care for the child were identified early on. If the parents were unable to improve their parenting skills or no alternative carers within the family were available, then the children were placed for adoption.

Between 2000 and 2011, Coram arranged 59 placements of which 57 were successful.[779] Three of the 57 children were returned to their birth parents and the other 54 remained with their prospective adopters and were adopted by them.[780] Compared with the usual delays in the adoption process this scheme meant that an adoption was finalised, on average, when a child was aged 17 months not the national average of 3 years, 7 months.[781] The findings from the Coram study suggest that concurrent planning leads to more efficient adoption outcomes. This is in line with the government's pro-adoption policy which emphasises minimising delay in the process of adoption (see Chapter 4) which, it has been considered, may not be an appropriate way of protecting the best interests of children in care.

At first glance, concurrent planning seems to provide respect for birth parents' and wider birth family's rights under ECHR Article 8. It appears to do so by ensuring that birth parents and the extended family have an ongoing relationship with their children prior to

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[778] House of Lords Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, (TSO, 2013) p27.
[779] Sophie Laws, Rebekah Wilson and Sumi Rabindrakumar, *Coram Concurrent Planning Study: Interim Report* (Coram Policy and Research Team, July 2012) p2.
[780] *Coram Outcomes of Concurrent Planning: Summary of Findings* (Coram Policy and Research Team, October 2013) p5.
[781] Sophie Laws, Rebekah Wilson and Sumi Rabindrakumar, *Coram Concurrent Planning Study: Interim Report* (Coram Policy and Research Team, July 2012) p3.

adoption as well as a chance of being reunited with their children.[782] Furthermore, the exploration of viable kinship care options enables children to have the potential opportunity to have blood ties acknowledged and respected, thereby protecting children's right to know and be cared for by their family and their right to know their identity under Articles 7 and 8 respectively of the UNCRC. Concurrent planning also acknowledges children's best interests under the welfare checklist in ACA 2002, s1(4) such as child's needs under s1(4)(b) to be provided with a stable and permanent home, as soon as possible, without delay (as is required by the ACA 2002, s1(3)).

Concurrent planning ensures that a child is protected from neglect and abuse and is able to form a secure attachment to a carer should a parent be unable to care for him/her.[783] Concurrent planning also respects the rights of the child and birth parents to have a relationship (e.g. protecting rights under UNCRC Articles 7, 8 and 9) and increases the likelihood that the State will satisfy its positive obligation under ECHR Article 8 to make reasonable efforts to reunite children with their parents. However, in cases where a non-consensual adoption is determined to be in the child's best interests, the child's right to know his or her identity under UNCRC Article 8 will not be protected, since adoptive parents are not under an obligation to inform the child that he or she is adopted and the adoption ultimately results in the loss of legal ties with his or her parents which is, it is submitted, an important part of a child's identity.

Concern has been expressed, however, that concurrent planning is not necessarily Convention compliant. O'Halloran, for example, has argued that by allowing attachments to form with prospective adopters that this may prejudice the welfare principle and make it less likely that children will be returned to their birth parents and even pre-empt the court's decision-making process, thereby violating parents' rights under ECHR Articles 6 and 8.[784] Furthermore, a potential disadvantage of concurrent planning which, the Coram project demonstrated (see above), was there was no guarantee that a child would have post-adoption contact with his or her parents, even where contact is positive. Contact itself, prior to the non-consensual adoption, has also been controversial. For instance,

[782] Note: it is not stated within the study whether the adoptions which took place were without consent via the Adoption and Children Act 2002, s52(1)(b) or with the consent of the birth parents.
[783] *Ibid* at p7.
[784] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015) p67.

Kenrick has argued that contact may, in the context of concurrent planning, be distressing to babies and young children but that it is difficult to assess the long-term impact that such contact has on children.[785]

Another issue with the Coram project is the way in which it was funded. Moss has suggested that Coram received a £35,000 payment for each adoption.[786] In other words, if Coram's support package failed to reunite children with their parents, they would receive money from the government.[787] This observation raises questions about the potential for a conflict of interest. In addition, it is important to observe that the rates of reunification of child and birth parent in this particular concurrent planning was low;[788] only three children were returned to their parents. While the scheme clearly provided parents with a second chance, the low success rate (only three children were returned to their parents) raises questions about its effectiveness and about whether this scheme provided sufficient protection for children's and parents' rights under ECHR Article 8.

The criticism of concurrent planning in general, and specifically in the context of the Coram project is relevant because there has been growth in the use of concurrent planning. Since the success of the pilot study,[789] the government decided to provide funding to Coram so that it become a National Centre for Excellence in Early Permanence,[790] which means that the charity's role in achieving permanence for children

[785] J. Kenrick, 'Concurrent planning: A retrospective study of the continuities and discontinuities of care, and their impact on the development of infants and young children placed for adoption by the Coram Concurrent Planning Project' [2009] 33 *Adoption & Fostering* 5.
[786] Finola Moss, 'Treading Carefully' *Solicitor's Journal*, 1 February 2011. Also, for general information on the cost of adoptions see: J. Selwyn, J. Sempik, P. Thurston, D. Wijedasa, *Adoption and the Inter-agency Fee* (University of Bristol, 2009).
[787] Finola Moss, 'Treading Carefully' *Solicitor's Journal*, 1 February 2011. See also: 'Coram's instant adoption plan helps to keep babies out of care system' (*National Literacy Trust*, 7 November 2009) http://www.literacytrust.org.uk/news/748_coram_s_instant_adoption_plan_helps_to_keep_babies_out_of_care_system
[788] J. Kenrick, 'Concurrent planning: A retrospective study of the continuities and discontinuities of care, and their impact on the development of infants and young children placed for adoption by the Coram Concurrent Planning Project' [2009] 33 *Adoption & Fostering* 5 and J Kenrick, 'Concurrent planning 'The rollercoaster of uncertainty'' [2010] 34 *Adoption and Fostering* 38.
[789] See, for example: Cambridgeshire Concurrent Planning Scheme http://www.coramcambridgeshireadoption.org.uk/how-our-adoption-works/find-out-about-our-concurrent-planning-scheme and also East Sussex and Hampshire. See: 'Coram to become a National Centre of Excellence in Early Permanence' http://www.familylawweek.co.uk/site.aspx?i=ed98944
[790] Cambridgeshire Concurrent Planning Scheme http://www.coramcambridgeshireadoption.org.uk/how-our-adoption-works/find-out-about-our-concurrent-planning-scheme and also East Sussex and Hampshire. See: 'Coram to become a National Centre of Excellence in Early Permanence' http://www.familylawweek.co.uk/site.aspx?i=ed98944 Also, see: Department for Education, *Proposals for placing children with their potential adopters earlier* (Department for Education, 2012).

in care via concurrent planning and, where appropriate, adoption has grown and continues to grow.[791] In order to reach firm conclusions on the effectiveness of this project for protecting the rights of children and parents, or the cost-effectiveness of this type of project. It would be helpful to have more detail about the specific methods Coram used to help parents in improving their skills, the frequency of these classes and whether the parents found the classes helpful.

It can be argued that offering parents the chance to take parenting classes and providing assistance in attending classes would enable parents to continue to develop relationships with their children. This could mean, for example, that any assistance provided takes into account impediments or aspects of daily life which may affect parents' ability to attend classes such as work commitments, specific disabilities, physical or mental illness, drug or alcohol addiction. Furthermore, parents who take these classes but who are still regarded as unfit to raise a child may improve their parenting skills sufficiently to be able to parent any children born in the future. An important part of a concurrent planning project then, ought to be whether or not parents who have had children adopted are able to keep subsequent children because of the new skills they have learned in parenting classes.[792]

In conclusion, it can be argued that a concurrent planning scheme which provides effective parenting classes increases the likelihood that the State will satisfy its positive obligation under ECHR Article 8 to attempt to reunite children with their parents. While concurrent planning may speed up the adoption process and raise issues about potential breaches of parental rights, if effective parenting classes are delivered and post-adoption contact is a possibility, concurrent planning is an option which provides better protection to both parents' and children's Article 8 rights, than non-consensual adoption without this form of State assistance. There are, however, cases where despite the provision of State assistance, children cannot be safely reunited with their parents and thus it is essential to

[791] Education and Adoption Bill (session 2015-16) Written evidence submitted by Coram (EAB 33) http://www.publications.parliament.uk/pa/cm201516/cmpublic/educationadoption/memo/educ33.htm ; 'Adoption Service gets boost with new Thurrock and Coram Partnership' (9 July 2015) https://www.thurrock.gov.uk/news/adoption/adoption-service-gets-boost-with-new-thurrock-and-coram-partnership

[792] State assistance and intervention to help with parenting skills in mothers who have repeat pregnancies, for example, has been advocated by Broadhurst and Mason. See: K. Broadhurst and C. Mason, 'Maternal Outcasts: Raising the profile of women who are vulnerable to successive, compulsory removals of their children – a plea for preventative action' [2013] 14 *Journal of Social Welfare and Family Law* 291.

consider other less restrictive alternatives to non-consensual adoption such as kinship care and special guardianship. These are considered in the following sections.

5.3 Kinship Care

5.3.1 An Overview of Kinship Care

Kinship care may be an alternative to non-consensual adoption where the child has relatives available and willing to care for him or her. Kinship care is where a relative cares for the child, when the child's birth parents are unwilling or unable to do so. Under English Law, a 'relative' is a step-parent, an aunt or uncle related by blood, sibling or grandparent. Cousins and aunts and uncles who are not related by blood, are not included within this definition of 'relative' under English Law. When carers are relatives of the child, there is no requirement to notify the local authority. It is thought that most kinship arrangements are informal in nature.[793]

The use of formal kinship placements is a relatively recent phenomenon[794] and there are many ways it can be formally recognised: via a private fostering arrangement, where a looked after child is placed in kinship foster care, through a child arrangements order[795] a special guardianship order,[796] or even an adoption order.[797] Changes to policy and legislation have given a clear message to social workers that wherever possible children should be placed in the care of their birth family or friends of the family.[798] The White

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[793] Shailen Nandy, Julie Selwyn, Elaine Farmer and Paula Vaisey, *Spotlight on kinship care using census microdata to examine the extent and nature of kinship care in the UK at the turn of the twentieth century* (HMSO, 2013) p2; J. Selwyn, E. Farmer, S.J. Meakings and P. Vaisey, *The Poor Relations? Children and Informal Kinship Carers Speak Out: A Summary Research Report* (Buttle UK and the University of Bristol, 2013).

[794] Rebecca Hegar and Maria Scannapieco, 'Kinship Care' in Gerald Mallon and Peg McCartt, *Child Welfare for the 21st Century* (New York: Columbia University Press, 2005) p522, Judge John Mitchell, *Adoption and Special Guardianship: A Permanency Handbook* (Bristol: Jordan Publishing Ltd, Family Law, 2009) p520; Kimberley Brisebois, 'Caseworker attitudes on Kinship Care in Ontario' [2013] 12 *Qualitative Social Work* 289.

[795] Formerly known as a residence order under the Children Act 1989, s8. Under the Children and Families Act 2014, s12 contact and residence orders are both referred to as 'child arrangement' orders.

[796] *Northampton County Council v. AS and Others* [2015] EWHC 199 (Fam). See also the Children Act 1989, ss14A-14G.

[797] Shailen Nandy, Julie Selwyn, Elaine Farmer and Paula Vaisey, *Spotlight on kinship care using census microdata to examine the extent and nature of kinship care in the UK at the turn of the twentieth century* (HMSO, 2013) p3.

[798] *Ibid* at p114.

Paper *Care Matters: Time for Change* emphasised the 'gateway approach'[799] which involved looking at family and friends first, where children were in care. It can be argued, however, that further legal developments such as the Children and Families Act 2014 suggest otherwise (see Section 4.2.3).

It can be argued that kinship placements are as, if not more effective, than placement with unrelated foster carers in terms of both behavioural development and mental health functioning and that this is supported by research.[800] It is clear that kinship care is associated with greater continuity, stability and security than non-kinship care.[801] If children are placed with the wider family, research suggests these placements last longer than other types of placement, such as placement in foster care with families previously unknown to them.[802] Statistically, where local authorities opt for kinship care in a child's care plan, these care plans have the highest likelihood of being fulfilled – 78 per cent.[803] Kinship care also prevents a loss of roots and connection with the birth family.[804] The House of Lords Select Committee on Adoption Legislation has observed that children in kinship care 'do as well if not better than those in unrelated foster care, in terms of their

[799] Department for Education, *Further action on adoption: finding more loving homes* (Department for Education, 2013).
[800] M Winokur, A Holtan, and D Valentine, *Kinship care for the safety, permanency, and well-being of children removed from the home for maltreatment* (Chichester: Cochrane Database of Systematic Reviews, John Wiley and Sons, 2009).
[801] Jenny Morris, *Children on the Edge of Care: Human Rights and the Children Act* (York: Joseph Rowntree Foundation, 2005) p21-22; Judge John Mitchell, *Adoption and Special Guardianship: A Permanency Handbook* (Bristol: Jordan Publishing Ltd, Family Law, 2009) p417; A. Holtan, J.A. Ronning, B.H. Handegard, & A. Sourander, 'A comparison of mental health problems in kinship and non kinship foster care' [2014] 14 *European Child & Adolescent Psychiatry* 200; M. Oosterman, C. Schuengel, N. Wim Slot, R.A.R Bullens, and T.A.H. Doreleijers, 'Disruptions in foster care: A review and meta-analysis' [2007] 29 *Children and Youth Services Review* 53; J. Selwyn and D. Quinton, 'Stability, permanence, outcomes and support' [2004] 28 Foster care and adoption compared *Adoption and Fostering* 4; J Hunt, S Waterhouse, and E Lutman, E, *Keeping them in the family: Outcomes for children placed in kinship care through care proceedings*, (London, BAAF, 2008); J. Selwyn, E. Farmer, S.J. Meakings and P. Vaisey, *The Poor Relations? Children and Informal Kinship Carers Speak Out: A Summary Research Report* (Buttle UK and the University of Bristol, 2013); Tessa Bell, 'Permanency and Safety Among Children in Foster Family and Kinship Care: A Scoping Review' *Trauma, Violence, Abuse* (October 11, 2015 doi: 10.1177/1524838015611673).
[802] Rebecca Hegar and Maria Scannapieco, 'Kinship Care' in Gerald Mallon and Peg McCartt, *Child Welfare for the 21st Century* (New York: Columbia University Press, 2005) p522, Judge John Mitchell, *Adoption and Special Guardianship: A Permanency Handbook* (Bristol: Jordan Publishing Ltd, Family Law, 2009) p555.
[803] Judge John Mitchell, *Adoption and Special Guardianship: A Permanency Handbook* (Bristol: Jordan Publishing Ltd, Family Law, 2009) p508-509.
[804] Murray Ryburn 'In whose best interests? – post-adoption contact with the birth family' [1998] 10 *CFLQ* 53.

health, school attendance and performance, self-esteem and personal and social relationships'.[805]

It has been argued throughout this thesis that less restrictive alternatives to non-consensual adoption (such as kinship care) should be used if they are as equally effective as non-consensual adoption. This argument can be supported by reference to Bainham, who has argued that human rights 'militate against' adoption and towards a less drastic means which might preserve kinship links and contacts.[806] When adoption takes place, it is uncommon for children to maintain relationships with their birth parents or wider birth family. Thus, kinship care enables children to maintain relationships with birth relatives and in some cases, may be able to develop relationships with their birth parents, even if they do not live with them.

Research demonstrates that when children are cared for by relatives, contact is more frequent and more enduring than when children are placed in foster care with adults unknown to them.[807] Although parental contact may decline over time, even in kinship placements,[808] Farmer and Moyers found that after a two-year period in a kinship placement, 70 per cent of the children in the care of family and friends still had contact with their mother and 49 per cent had contact with their father.[809] Research suggests that kinship carers tend to have a high degree of commitment to maintaining contact between children and their birth parents, even when the circumstances may be challenging.[810] Hunt *et al* conducted a study on kinship care and examined measures such as placement stability, placement quality, relationship quality (between children and kinship carers) and child well-being. They found that 58 per cent of kinship placements scored positively across all of the measures and 76 per cent of the children had positive relationships with their kinship carers, even when placements ended. They state that kinship care provides a

[805] House of Lords Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, (TSO, 2013) p29.
[806] A Bainham, 'Arguments about parentage' [2008] *CLJ* 322 at 350.
[807] E Farmer and S Moyers, *Kinship Care: Fostering Effective Family and Friends Placements*, (London, Jessica Kingsley Publishers, 2008).
[808] Jim Wade, Ian Sinclair, Lucy Stuttard, *Investigating Special Guardianship: experiences, challenges and outcomes* (London: BAAF, 2014) p176.
[809] E Farmer and S Moyers, *Kinship Care: Fostering Effective Family and Friends Placements*, (London, Jessica Kingsley Publishers, 2008).
[810] See for example: J Hunt, *Family and friends carers: Scoping paper prepared for the Department of Health*, (London, Department of Health, 2003); J Hunt, S Waterhouse, and E Lutman, E, *Keeping them in the family: Outcomes for children placed in kinship care through care proceedings*, (London, BAAF, 2008).

'safe, effective and permanent'[811] care option for children and is a viable method of permanence which ought to be promoted.

The fact that children in care often have 'serious physical, mental health, developmental and psychosocial problems',[812] however, means that once kinship carers take these children into their homes, they often have difficulties with them because they lack the support to deal with such challenging behaviour. As O'Brien has pointed out, the effort and resources invested in ensuring family continuity is not always sufficient to mitigate the effects of multiple care placements prior to kinship care. Thus, while kinship care placements are associated with fewer breakdowns when compared with foster care placements, she has suggested that rate of breakdown in kinship care increases after the first year that the child is in that placement.[813] This is because the kinship carers' parenting skills may not be sufficient to address the children's challenging behaviour.[814] Furthermore, research suggests that kinship carers have reported experiencing difficulties such as isolation, stigma, pain and depression[815] and in some circumstances, stress from managing contact with children's birth parents.[816]

Despite the benefits of kinship care, carers may face challenges without the same level of support provided by local authorities to foster carers and prospective adoptive parents. In some circumstances then, kinship care may not necessarily serve children's best interests even if it protects various relationship rights (in particular, UNCRC Article 7) and it may be less effective than non-consensual adoption for which substantial local authority support is available before, during and after the adoption process. However, O'Brien has argued that this problem could be addressed by providing financial support and

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[811] Joan Hunt, Suzette Waterhouse and Eleanor Lutman, 'Parental Contact for Children Placed in Kinship Care through Care Proceedings' [2010] *CFLQ* 71.
[812] Moira Szilagyi, David Rosen, David Rubin and Sarah Zlotnk, 'Health Care Issues for Children and Adolescents in Foster Care and Kinship Care' [2015] 136 *American Academy of Pediatrics* 1131. Also see: Agnes Gautier, Sarah Wellard and Susannah Cardy, *Forgotten Children: children growing up in kinship care* (Grandparents Plus, 2013).
[813] Valerie O'Brien, *Kinship Care: Stability, Disruption and the Place of Support Services* (University College Dublin, 2013) p1-3; for similar conclusions on differences in variables between foster care and kinship care diminishing over time, see: Tessa Bell, 'Permanency and Safety Among Children in Foster Family and Kinship Care: A Scoping Review' *Trauma, Violence, Abuse* (October 11, 2015 doi: 10.1177/1524838015611673).
[814] *Ibid* at p4.
[815] J. Selwyn, E. Farmer, S.J. Meakings and P. Vaisey, *The Poor Relations? Children and Informal Kinship Carers Speak Out: A Summary Research Report* (Buttle UK and the University of Bristol, 2013).
[816] Agnes Gautier, Sarah Wellard and Susannah Cardy, *Forgotten Children: children growing up in kinship care* (Grandparents Plus, 2013).

appropriate support with children's emotional issues, e.g. 'attachment, loss, challenging behaviour, life-cycle transitions/changes'.[817] An important question to ask but to which there is not a clear answer, is the extent to which local authorities have a positive obligation under ECHR Article 8 to provide State assistance to kinship carers. This issue has not been directly addressed in the ECtHR even though it has been argued that the scope of this type of positive obligation towards parents is widening (see Section 3.4.5).

It can be argued that, with appropriate investment, kinship care may, in some circumstances, strike a better balance in protecting children's rights under Article 2, 3 and 6 on the one hand and the Article 8 rights of the children and parents on the other. In other words, greater investment may lead to the greater availability of less restrictive alternatives which are just as effective as non-consensual adoption (for further consideration of the limitations on and importance of financial support for birth parents, kinship carers and other carers, see Section 5.3.3). This option has the benefit of protecting children from neglect or abuse at the hands of their parents, while allowing for the possibility of maintaining or developing relationships between children and their birth parents. It may also protect the child's right to contact with their parents and the child's right to know his or her own identity under UNCRC Article 8. Due to its benefits for families, described above, kinship care is potentially an equally effective method in protecting children's welfare when compared with non-consensual adoption. However, based on the jurisprudence considered in Chapters 3 and 4, while it is clear that the State must provide assistance to birth parents, the precise scope of this positive obligation (and whether or not it applies to other birth relatives, for example) is unclear.

In the light of the benefits of kinship care, it is surprising that there is still variation in local authorities' use of it. Although some local authorities in England and Wales are increasing the use of kinship care,[818] and statistically the use of formal kinship arrangements is increasing,[819] many local authorities still do not make enquiries within a

[817] *Ibid* at p3.
[818] Matthew Colton and Margaret Williams, *Global perspectives on foster family care* (Dorset: Russell House Publishing, 2006) p83.
[819] Between 31st March 1996 and 31st March 2000 the number of children in formal kinship care increased by 32%. Shailen Nandy, Julie Selwyn, Elaine Farmer and Paula Vaisey, *Spotlight on kinship care using census microdata to examine the extent and nature of kinship care in the UK at the turn of the twentieth century* (HMSO, 2013) p114.

child's wider family before deciding that adoption is in a child's best interests.[820] Luckock and Broadhurst conducted a case study examining 12 adoptions without parental consent. They found that some local authorities had reactive approaches[821] to the assessment of suitability of kinship carers. They stated that the local authorities in the study could have been more proactive in initiating a search for relatives of children in care and that when searches were initiated, the local authorities could have made more concerted efforts to place children with relatives.[822] It has been observed by Hunt *et al*, that identifying potential kinship carers prior to care proceedings might also speed up the process of securing permanence for children who cannot be raised by their parents.[823] Furthermore, even where social workers are aware of alternative carers, they are reluctant to inform them that the child is in care, against the wishes of the parent.[824]

Munby P has stated that some parents are reluctant to reveal, even to family members, that their child is in care because parents are in a 'bubble of deniability'.[825] He suggested that, in some cases, parents hope to have their children returned to them. They may also feel ashamed that their children have been taken into care and may seek to hide this from their families.[826] Munby P has argued that the difficulty in identifying potential kinship carers could be avoided by less pointed questioning and by asking birth parents general questions about their family to build a genogram,[827] rather than telling them that their child is going to be adopted unless other potential carers can be found.[828] It is clear though, that these problems may lead to delay in identifying kinship carers, which means that children may spend longer in care and may be adopted without parental consent where a less restrictive and potentially equally effective alternative to non-consensual

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[820] Judge John Mitchell, *Adoption and Special Guardianship: A Permanency Handbook* (Bristol: Jordan Publishing Ltd, Family Law, 2009) p417.
[821] Barry Luckock, and Karen Broadhurst, *Adoption cases reviewed: an indicative study of process and practice* (Department for Education, 2013).
[822] *Ibid.*
[823] Joan Hunt, Suzette Waterhouse and Eleanor Lutman, 'Parental Contact for Children Placed in Kinship Care through Care Proceedings' [2010] *CFLQ* 71.
[824] NAGALRO, *Nagalro Response to the Government Consultation on Special Guardianship 15 September 2015* (NAGALRO, 2015).
[825] President Munby, 'Between a Rock and a Hard Place. 26 weeks and Re B-S: conflicting pressures for family courts.' NAGALRO Conference, 16 March 2015.
[826] Bridget Lindley, 'Between a Rock and a Hard Place. 26 weeks and Re B-S: conflicting pressures for family courts.' NAGALRO Conference, 16 March 2015.
[827] A document which is like a family tree stating who the child's parents, grandparents, aunts and uncles and siblings are but also may include reference to other significant relationships in the child's life, such as step-parents or friends of the family.
[828] President Munby, 'Between a Rock and a Hard Place. 26 weeks and Re B-S: conflicting pressures for family courts.' NAGALRO Conference, 16 March 2015.

adoption might have been available. Furthermore, if local authorities assess birth family members as potential carers for children in care, local authorities do not always provide documentation of their concerns prior to the assessments[829] and, where the outcome of the assessment is negative because they are not necessarily parties to proceedings concerning the children, local authorities may make other arrangements for children including fostering for adoption arrangements.

The duty to consider fostering for adoption (i.e. when children are placed with foster carers with the intention that they may be adopted by their foster carers) under the Children and Families Act 2014, s2(3) may mean that local authorities do not look for kinship carers and this may result in fewer children being placed with family members. This provision not only has the potential to violate the Article 8 rights of children and their birth relatives, but may violate several provisions under the UNCRC which are, according to Sloan, 'designed to protect children's kinship links'.[830] Lindley has argued in favour of a statutory duty to assess birth relatives before children are placed for adoption with non-related carers.[831] She has also suggested that kinship carers ought to be identified early on, pre-proceedings at Family Group Conferences via a standardised viability tool.[832] This would strike the balance between avoiding undue delay in the adoption process where there are no suitable kinship carers for the child while ensuring, that where possible, children are raised within their birth families and that *de facto* and legal ties are maintained.

One difficulty in the context of kinship care is that birth relatives, such as grandparents, may face obstacles in becoming kinship carers. Thus, Lindley has suggested that children may lose the opportunity of being raised within their birth families because their relatives may not have access to enough information and advice on how to proceed.[833] This is particularly relevant in terms of children whose families have origins elsewhere in

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[829] Bridget Lindley, 'Between a Rock and a Hard Place. 26 weeks and Re B-S: conflicting pressures for family courts.' NAGALRO Conference, 16 March 2015.
[830] Brian Sloan, 'Fostering and Adoption as a Means of Securing Article 6 Rights in England' [2015] 26 *Stellenbosch Law Review* 363 at 375.
[831] Bridget Lindley, 'Between a Rock and a Hard Place. 26 weeks and Re B-S: conflicting pressures for family courts.' NAGALRO Conference, 16 March 2015.
[832] Bridget Lindley, 'Between a Rock and a Hard Place. 26 weeks and Re B-S: conflicting pressures for family courts.' NAGALRO Conference, 16 March 2015. Also see: House of Lords Select Committee on Adoption Legislation, *2nd Report of Session 2012-13 Adoption: Post-Legislative Scrutiny*, (TSO, 2013) p73.
[833] *Ibid.*

Europe. For example, there has been an increase in families from former Soviet bloc countries, such as Slovakia and Lithuania, coming to England and Wales; and concern has been expressed about increased care proceedings in relation to children from Eastern Europe.[834] In these cases, special guardianship orders (considered below in Section 5.4) might be a less restrictive but equally effective alternative to non-consensual adoption.

Even though there is little doubt in most cases that kinship carers will protect children from harm, they are often ruled out as carers due to a refusal on their part to accept that their kin could have neglected or abused a child.[835] This is because, in some cases, kinship carers may fail to adhere to contact restrictions (preventing birth parents from seeing their children at all or allowing only supervised contact, for example) which may result in harm to the child.[836] Another issue in the context of kinship care is the wide variability in assessments for kinship care which means that relatives may be assessed via a 20 minute phone call or a more thorough face-to-face meeting or meetings. It is essential that Social Services across England and Wales develop an efficient, standardised approach towards identifying suitable kinship carers, since where children are adopted instead of being cared for by viable kinship carers, this may give rise to a successful claim under ECHR Article 8. Overall, it is apparent from the discussion in this section that, in some cases, children remain in the care of the State or are placed for non-consensual adoption when it might have been possible for them to have remained with their parents with the help of State assistance or have been placed with other relatives, including grandparents (see below).

5.3.2 Grandparents as Kinship Carers

Grandparents are increasingly playing an important role in the provision of care for children whose parents are unwilling or unable to care for them. Mitchell, for example, has observed that it is common for grandparents to seek to care for grandchildren who are being looked after by a local authority.[837] It has been suggested by Gautier *et al* that the

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[834] Joanne Porter, 'Families from Eastern Europe and care proceedings' [2014] *Fam Law* 183.
[835] *Ibid.* See, for example a case where the grandparents were ruled out as possible carers due to the fact that they would not accept that the children had been abused by their parents. In this case, it turned out that that the parents had not abused the children: *Webster and another v. Norfolk County Council and others* [2009] EWCA Civ 59.
[836] See, for example: *EH v London Borough of Greenwich* [2010] EWCA Civ 344.
[837] Judge John Mitchell, *Adoption and Special Guardianship: A Permanency Handbook* (Bristol: Jordan Publishing Ltd, Family Law, 2009) p415.

majority of kinship carers are in fact grandparents,[838] which means it is important to consider the various issues which arise in relation to grandparents in the context of kinship care and adoption. In practice, grandparents and other relatives (as considered above) may face difficulties in participating in the court process[839] because they are not automatic parties to care proceedings. Instead, they must first obtain permission from the court before they can make an application.

An important case to consider in this context is *C (A Child).*[840] In this case, the grandparents appealed against an order placing their grandchild for adoption. They believed insufficient consideration had been given to the successful parenting of two of their children in the ultimate decision to place the grandchild for adoption instead of placing the child with them. They argued that the judge was plainly wrong and sought another assessment. Thorpe LJ dismissed the grandparents' appeal on the basis that it would need to be an exceptional case for the Court to conclude that the judge was plainly wrong, especially as the basis of the grandparents' argument had been that the judge had placed too much weight on one relevant factor and too little emphasis on another.

However, Thorpe LJ acknowledged that the family must have felt that M was deprived of his right and all of the benefits of advantages that being placed with his grandparents would have offered. Although Thorpe LJ considered that M's own rights might have been affected by the non-consensual adoption, he did not provide detail on the specific rights and benefits that M had been deprived of (such as, for example, under the ECHR and the UNCRC) and nor did he consider whether the difficulties in placing M with his grandparents could have been overcome with assistance by the local authority. It can be argued that M's ECHR Article 8 right to a family life (as well as the same rights of the grandparents) may have been violated by the adoption. Although ordering another assessment of M's grandparents had the potential to violate M's rights under Article 6(1) due to the potential delay, his Article 8 right may have been violated as, if his grandparents' assessment had been found to be positive, he could have been raised by his

[838] Agnes Gautier, Sarah Wellard and Susannah Cardy, *Forgotten Children: children growing up in kinship care* (Grandparents Plus, 2013); J. Selwyn, E. Farmer, S.J. Meakings and P. Vaisey, *The Poor Relations? Children and Informal Kinship Carers Speak Out: A Summary Research Report* (Buttle UK and the University of Bristol, 2013).
[839] Hansard debates 26 October 2012, column 1201-1202. Also, see for example: *P, C and S v. UK* (Application no. 56547/00) 16 July 2002.
[840] [2012] EWCA Civ 1787.

birth family which would have been a less restrictive measure when compared with non-consensual adoption.

Placing children in the care of their grandparents may, in many cases, provide a less restrictive but equally effective alternative to non-consensual adoption. However, there appears to be prejudice recognising grandparents' viability as potential carers. Tingle has observed that, in some cases, grandparents are regarded as unsuitable to care for their grandchildren for reasons such as being too 'old'.[841] Pryor has emphasised that grandparents may be viable carers, has suggested that grandparents may often be a good choice to care for children where they are relatively young, healthy and have good energy levels.[842] By implication then, grandparents who are older, have health problems including disabilities, could still be ruled out as carers for their grandchildren. Such perceptions fail to take into account other relevant factors such as practical and financial resources which may be available to grandparents or the possibility of State assistance which could help them.

It can be argued that age and poor health are not sufficient reasons to rule out grandparents as carers and that more research must be conducted in this context. NAGALRO have pointed out that, social workers may be 'prejudiced'[843] against some relatives, particularly grandmothers, perceiving them as the cause of the birth parent's problem in not being able to raise his or her child. Another obstacle to placement with grandparents and other members of the birth family is that they might find it difficult to accept that the children have been neglected and abused. While this might be a relevant factor to be considered by Social Services and the courts, it should not be a determinative factor when deciding where to place a child. It is strongly argued that more research needs to be undertaken to identify the extent of the difficulties that grandparents may face in becoming kinship carers, since grandparent care might in some cases be a more proportionate measure than non-consensual adoption.

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[841] Noreen Tingle, 'A view of wider family perspectives in contested adoptions' in Murray Ryburn, *Contested Adoptions: Research, law, policy and practice* (Hants: Ashgate Publishing, 1994) p1766. For example, see *P, C and S v. UK* (Application no. 56547/00) 16 July 2002. Also see: Andrew Levy and Rosie Taylor 'Grandparents aged 58 and 70 who were told they were too OLD to adopt their granddaughter, three, hit out at 'wicked' treatment' (21 July 2005) http://www.dailymail.co.uk/news/article-3170134/Grandparents-blocked-adopting-three-year-old-granddaughter-hit-wicked-treatment-shouldn-t-happen-civilised-society.html

[842] Jan Pryor, 'Children's Contact with Relatives' in Andrew Bainham, Bridget Lindley, Martin Richards and Liz Trinder, *Children and Their Families* (Oregon: Hart Publishing, 2003) p47 at 53.

[843] NAGALRO, *Nagalro Response to the Government Consultation on Special Guardianship 15 September 2015* (NAGALRO, 2015) p4.

5.3.3 Financial Support for Kinship Carers

The status of kinship carers is important because it has an impact on how much financial help they will receive from the State. Carers who raise children with a special guardianship, residence or adoption order in place are typically dependent on means-tested allowances which tend to be lower than the allowances received by foster carers.[844] Research shows that allowances which are paid under the Children Act 1989, s17 are especially low.[845] The availability and awareness of financial support available for relatives who have children placed with them is important as research suggests the children's relatives are likely to receive less support from social workers than unrelated carers,[846] and are more likely to experience greater economic difficulties[847] and problems with accommodation.[848] The Local Government Ombudsman Report, *Family Values: council services to family and friends who care for others' children* states that 145,000 children are cared for by adults who are not their parents[849] and is critical of how families and foster carers are treated by local authorities. The Report cites an example of a case where a grandmother, who filed for bankruptcy because she had to give up work to care for her grandchild, ended up being paid £45,000 by the local authority to cover the years she had not been paid.[850]

It can be argued that the Children and Families Act 2014 includes provisions which further encourage non-consensual adoption, instead of encouraging the use of less restrictive alternatives to non-consensual adoption. It was suggested by the Local

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[844] Shailen Nandy, Julie Selwyn, Elaine Farmer and Paula Vaisey, *Spotlight on kinship care using census microdata to examine the extent and nature of kinship care in the UK at the turn of the twentieth century* (HMSO, 2013) p5.
[845] E Farmer and S Moyers, *Kinship Care: Fostering Effective Family and Friends Placements*, (London: Jessica Kingsley Publishers, 2008).
[846] Heidi Argent, 'What's the Problem with Kinship Care?' [2009] 33 *Adoption and Fostering* 6; Jim Wade, Ian Sinclair, Lucy Stuttard, *Investigating Special Guardianship: experiences, challenges and outcomes* (London: BAAF, 2014) p170.
[847] Shailen Nandy, Julie Selwyn, Elaine Farmer and Paula Vaisey, *Spotlight on kinship care using census microdata to examine the extent and nature of kinship care in the UK at the turn of the twentieth century* (HMSO, 2013); Jim Wade, Ian Sinclair, Lucy Stuttard, *Investigating Special Guardianship: experiences, challenges and outcomes* (London: BAAF, 2014) p170; Agnes Gautier, Sarah Wellard and Susannah Cardy, *Forgotten Children: children growing up in kinship care* (Grandparents Plus, 2013).
[848] Jenny Morris, *Children on the Edge of Care: Human Rights and the Children Act* (York: Joseph Rowntree Foundation, 2005) p21-22.
[849] Local Government Ombudsman, *Family Values: council services to family and friends who care for others' children* (Local Government Ombudsman, 2013) at p1.
[850] *Ibid* at p11.

Ombudsman Report, for example, that the CFA 2014 could have been used as an opportunity to provide a national financial allowance so that children can be raised by family (or friends), rather than be forced into the care system because their relatives are unable to afford to look after them. It also suggested that local authorities should have new duties to provide support services for children raised by family or friends who are unable to live with their birth parents, regardless of their legal status.[851]

Furthermore, the Report proposed that these carers should have the right to paid leave when they take on children as the government is doing for adopters so that they do not have to give up work and become financially dependent on the State. The extent to which relatives should have financial support from local authorities has been controversial, although the High Court has ruled that family and friends should not be precluded from receiving fostering allowance.[852] It is unclear though whether local authorities are under a duty to provide birth relatives with information about the support which they are entitled to receive. If there was such a duty to relatives this might encourage more of them to become kinship carers, thereby decreasing the need for a restrictive form of intervention such as non-consensual adoption.

Although case law under Article 8 has traditionally focused on protecting relationships between children and their birth parents, it could be argued that children have wider rights under ECHR Article 8. If the State does not proactively initiate and sustain a search or provide financial and practical support to kinship carers, it could be argued that the child's UNCRC Article 7 (right to know and be raised by one's parents) and Article 8 (right to know one's identity) are also engaged. Furthermore, it could potentially be argued that ECHR Article 8 could also be relevant in the context of kinship care. It has been shown through the discussion of ECtHR case law (see Chapter 3) that the State is required to be more pro-active in keeping families together and must take practical measures (such as housing, therapeutic intervention or ongoing support from social workers) and invest more financial resources, in individual cases, so as to keep families together under its positive obligation under Article 8.[853] Although the cases considered in Chapter 3 were argued by birth parents, there is potential for kinship carers to also argue

[851] Local Government Ombudsman, *Family Values: council services to family and friends who care for others' children* (Local Government Ombudsman, 2013). Also more generally, see: Heidi Argent, 'What's the Problem with Kinship Care?' [2009] 33 *Adoption and Fostering* 6.
[852] *R (X) v Tower Hamlets LBC* [2013] EWHC 480 (Admin).
[853] *SH v. Italy* (Application no. 52557/14) 13 October 2015.

that their Article 8 right is engaged and may be violated in cases where they do not receive sufficient State assistance.

It can be argued that it is very important for local authorities not only to be proactive in finding kinship carers for children in care, but to provide efficient and thorough viability assessments and to ensure that relatives are aware of the financial and practical support they are entitled to receive. Children in such kinship care arrangements may be regarded as 'in need' and receive short term or long term support from Children's Services under the CA 1989, s17, for example. Thus, where birth relatives are unable to care for children because of a lack of financial support, despite the powers available to local authorities, it could be argued that such relatives could present a case that the State has violated the ECHR Article 8 rights of the child, as the State has a positive obligation to keep a family together where possible. In such circumstances, if non-consensual adoption did take place when a less restrictive but equally effective alternative might have been available, it is argued that this might amount to a disproportionate interference with children's and parents' Article 8 rights. The difficulty is that the State's ability to fulfil its positive obligation under Article 8 may be limited by its lack of financial resources. This is why, it is argued that further research is required to determine the relative cost of different options for children in care because, in practice, financial limitations may have an impact on the permanence measure which is chosen for a child (for further discussion on this issue, see Section 5.6).

5.4 Special Guardianship Orders

5.4.1 Special Guardianship Orders

Special guardianship is another alternative to non-consensual adoption in cases where children cannot live with their parents.[854] A special guardianship order (SGO) has been described by Ward LJ as 'a half-way house between a residence order and an adoption order'.[855] An SGO is an alternative to an adoption order which enables children to retain their legal tie with their birth parents, while under the care of another (e.g. relative, friend of the family or foster carer). Special guardianship was inserted into the CA 1989 (ss14A-

[854] For example, see: Department for Education, *Special guardianship review: report on findings, Government consultation response* (Department for Education, 2015).
[855] *Re L (Special Guardianship: Surname)* [2007] EWCA Civ 196 at para 31 (*per* Ward LJ).

14G). This order primarily protects older children in care for whom adoption is not an option.[856] An SGO is different from adoption in a number of ways: it is not irrevocable, it can suspend parental responsibility but an SGO will not extinguish it, an SGO will not alter the relationship with natural family, the birth parents can still have contact under the control of the court, children can retain their own name and there is no right, as there is with adoption, to inherit under intestacy. Special guardianship thus offers both security and permanence which were previously only found with adoption.[857] It envisages continuance in the connection between children and their birth family.[858] It is quite common for kinship care (considered above) to later lead to the application for an SGO.[859] This is because adoption by members of the birth family (e.g. aunts and uncles, siblings, grandparents) is often seen as inappropriate because it may distort family relationships.[860]

In *Re S (A Child)*[861] the Court of Appeal reviewed three separate cases and provided key guidance on the use of SGOs. The Court stated that courts considering whether to make an SGO or an adoption order, must provide full reasons for choosing one order over another. In *Re S*, the Court stressed that there were differences in the status of the two types of orders which should be borne in mind when applying the welfare checklist under both the CA 1989, s1(3) and the ACA 2002, s1(4). It was observed that there was no specific guidance from legislation dictating the circumstances in which either an adoption or an SGO should apply. Therefore, the courts would need to ask which order would better serve the welfare of the child.

The Court reflected on the human rights considerations that arise when considering whether to make an adoption or SGO. Wall LJ observed that an SGO is 'less intrusive' than adoption and amounts to a 'less fundamental interference with existing legal relationships'.[862] When Article 8, the right to respect for private and family life is at stake, courts must decide whether the interference with family life is proportionate in the

[856] Caroline Bridge and Heather Swindells, *Adoption: The Modern Law*, (Bristol: Family Law, Bristol, Jordan Publishing Limited, 2003) p147.
[857] Ian Dey, 'Adapting Adoption: A Case of Closet Politics?' [2005] 19 *IJLPF* 289.
[858] Jim Wade, Ian Sinclair, Lucy Stuttard, *Investigating Special Guardianship: experiences, challenges and outcomes* (London: BAAF, 2014) p175.
[859] *Ibid* at p121.
[860] *Ibid* at p115.
[861] [2007] EWCA Civ 54.
[862] *Re S (A Child)* [2007] EWCA Civ 54, at para 49 *per* Wall LJ.

light of the harm the child faces. Wall LJ observed that when choosing whether to make an adoption order or SGO that Article 8:

> '…is unlikely to add anything to the considerations contained in the respective welfare checklists… However, in some cases, the fact that the welfare objective can be achieved with less disruption of existing family relationships can properly be regarded as helping tip the balance'.

However, he has stressed that an SGO 'did not always provide the same permanency of protection as adoption . . . which in a finely balanced case, could well tip the scales in favour of adoption'.[863] There are cases where an SGO might provide safety and stability for children while allowing them to maintain relationships with family members. Sloan has suggested that a SGO in favour of prospective adopters may be appropriate where adoption is not in the child's best interests or it would be incompatible with the child's rights under the UNCRC (e.g. Articles 7, 8 and 9) or the ECHR (e.g. Article 8).[864] This could apply, for example, when children are older and/or have established bonds with their birth parents, siblings or other family members or express a desire not to be adopted. SGOs are commonly made in favour of family members[865] but may also be suitable for long-term foster carers who may or may not also be kinship carers.

An examination of paragraph 18 of the Explanatory Notes to the ACA 2002 reveals that a purpose behind special guardianship is to accommodate the needs of families from cultures where adoption is rejected. It has been suggested though, that this purpose is not readily apparent from the legislation and the exception is 'almost hidden'.[866] Other cultures use methods other than adoption to meet children's long-term needs and regard them to be as effective at meeting a child's need for stability, without severing the legal tie between the child and his/her birth parents. Thus, SGOs may be regarded as an equivalent arrangement (to 'kafalah' under Islamic Law, for example).[867] While in some cases, SGOs may not offer the permanence of an adoption, which may be required by

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[863] *Ibid* at paras 65-68.
[864] Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' [2013] 25 *CFLQ* 40.
[865] See, for example: *Surrey County Council v. Al-Hilli & Others* [2013] EWHC 3404 (Fam); *B (Children)* [2014] EWCA Civ 814; Department for Education, *Special guardianship review: report on findings, Government consultation response* (Department for Education, 2015).
[866] Meena Bhamra, *The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism* (Surrey: Ashgate, 2011) p103.
[867] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy and Practice*, 3rd edn, (Brisbane: Springer, 2015) p5.

some children, it is argued that it may, in some cases, be equally effective at protecting children's best interests and rights when compared with non-consensual adoption. An SGO may be regarded as a less restrictive alternative to the making of an adoption order without parental consent,[868] which also potentially protects children's rights under the UNCRC (such as Articles 7 and 8). In *Harroudj v. France,*[869] the ECtHR asserted that kafalah struck the appropriate balance between acknowledging the de facto relationship between a child and his or her carers and preserving the child's tie to his or her countries of origin.

It can be argued that an SGO can be an appropriate measure even in circumstances where the child's country of origin does not prohibit adoption but generally in cases where, for a number of reasons, adoption may not be in a child's best interests. In *A (Children),*[870] it was argued, albeit unsuccessfully by the parents, that adoption was not a proportionate measure or in the best interests of the child, but that an SGO ought to have been made instead. Munby P has suggested that adoption should only take place if special guardianship would fail to meet the needs of the child. He stated that: 'One should consider special guardianship first, and address adoption only if satisfied that special guardianship will not suffice'.[871] This emphasis on SGOs is powerful support for the argument that for a non-consensual adoption to be a proportionate measure, least restrictive alternatives must be considered first.

Munby P has observed that there used to be a perception that adoption would be appropriate in the majority of cases and that SGOs would be for special cases only. He has argued that this ought to be the other way around, namely that adoption orders ought to be made where SGOs would not be appropriate.[872] In 2006, only 372 SGOs were made compared to 2,746 adoption orders.[873] However, there is evidence that the use of SGOs is

[868] Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' [2015] 46 *Victoria University of Wellington Law Review* 627
[869] (Application no. 43631/09) 4 October 2010.
[870] [2015] EWCA Civ 1254.
[871] J. Munby, 'Special Guardianship: A Judicial Perspective', in L. Jordan and B. Lindley, *Special Guardianship: What Does it Offer Children who Cannot Live with their Parents?* (London: Family Rights Group, 2006).
[872] *Ibid.*
[873] *Ibid* at p149.

steadily increasing.[874] Figures from March 2013 show that 9.6 per cent of children left care through special guardianship compared to 14 per cent by means of adoption orders and 5.8 per cent through residence orders.[875] In 2014, 3,330 children left care via an SGO, accounting for 11 per cent of children ceasing to be looked after in care, compared to just 1,290 leaving care via an SGO in 2010.[876] This demonstrates then, that the number of SGOs made in 2014 is more than double the number made in 2010.

This increase may be attributed to the decision of *Re B-S (Children)* and can be regarded as desirable as special guardianship is undoubtedly a less restrictive alternative to non-consensual adoption. Furthermore, it has the potential to be an equally effective measure at protecting children's best interests and rights in cases involving children raised within different cultures or older children who have strong ties with their birth parents.[877] There are many benefits to SGOs such as the fact that children do not have to face the stigma of being in the care system and have an increased sense of security.[878] Furthermore, as stated above, an SGO is more likely to be compliant with ECHR Article 8 because it enables children to retain legal ties with their parents. Special guardianship also has the benefit that it may be a possible alternative for children from cultures which reject adoption. This can be seen in Islamic law which has practice of kafalah instead of adoption, which allows for others to be the primary carer of a child and to be a substitute family.[879] England and Wales are becoming increasingly culturally diverse, which means it is helpful to consider how adoption orders might be viewed by other cultures. In some cases, special guardianship may be a better way of respecting a child and the child's birth family's right to freedom of thought, conscience and religion under ECHR Article 9.

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[874] Jim Wade, Ian Sinclair, Lucy Stuttard, *Investigating Special Guardianship: experiences, challenges and outcomes* (London: BAAF, 2014) p69.
[875] *Ibid* at p20.
[876] Department for Education, *Children Looked After in England (including care leavers) year ending 31 March 2014* (Department for Education, 2014) p12.
[877] See: *Down Lisburn Health and Social Services Trust and another (AP) v. H (AP) and another (AP)* [2006] UKHL 36 at para 6.
[878] Ananda Hall, 'Special Guardianship: A Missed Opportunity – Findings from Research' [2008] *Fam Law* 148 at 151.
[879] See Judge David Pearl and Dr Werner Menski, *Muslim Family Law* 3rd edn (London: Sweet and Maxwell, 1998) p410.

It is clear that SGOs have advantages and, as Gilmore and Bainham have argued, there ought to be more 'proactive promotion'[880] of SGOs. There are, however, issues affecting the success of these orders. Thus, SGOs tend to work best when they are made in favour of carers whom children know. It has been argued that where children are placed with carers with whom they do not have a prior relationship, there is a higher risk of breakdown in the placement.[881] Further research needs to be undertaken to establish whether, in such cases, SGOs were less effective for those children than adoption placements would have been. Another concern with respect to the effectiveness of SGOs when compared against non-consensual adoption is the thoroughness of the assessment process. NAGALRO has argued that viability assessments for potential carers are variable in quality and may be 'inappropriately influenced by the preconceptions of the assessor' and the time constraints of the child's social worker.[882]

NAGALRO has suggested that this issue could be resolved by applying a higher standard when considering whether relatives or non-relatives of the child ought to be special guardians.[883] NAGALRO has argued that the assessment process for kinship carers should be as rigorous as the assessment process for other unrelated carers such as adopters.[884] It has suggested that there ought to be DBS checks, for example. Whilst this may provide increased protection for children's best interests and rights (for example, under ECHR Article 2 and to protect them from physical harm under ECHR Article 3), it is arguable that if alternatives to non-consensual adoption become just as lengthy to arrange as non-consensual adoption, then this would lead to further delay in achieving permanence for children[885] which is not in their best interests.

Concern has also been expressed that the motive behind the increase in the making of SGOs may not be to protect children's welfare. It has been argued by the charity TACT, for example, that in some cases local authorities are aggressively pursuing SGOs, often

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[880] Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' [2015] 46 *Victoria University of Wellington Law Review* 627 at 646.
[881] NAGALRO, *Nagalro Response to the Government Consultation on Special Guardianship 15 September 2015* (NAGALRO, 2015) p2.
[882] NAGALRO, *Nagalro Response to the Government Consultation on Special Guardianship 15 September 2015* (NAGALRO, 2015).
[883] NAGALRO, *Nagalro Response to the Government Consultation on Special Guardianship 15 September 2015* (NAGALRO, 2015) at p4. Also see: Department for Education, *Special guardianship review: report on findings, Government consultation response* (Department for Education, 2015).
[884] *Ibid.*
[885] *Ibid* at p3.

encouraging foster carers to become special guardians so that they can pay these carers less money.[886] However, as considered above in Section 5.3.3, kinship carers are now entitled to claim as much money for a child's care as foster carers. It is unclear, for example, if a kinship carer who is also a special guardian is entitled to claim the same amount of funding. This issue is not within the scope of this thesis and will not be explored further. Nonetheless, it can be argued that the legal provisions relating to financial provision for kinship carers, foster carers and special guardians needs to be clarified.

The discussion above has shown that State assistance, kinship care, special guardianship or a combination of these alternatives are less restrictive measures when compared with non-consensual adoption. It has also been argued that these measures may be just as effective at protecting children's best interests whilst also protecting parental rights under ECHR Article 8 and children's rights under ECHR Articles 2, 3 and 8. It is argued that these alternatives may be ruled out too quickly or might not be considered at all. Also, resource implications should not prevent the use of less detrimental alternatives – especially as there is a strong possibility, based on the evidence considered above, that these alternatives are not necessarily more expensive than non-consensual adoption. Having outlined various alternatives to non-consensual adoption which enable children to retain legal ties with their parents, it is important to acknowledge that there may be cases where non-consensual adoption is in fact a necessary and proportionate measure. In some non-consensual adoption cases, however, opportunities for continuing contact may not be considered sufficiently as a viable option. This issue is considered in the following section.

5.5 Non-Consensual Adoption with Direct Contact

Non-consensual adoption with direct contact is another option which may potentially strike the balance between protecting children's best interests on the one hand and children and parents' ECHR Article 8 right to respect for private and family life on the other. Case law has long emphasised the importance of contact[887] between children and

[886] 'TACT express concerns over further sharp rises in Special Guardianship Orders' http://tactcare.org.uk/news/tact-expresses-concerns-over-further-sharp-rises-in-special-guardianship-orders/

[887] Contact orders are made under the Children Act 1989, s8. This has been amended by the Children and Families Act 2014 and these orders are now (along with residence orders) referred to as 'child arrangement' orders.

parents in the context of family breakdown but in the adoption context, the judiciary has been reluctant to order post-adoption contact.[888] When an adoption order is made, it is common practice for contact between children and parents to be decreased or even stopped prior to an adoption[889] and contact is thus either indirect (via letters sent from the birth parent to the adoptive parents) or non-existent post-adoption.[890]

One reason why post-adoption contact is not regularly ordered is because judges fear that post-adoption contact will destabilise the adoptive placements and threaten the security of adopters in their role as new parents.[891] However, there is no concrete evidence to support this contention.[892] In fact, there are many reasons which suggest that post-adoption contact may be beneficial.[893] Contact with the birth family assists the development of personal identity (especially for children from ethnic minorities[894]) and enables continuance of family relationships.[895] Research suggests that adopted children may experience a sense of loss and rejection by their birth parents, even where the adoption is successful and the children have a good relationship with their adoptive parents.[896] It has been found that adopted children place an importance on knowledge of their origins[897] as well as social and genetic identity.[898] According to Ryburn, post-adoption contact has the

[888] See, for example: *Re R (Adoption: Contact)* [2005] EWCA Civ 1128. For further discussion, see: Recep Dogan, 'Wishful Thinking or Solution? The Concept of Open Adoption and its Future' [2011] 8 *Ankara Law Review* 239; Carol Smith, 'Trust v Law: Promoting and Safeguarding Post-Adoption Contact' [2005] *27 Journal of Social Welfare and Family Law* 315.
[889] Bridget Lindley, 'Open Adoption – Is the Door Ajar?' [1997] *CFLQ* 115; Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' [2013] 25 *CFLQ* 40; Brian Sloan, 'Post-Adoption Contact Reform: Compounding the State-Ordered Termination of Parenthood?' [2014] 73 *CLJ* 378.
[890] C Smith and J Logan, 'Adoptive Parenthood as a "Legal Fiction"—its Consequences for Direct Post Adoption Contact' [2002] 14 *CFLQ* 281.
[891] See, for example: *Seddon v. Oldham MBC (Adoption Human Rights)* [2015] EWHC 2609 (Fam). For further discussion, see: Bridget Lindley, 'Open-Adoption – Is the Door Ajar?' [1997] *CFLQ* 115.
[892] Sonia Harris-Short, 'Adoption and Children Bill – A Fast Track to Failure?' [2001] 13 *CFLQ* 405 at 410.
[893] See, for example: Simon Jolly, 'Cutting the ties – the termination of contact in care' [1994] 16 *Journal of Social Welfare and Family Law* 299; John Triseliotis, 'Contact between looked after children and their parents: a level playing field?' [2010] 34 Adoption and Fostering 59; Scott Ryan, Gardenia Harris, Donna Brown, Doris Houston, Susan Livingston-Smith, Jeanne Howard, 'Open Adoptions in Child Welfare: Social Worker and Foster/Adoptive Parent Attitudes' [2011] 5 *Journal of Public Child Welfare* 445.
[894] Ian Dey, 'Adapting Adoption: A Case of Closet Politics?' [2005] 19 *IJLPF* 289.
[895] *Re G (Adoption: Contact)* [2003] 1 FLR 270 at 274 Ward LJ, Elsbeth Neil, 'Adoption and Contact: A Research Review' in Andrew Bainham, Bridget Lindley, Martin Richards and Liz Trinder, *Children and Their Families* p275 at 278-281 (Oregon: Hart Publishing, 2003).
[896] D. Casey and A. Gibberd, 'Adoption and Contact' [2001] *Fam Law* 39 at 73.
[897] J. Triseliotis, *In Search of Origins* (London: Routledge and Kegan Paul, 1973).
[898] Sue Wells, *Within Me, Without Me, Adoption: an open and shut case?* (London: Scarlett Press, 1994) p39; John Triseliotis, 'Adoption with contact' [1985] 9 *Adoption and Fostering* 19.

benefit of replacing 'speculation' and 'fantasy' with facts[899] and provides children with information and certainty about their identity. Moe suggests that there are benefits from open adoption with direct contact such as lack of secrecy, a knowledge of identity and family medical history and a reduced need for the child to construct a fantasy of what their birth parents were like.[900] Furthermore, it has been suggested that contact with birth parents can sometimes enhance children's relationships with their adoptive parents.[901]

There is a perception that the courts have not fully come to terms with post-adoption contact. Hughes and Sloan have argued that the courts need to 'get to grips with the human rights implications of [adoption] cases' and 'to consider the relationship between each of these competing rights, and the relationship between these rights and the welfare provisions of the Children Act 1989 and Children and Adoption Act 2002'.[902] Hughes and Sloan have argued that the UNCRC conceptualises contact as a human right. This can be seen in UNCRC General Comment No. 14, for example, which in relation to UNCRC Article 9 states that:

> 'When separation becomes necessary, the decision-makers shall ensure that the child maintains the linkages and relations with his or her parents and family (siblings, relatives and persons with whom the child has had strong personal relationships) unless this is contrary to the child's best interests. The quality of the relationships and the need to retain them must be taken into consideration in decisions on the frequency and length of visits and other contact when a child is placed outside the family'.

Furthermore, the European jurisprudence has referred to the importance of contact between children and their parents (see Section 3.4.7). As public authorities have a positive obligation to act compatibly with Convention Rights under s6 of the Human Rights Act 1998, then the courts ought to protect the right to contact under ECHR Article

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[899] Murray Ryburn, 'In whose best interests? – post-adoption contact with the birth family' [1998] 10 *CFLQ* 53.
[900] Barbara Moe, *Adoption: A Reference Handbook* (California: ABC-CLIO, 2007) p41.
[901] Recep Dogan, 'Wishful Thinking or Solution? The Concept of Open Adoption and its Future' [2011] 8 *Ankara Law Review* 239, Murray Ryburn, 'In whose best interests? – post-adoption contact with the birth family' [1998] 10 *CFLQ* 53; *Re G (Adoption: Contact)* [2002] EWCA Civ 761 at para 14, *per* Ward LJ. Note, in *SB v. A County Council; Re P* [2008] EWCA Civ 535, Wall LJ urged the courts to utilise their powers arising from the Adoption and Children Act 2002 to provide for post-adoption contact. For further discussion on the Re P decision, see: Rachel Langsdale and James Weston 'Guidance on the Adoption and Children Act 2002; Re P' [2008] *Fam Law* 769.
[902] Kirsty Hughes and Brian Sloan, 'Post-Adoption Photographs: Welfare, Rights and Judicial Reasoning' [2011] *CFLQ* 393.

8.[903] Sloan has pointed to the decision of *R and H v. UK*[904] (see Chapter 6) where, he has argued, that the Court of Human Rights has attached great significance to the issue of post-adoption contact in the context of Article 8.[905]

In contrast to the position taken by the ECtHR which emphasises the importance of contact, the Children and Families Act 2014 has the objective of reducing the scope for post-adoption contact (see Section 4.2.3),[906] which adds further uncertainty to the issue of contact and adoption in England and Wales. Regardless, it is clear that the courts in England and Wales have been cautious, in that they regard contact as one of the factors which may be considered under the welfare checklist rather than a specific right which the State has a positive obligation to protect.[907] In the High Court decision of *Seddon v. Oldham MBC (Adoption Human Rights)*[908] Jackson J made it clear that the making of an adoption order brought to an end pre-existing ECHR Article 8 rights to family life between children and their birth parents. He stated that:

> '…[T]he making of an order for contact at the same time as an adoption order would create a new right to contact, though not necessarily an Art. 8 right. The right is not the preservation or extension of a previous right held by virtue of being a birth parent'.[909]

The only right that parents have, according to the English Courts, in the context of post-adoption contact is the right to correspondence under ECHR Article 8 (i.e. letters).[910] However, while the courts' existing approach serves to protect the stability of the child's adoptive placement, there may be disadvantages to such a rigid approach. According to Neil *et al*, the disadvantages which a child may face if he or she loses contact with his or her parents as a consequence of adoption, is an issue which has yet to be explored fully

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[903] Andrew Bainham, Bridget Lindley, Martin Richards and Liz Trinder, *Children and Their Families* (Oregon: Hart Publishing, 2003) p5; Kirsty Hughes and Brian Sloan, 'Post-Adoption Photographs: Welfare, Rights and Judicial Reasoning' [2011] *CFLQ* 393; Carol Smith, 'Trust v Law: Promoting and Safeguarding Post-Adoption Contact' [2005] 27 *Journal of Social Welfare and Family Law* 315.
[904] (Application no. 35348/06) [2011] ECHR 844.
[905] Brian Sloan, 'Post-Adoption Contact Reform: Compounding the State-Ordered Termination of Parenthood?' [2014] 73 *CLJ* 378.
[906] Brian Sloan, 'Post-Adoption Contact Reform: Compounding the State-Ordered Termination of Parenthood?' [2014] 73 *CLJ* 378; Andrew Bainham and Stephen Gilmore, 'The English Children and Families Act 2014' [2015] 46 *Victoria University of Wellington Law Review* 627.
[907] *Re L, Re V, Re M, Re H (Contact: Domestic Violence)* [2000] 1 FLR 334 at 364 *per* Thorpe LJ.
[908] [2015] EWHC 2609 (Fam).
[909] *Seddon v. Oldham MBC (Adoption Human Rights)* [2015] EWHC 2609 (Fam) at para 53 *per* Jackson, J.
[910] *Seddon v. Oldham MBC (Adoption Human Rights)* [2015] EWHC 2609 (Fam).

by the courts in England and Wales.[911] Diver has argued that removing the presumption that children are best raised by their natural parents (see Chapter 2) would remove delays within the child protection process and that the absence of such a presumption would necessitate greater protection of parental rights post-adoption. Thus, she has suggested that a consequence of removing this presumption might be that open adoption and indirect contact would become more 'widely accepted'.[912]

The approach taken by the judiciary and by the adoption legislation in England and Wales (see Section 4.6.4) has been contrary to the growing body of research which is in favour of open adoption.[913] Despite the existence of this research, Harris-Short has observed that judges face 'difficulty in reconciling a move toward openness with the traditional legal understanding of the nature of an adoption order'.[914] It can be argued that regardless of whether or not the courts in England and Wales have conceptualised contact as a right, in cases concerning post-adoption contact, jurisprudence from the ECtHR (considered in Chapter 3) can be used to support the notion such a right may exist even though this right may be limited by the children's best interests. Non-consensual adoption with direct contact would in some cases be a less restrictive alternative to non-consensual adoption. Thus, in cases which children have positive relationships with their birth parents, may not only protect parental rights under ECHR Article 8 but also serve to protect children's best interests and rights under ECHR Article 8 and UNCRC Articles 7 and 8. Therefore, post-adoption contact should take place, where possible[915] and children and birth parents have a right to contact with one another (as long as it is in the child's best interests).

5.6 Government Targets, Financial Savings and Proportionality

[911] E. Neil, M. Beek, J. Thoburn, G. Schofield, and E. Ward, *Contact arrangements for adopted children: what can be learned from research?* (Centre for Research on the Child and Family, University of East Anglia, 2012).
[912] Alice Diver, 'Child Paramountcy v. Family Privacy - Judicial Balancing of Human Rights Principles in Family Law' (Draft paper presented at J. Reuben Clark Law School, 19 July 2005) p1.
[913] Sonia Harris-Short, 'Making and Breaking Family Life: Adoption, the State and Human Rights' [2008] 35 *Journal of Law and Society* 28 at 41. See: Julie Selwyn, David Quinton and Wendy Sturgess, *Costs and Outcomes of Non-Infant Adoption*, (Hadley Centre for Adoption and Foster Care Studies, April 2006).
[914] Sonia Harris-Short and Joanna Miles, *Family Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2007) p1042.
[915] See, for example: Claire Fenton-Glynn, *Adoption without parental consent: Study for the Peti Committee* (European Union: Brussels, 2015), p47.

As has been considered throughout this thesis, while there may be many cases where non-consensual adoption is a necessary and proportionate measure, there have been cases (considered above and in Chapters 3 and 4) where less restrictive and potentially equally effective alternatives might have been used. The question then is, why, in the light of the benefits of State assistance, kinship care and non-consensual adoption with direct contact, successive governments have not placed more emphasis on less restrictive alternatives to non-consensual adoption. It has been argued that one of the reasons is due to the perception, on the part of successive governments, that non-consensual adoption is the most cost-effective measure for children in care and that this is part of the rationale for endeavouring to increase the number of adoptions and to reduce delay in the adoption process, even though non-consensual adoption has the potential to violate children and parents' right to a family life under Article 8. While it is true that placing a child for adoption is less expensive than looking after children in care (e.g. in a residential home or foster care), which it has been estimated to cost £23,470 a year,[916] it is not necessarily true that non-consensual adoption is the most cost-effective measure available or that the emphasis on adoption for children in care is justified.

Barton has argued that there is no explanation behind the government's aim to increase the number of adoptions by 50 per cent, how these figures were calculated or how the target is 'reconcilable with the need for a case-by-case assessment'.[917] After the enactment of the ACA 2002, local authorities were instructed to increase the percentage of adoptions of looked after children by at least 40 per cent. Public Service Agreements about adoption figures were sometimes created between the government and local authorities, which set specific targets for local authority performance, with the understanding that a reward grant would be paid to local authorities which met national targets for adoption.[918]

Many local authorities who reached their targets received significant financial rewards. For example, Hammersmith and Fulham Council publicly acknowledged that it had

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[916] Di McNeish and Sara Scott, *What Works in Achieving Adoption for Looked After Children: An Overview of Evidence for the Coram/Barnados Partnership* (DMSS Research, 2013) p12-13.
[917] Chris Barton, 'Adoption and Children Bill 2001 – Don't let them out of your sight' [2001] *Fam Law* 431.
[918] 'Baby removed to meet targets' (26 January, 2007) http://news.bbc.co.uk/1/hi/6297573.stm and also see: Local Authority Circular LAC(2001)33 (2007).

received £500,000 for placing over 100 children for adoption in 3 years, most of whom were adopted without parental consent.[919] Although the government has denied giving bonuses to councils for meeting adoption targets, this remains a controversial issue, with political figures such as John Hemming maintaining that there is documentary evidence that councils have been offered financial incentives to increase the number of adoptions.[920] This means then, that there may be cases where non-consensual adoption has been or is being used in cases where less restrictive alternatives (such as State assistance, kinship care and special guardianship orders) might have been available and which might have been equally effective.

In the government's *Action Plan for Adoption: Tackling Delay*, it was advocated that local authorities ought to use 'score cards' to record how quickly adoptions take place and that performance tables ought to exist to make local authorities accountable for delay. The scorecards, published on the Department for Education website, show how long it takes local authorities to place children in care for adoption. It can be argued that these scorecards may have a naming and shaming effect, which may encourage local authorities to speed up the adoption process, instead of focusing on the welfare of the individual child. In other words, councils may be encouraging non-consensual adoption in cases where equally effective but less restrictive alternatives to non-consensual adoption may be available.[921]

Academics and social workers have both expressed concern about the target-driven nature of the adoption process.[922] Allen, for example, has expressed concerns that government targets may have led to social workers prematurely deciding that children ought to be adopted when, after time they could have been reunited with their birth parents.[923] It has also been suggested by Dale that there should be caution in treating

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[919] Ben Leapman, 'Cash prize for council that hits adoption targets*'* (*The Telegraph*, 13 April 2008).
[920] Claire Fenton-Glynn, *Adoption without parental consent: Study for the Peti Committee* (European Union: Brussels, 2015); See Adam Lusher, 'Anger as minister denies adoption bonus policy' (*The Telegraph*, 3 February 2008) http://www.telegraph.co.uk/news/uknews/1577386/Anger-as-minister-denies-adoption-bonus-policy.html. See also: Finola Moss, 'Authorised abuse?' [2007] 157 *NLJ* 1310. Finola Moss, 'Treading Carefully' *Solicitor's Journal*, 1 February 2011.
[921] 'Adoption score cards are a gamble' http://www.local.gov.uk/media-releases/-/journal_content/56/10180/3375265/NEWS
[922] See, for example: Tracey Sagar and Emma Hitchings, '"More Adoptions, more Quickly": A study of Social Workers' Responses to the Adoption and Children Act 2002 [2008] 29 *Journal of Social Welfare and Family Law* 199.
[923] Nick Allen, *Making Sense of the New Adoption Law* (Dorset: Russell House, 2003) p62.

adoption as a 'panacea'.[924] In fact, the policy of more adoptions more quickly may result in a failure to consider alternatives to adoption and may marginalise the rights and interests of birth parents and ultimately minimise the importance of substantive and procedural safeguards in court.[925]

Adoption policy is potentially a way of fulfilling a political agenda (especially in world of cuts in funding) which does not promote either the welfare and rights of children or the rights of their parents.[926] This pro-adoption policy may not strike the correct balance in protecting the best interests and the rights of children and the rights of their birth parents.[927] In fact, encouraging adoption means that adoption orders may be made when there may be other options available (such as special guardianship orders or kinship care), which are less intrusive to family life and thus less likely to violate the rights of children and parents under ECHR Article 8. It is possible that the government's pro-adoption policy is a misguided way of furthering State interests[928] rather than protecting children's best interests or the rights of children under Article 8. It is argued that the Labour government, which enacted the ACA 2002, may have been influenced by the fact that adoption is regarded as a cheaper alternative to other types of placement.[929]

The current Conservative government has continued to support the pro-adoption policy even though it can be criticised as being influenced by the fact that it is regarded as cheaper and easier to place children for adoption than it is to undertake complex assessments and managing programmes aimed at reuniting children and their parents.[930] Figures reported during the passage of the ACA 2002 suggested that adoption was in fact a less expensive alternative to long-term foster care. Allowances provided to adoptive parents are, in practice, significantly less than those provided to foster parents. The

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[924] Dr Peter Dale, 'The Department of Education Contact Arrangements for Children: A Call for Views' 2012, p3 - http://www.peterdale.co.uk/downloads/

[925] 'Holding Onto the Past Adoption, Birth Parents and the Law in the Twenty-First Century' p151 in Jonathan Herring , *Family Law: Issues, Debates, Policy*, (Devon: Willan Publishing, 2001) p151

[926] *Ibid* at p159.

[927] *Ibid.*

[928] As discussed in Chapter 3, Guggenheim has argued that the rights of children can sometimes be used as a way of furthering the interests of another, including the State. It can be argued that a pro-adoption policy justified as in the child's best interests will not necessarily be in the best interests of every child in care.

[929] Eva-Maria Bonin, Clare Lushey, Jenny Blackmore, Lisa Holmes, Jennifer Beecham, *Supporting adoption and supporting families that adopt: value for money* (Childhood Wellbeing Research Centre, 2013).

[930] Dr Peter Dale, 'The Department of Education Contact Arrangements for Children: A Call for Views' 2012, p13 - http://www.peterdale.co.uk/downloads/

figures quoted were that the adoption allowance available for a child between 4 and 7 was £54.89 a week, which is means-tested and adopters receive less child benefit. However, for a child of the equivalent age who is fostered, the care allowance offered to foster parents was £153.58, which is almost treble.[931] These figures show that local authorities can make significant savings when children are placed for adoption, rather than being kept in long-term foster care.

Between 2013 and 2014, the government allocated £150 million of funding to local authorities to enable them to boost adopter recruitment and support and to fund the creation of a National Gateway enabling adopters to find potential children quickly.[932] In other words, a significant amount of money has been invested in adoption. However, more recent research has suggested that it may be more cost-effective to invest in reuniting children with their parents or wider birth family than to place them for adoption. Thomas, for example, considered the findings of several studies on the costs of supporting birth families versus supporting adoptive families and found that although the allowance provided to adoptive parents was less that provided to foster parents, the average cost of an adoptive placement by local authorities and voluntary adoption agencies was £36,000 in financial year 2007-2008.[933] In practice, there are a range of different expenses associated with the adoption process. The Helping Birth Families study found that the mean cost of supporting birth families was £511 over the 12 month study. The cost ranged from nothing to £4,563.[934]

The Family Findings study found that the costs of finding a suitable family to adopt a child could be expensive. In a swift case, this would cost £4,430 and it could cost as much as £5,835 for a wider search.[935] The Family Finding study demonstrated that adoption support services for each child varied widely and the cost could range from

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[931] Special Standing Committee Discussion on the Adoption and Children Bill, 11 December 2001 (afternoon session).
[932] Department for Education, *Further action on adoption: finding more loving homes* (Department for Education, 2013). Also see: https://www.gov.uk/government/news/adoption-scorecards-and-thresholds-published
[933] Caroline Thomas, *Adoption for looked after children: messages from research – An overview of the adoption research initiative*, (London: BAAF, 2013), p30. Also, for further information on the cost of adoptions see: J. Selwyn, J. Sempik, P. Thurston, D. Wijedasa, *Adoption and the Inter-agency Fee* (University of Bristol, 2009), p23.
[934] *Ibid* at p61.
[935] *Ibid* at p47.

£980 to £6,270. The mean cost of this was £2,842.[936] The mean cost of support services for contact for adoptive families was £999 but could cost anything between £0-£4,052 over a 12 month period. For birth families the mean figure for support was £757, costing somewhere between £0-1,984 over a 12 month period.[937] This study seems to suggest that supporting birth families may be less expensive than searching for suitable prospective adopters and supporting adopters before, during and after the making of the adoption order. More research therefore needs to be undertaken to determine just how cost-effective adoption is in comparison to other measures such as reuniting children with their parents, their wider birth family and the use of long-term foster care.

However, even if policies aimed at returning children to their birth parents would be more cost-effective than placing them for adoption, returning children to their parents is unlikely to be appropriate in the most serious cases of neglect and/or abuse. In fact, returning children in such circumstances would have the potential to violate the child's rights under Article 2 (the right to life) and Article 3 (the right to freedom from torture or inhuman or degrading treatment). Thus, in some cases, non-consensual adoption may well be necessary and proportionate but in others there may be less restrictive alternatives available, such as kinship care, which may be just as effective in terms of the outcomes for children. It is argued here that regardless of whether a child is placed for adoption, placed with birth relatives, returned to birth parents or remains in foster care, that although financial considerations might be a relevant factor, a financial motive should not be the overriding factor influencing adoption policy. In such cases, if equally effective alternatives to non-consensual adoption were in fact available, then the adoption would amount to a disproportionate measure.

5.7 Conclusion

This chapter has examined the alternatives to non-consensual adoption and has considered the extent to which each option complies with the European Convention on Human Rights. The alternatives considered in this chapter may, in some cases, protect children's best interests and rights and the rights of their birth parents under ECHR Article 8. Alternative measures such as State assistance, special guardianship and kinship care may also have the benefit of protecting children's rights under UNCRC Articles 7, 8

[936] *Ibid* at p57.
[937] *Ibid* at p77.

and 9. An important consideration underpinning the discussion in this chapter is the need to balance the State's positive obligation under ECHR Article 8 to reunite children with their birth parents (where possible) against the State's positive obligation to children under Article 2 (the right to life) and Article 3 (the right to freedom from torture or inhuman or degrading treatment).[938]

This chapter has considered that State assistance primarily consists of financial support and/or practical assistance such as provision of parenting classes, therapy. The provision of State assistance increases the likelihood that the State has satisfied its positive obligation under ECHR Article 8 to undertake reasonable efforts to reunite children with their parents, even if the State then subsequently determines that non-consensual adoption is in the child's best interests. In particular, it has been suggested that one way for the State satisfy its obligation under ECHR Article 8 to reunite children and their birth parents and also to protect children's best interests (and rights under Articles 2 and 3) may be via the use of concurrent planning. However, it has been emphasised that there must be thorough scrutiny of this measure to ensure that it amounts to an equally effective alternative to non-consensual adoption and not merely a tokenistic way of acknowledging children's and parents' rights.

This chapter has emphasised the increased use of and potential value of kinship care as a less restrictive alternative to non-consensual adoption. It has been observed that the psychological, social and educational outcomes associated with kinship care are on a par with the outcomes for non-consensual adoption. Thus, it has been argued that efforts ought to be made to overcome potential barriers to kinship care (such as the lack of financial resources for carers and the need for assistance with parenting skills enabling birth relatives to care for children with challenging behaviours). Thus, it has been argued that kinship care is, in many cases, a measure of intervention which protects children from harm and also protects children's rights to develop and maintain relationships with their birth family under ECHR Article 8 (which are further reinforced by UNCRC rights such as Article 8, for example).

[938] In particular, to ensure that no undue delay exists in the adoption process.

Special guardianship has the benefit of ensuring that children retain their legal ties with their parents and wider birth family. Research suggests that the use of special guardianship orders is on the increase and, in some cases, SGOs may be made in respect of kinship carers. This chapter has shown that special guardianship orders have many uses and are potentially beneficial for older children or children from different cultures. In such circumstances, special guardianship may be a more proportionate interference with children's and parents' rights under ECHR Article 8 (and children's rights under UNCRC Article 20).

This chapter has also considered the fact that, in some cases, non-consensual adoption may be a justified, necessary and proportionate measure. However, it has been argued in some cases that non-consensual adoption with direct post-adoption contact would be a less restrictive (and potentially equally effective) measure of intervention to protect children's best interests and rights under ECHR Article 8 on the one hand and parents' ECHR Article 8 rights on the other. It has been observed that the courts have, in many cases, been reluctant to order that direct post-adoption contact should take place. However, while direct contact may not be appropriate in cases of very severe neglect and abuse, there may be cases where it offers real benefits to children and their parents since it enables children and parents the opportunity to maintain and continue to develop relationships with one another, thereby protecting parents' rights under ECHR Article 8 and children's rights under ECHR Article 8 and the UNCRC.

The overall conclusion of this chapter is that there are cases where non-consensual adoption is a proportionate measure and offers much needed protection, security and permanence for children. Adoption is an appropriate measure for protecting children's best interests in many cases. However, there may be cases where alternatives to non-consensual adoption may be available which are less likely to amount to an interference with children and parents' human rights. It is clear from the discussion in Chapters 4 and Chapter 5, that placing an emphasis on encouraging and investing financial resources in non-consensual adoption, may mean less restrictive alternatives are not being pursued which may enable children to retain relationships with their birth families or which may prevent them from going into care in the first place. This thesis will now go on to consider adoption cases from the UK which went to the European Court of Human Rights

in order to consider whether or not less restrictive but equally effective alternatives to non-consensual adoption should have been considered and made available in these cases.

Chapter 6: An Analysis of UK Adoption Cases in the European Court of Human Rights

6.1 Introduction

As was considered in Chapters 2 and 4, non-consensual adoptions in England and Wales are made on the basis of children's welfare (see the Adoption and Children Act 2002, s52(1)(b)). It has been emphasised in the case of *Re B-S (Children)*[939] that the balance sheet approach is now the method that the English Courts must use to decide whether or not it is in a child's best interests for an adoption order to be made. The focus in adoption cases heard in the European Court of Human Rights (see Chapter 3) is different as the ECtHR considers alleged violations of parental rights, including ECHR Article 8(1) and whether or not interference with these rights can be justified on the basis of children's best interests (under Article 8(2), for example). The Court's role to play is then to decide whether or not State intervention, including non-consensual adoption, may be regarded as a necessary and proportionate measure.

It has been argued that the courts in England and Wales and the ECtHR, ought to routinely consider parental rights as well as children's rights in non-consensual adoption cases which may include factors such as the child's attachment to his or her parents and, where appropriate, a consideration of the child's wishes and feelings. It is argued that these are relevant factors and may, influence whether or not less restrictive alternatives to adoption should be chosen. The cases considered in Chapter 3 showed that the ECtHR held that there had been violations of parental rights under ECHR Article 8 and that less restrictive alternatives to non-consensual adoption should have been chosen (see *Pontes v. Portugal*,[940] *R.M.S. v. Spain*,[941] and *Zhou v. Italy*[942]).

This chapter considers two key decisions on non-consensual adoption originally heard in the UK and subsequently taken to the ECtHR (*R and H v. UK*[943] and *Y.C. v. UK*[944]). It is argued, in the light of these cases, that the domestic courts and the Court of Human

[939] [2013] EWCA Civ 1146.
[940] (Application no. 19554/09) 10 April 2012.
[941] (Application no. 28775/12) 18 June 2013.
[942] (Application no. 33773/11) 21 January 2014.
[943] [2011] ECHR 844.
[944] (Application no. 4547/10) 13 March 2012.

Rights ought to refer to the United Nations Convention on the Rights of the Child in order to assess what is in the best interests of children. It is also argued that a fresh assessment of the best interests principle and the availability of less restrictive (and potentially equally effective) alternatives to non-consensual adoption ought to form part of the reasoning of the domestic courts and of the ECtHR.

6.2 Two UK Adoption Cases in the European Court of Human Rights

6.2.1 R and H v. UK

R and H v. UK[945] concerned an adoption which had originated in Northern Ireland. The final appeal was heard in the House of Lords (now the Supreme Court in the UK) which is the final court of appeal in the land for Northern Ireland as well as England and Wales. Thus, even though the adoption law is different in Northern Ireland, this case is important to this thesis because it nonetheless forms part of the law on England and Wales and may be relevant in cases where the Court considers non-consensual adoptions under the Adoption and Children Act 2002. This case also provides an example of how subsequent analysis on an adoption case heard in the highest court in England and Wales has been approached by the ECtHR.

In this case, the applicants were the biological parents of N, a baby girl, who was born in April 2002. The mother had a history of alcohol problems and was admitted to an addictions centre after the birth of N (who was removed after birth) and attended a parenting centre with N for assessment purposes. The reports were positive and the applicants were allowed to take N home. However, the mother subsequently returned to her drinking and asked for assistance from Social Services because she was unable to care for her children. N was again taken into care by social workers from Down Lisburn Health and Social Services Trust on a voluntary basis and placed with foster carers. The mother had three other children who were placed in trust accommodation but who were eventually returned to their mother. N's care plan was that she would remain with foster parents in the short term, but in the long term, she would be freed for adoption. A kinship assessment was made of N's maternal grandmother but it was decided that the placement with her would not be appropriate. On 31 May, 2005 it was determined that adoption was

[945] [2011] ECHR 844.

in N's best interests because it was unlikely that the mother would remain abstinent from alcohol and because of the mother's failure to prioritise the needs of her children and herself over those of her partner. The judge accordingly made the freeing order requested by the authorities.

The applicants took their case to the ECtHR and argued violations of Article 6 (the right to a fair hearing) and Article 8 (the right to respect for private and family life). It was argued under Article 6(1) that conducting freeing order proceedings deprived the parents of the opportunity to participate in the later adoption order proceedings, which breached their right to a fair hearing. In terms of the substantive aspect of Article 8, it was argued that the freeing order was a disproportionate interference with their rights because the national authorities had not kept the family situation under review and had not given sufficient consideration to kinship assessments for N. The applicants also argued that the reasons for the freeing order provided by the trial judge were neither relevant nor sufficient because the order had been based on the prediction that the second applicant would be unable to abstain from drinking alcohol, a prediction that she disputed. The applicants drew attention to the fact that they had subsequently had another child, O, who had not been the subject of care proceedings since birth and with respect to whom no concerns had been expressed about his welfare. They also argued via the procedural aspect of Article 8, that it was procedurally improper to make a freeing order in advance of an adoption order and was disproportionate in the light of the mother's lengthy period of sobriety. The Court considered the arguments presented by the applicants and held that there had been no violations of Articles 6 or 8.

The Court did not consider the argument that the freeing order prevented the couple from participating in the adoption proceedings within the scope of Article 6(1); but instead dealt with it as part of the Court's analysis of the procedural requirements of Article 8. The question for the Court was whether the removal and adoption struck a fair balance between the parents' right to have a relationship and contact with N on the one hand and N's best interests in being protected from harm on the other.[946] The Court considered the relationship between the parents' Article 8 right and the best interests of the child. In doing so, it examined the earlier child abduction case of *Neulinger and Shuruk v.*

[946] *R and H v. UK* [2011] ECHR 844 at para 85.

Switzerland[947] which stated that the child's best interests should be treated as paramount even where they clash with the rights of the parent. In *R and H*, the Court held that the principles in *Neulinger* were of general application and could be applied to cases concerning custody and adoption proceedings. In *Neulinger*, it was proposed that there are two limbs to be applied when determining the child's best interests: 1) 'the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, 2) 'it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development'.[948]

The Court observed that the State had a wide margin of appreciation in matters pertaining to the best interests of the child. However, despite this wide margin, the Court noted that as adoption had the effect of depriving biological parents of their parental responsibilities, then adoption should be authorised only in exceptional circumstances and would be justified only if the adoption was in the child's best interests.[949] In this case, the Court deferred to the UK Court in determining what measure was in the child's best interests. Leaving the State to determine both the best interests *and* the appropriate measure to be taken in pursuit of the child's best interests without further scrutiny is in keeping with the wide margin of appreciation. However, it seems to differ from the approach envisaged in *Neulinger*, which allows the Court of Human Rights to perform its own best interests analysis, which has been acknowledged as being of general application in all cases concerning the child's best interests.[950]

In terms of the procedural aspect of Article 8, which requires fairness in decision-making relating to Article 8 rights, the Court emphasised that this principle applies 'with greater force when those proceedings may culminate in a child being taken away from her biological parents and placed for adoption'.[951] On the facts, however, no Article 8 violation was found. The applicants had been legally represented, had been able to participate, and to make their views known and there were practical reasons for the two-stage procedure involving first the freeing and then the adoption of their child. The Court

[947] (Application no. 41615/07) 6 July 2010.
[948] *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) 6 July 2010 at para 136.
[949] *R and H v. UK* [2011] ECHR 844 at paras 81 and 88.
[950] *Ibid* at para 74.
[951] *R and H v. UK* [2011] ECHR 844 at para 76.

observed that freeing orders were not made lightly and that well-defined criteria tended to be applied. Although it was noted that it would be more advantageous to biological parents if they were able to participate in adoption proceedings, ultimately, weighing this against the right of the child, meant that 'the interests of the biological parents must inevitably give way to that of the child'.[952]

The Court was unable to conclude that the process was unfair or that Social Services and the UK Court had failed to provide sufficient protection to the parents' interests. In balancing the interests of the child against those of the parents, the State had acted in a manner which was proportionate to the aim of protecting the welfare of the child. The mother's problem with alcohol was cited as a reason for N to be freed for adoption, rather than being returned to her parents. The Court accepted this as a relevant and sufficient reason for rejecting the applicants' submission against the freeing order and held that there was no violation of Article 8.

The Court decided that 'exceptional circumstances' justified N's removal into care and her subsequent adoption without parental consent. As considered in Chapter 3, however, it is not difficult to establish the existence of 'exceptional circumstances', which will in the eyes of the Court justify a removal and placement of a child for adoption (see Section 3.5.3). However, on the facts, when N had been removed into care she had suffered very serious neglect[953] which arguably engaged her right to freedom from torture or inhuman or degrading treatment under ECHR Article 3. It is not disputed that the initial State intervention was justified but it is at least questionable as to whether non-consensual adoption was necessary and proportionate.

It has been suggested in Section 3.5 that a number of factors may be relevant in determining whether or not a non-consensual adoption may be regarded as a necessary and proportionate measure. In the first instance, the child entered into the care system with the mother's consent. In the second instance, based on the facts, there was recognisable neglect which warranted State intervention. The State had provided assistance initially to the parents, but once N had been taken into care a second time, it

[952] *R and H v. UK* [2011] ECHR 844 at para 77.
[953] *Down Lisburn Health and Social Services Trust and another v H and another* [2006] UKHL 36 at para 49.

was determined that adoption was in her best interests. In part, this seems to have been based on the 'complex problems'[954] of two of N's older siblings, who were considered to be 'extremely disturbed and damaged young people'.[955] However, one of the older siblings had not been as seriously affected by the mother's issues and the mother and N's father were raising O effectively, which suggests that the mother had worked hard to address her issues and was able to parent effectively.

As considered above, the mother's alcohol problem was the main reason used to argue against N's return and suggest that she was at risk of harm. However, this was never argued in relation to a subsequent child, O, who had never been subject to care proceedings. If anything, the facts seem to suggest that the mother's circumstances had in fact changed and that her continued sobriety had enabled her to raise all of her children without the need for support from the State. Further measures of State intervention could have been appropriate here and that practical assistance (such as ongoing alcohol rehabilitation, therapy or support from social workers) may have addressed concerns about future relapses of the mother. Furthermore, while the trial judge had been concerned about history repeating itself' on the part of the mother, the Court of Appeal was less pessimistic in this regard.[956]

The ECtHR appeared to place little weight on particular factors which suggested that the parents were able to raise N. These factors were the parents' ability to raise O, who was born after N as well as N's three half-siblings. Another relevant factor which ought to have been considered in more depth was the attachments which had been observed during contact sessions between N and her parents. The Court simply described the existence of this fact as 'instructive'[957] and stated that the national authority was entitled to focus on N's individual needs and interests, although the ECtHR did not articulate what these needs and interests were and how they had been best served by adoption. It could be argued here, that the national authorities should have considered the impact that the adoption would have had on N's right to know and be cared for her parents under UNCRC Article 7. The Court should also have considered how an adoption prevented N

[954] *Down Lisburn Health and Social Services Trust and another v H and another* [2006] UKHL 36 at para 49 at para 11
[955] *Ibid* at para 48.
[956] *Ibid* at para 29.
[957] *Ibid* at para 86.

from being raised with her three half-siblings and her full sibling O. These considerations could have been weighed against any potential detriment to N if her mother were to resume her alcohol addiction. Even if the ECtHR had still ultimately agreed with the State's decision, by providing a detailed assessment of the N's best interests it would have sent a clear message to Member States as to which factors should be emphasised in an assessment of best interests.

In determining the best interests of N, once the national authorities had decided that she could not be returned into her parents' care, they only examined one possible alternative to adoption which was placing the child with her grandparents. The ECtHR considered this and concluded that Social Services had been justified in rejecting the kinship placement with the grandmother, based on the allegations of indecent assault made against the grandfather many years before. However, the Court failed to consider the possibility of other less restrictive, but equally effective, alternatives which might have achieved a better balance between the protection of the best interests and the rights of N on the one hand (i.e. to be protected from harm under Article 3 and to have a relationship with her parent under Article 8) and her parents' Article 8 rights on the other hand. Here, long-term foster care may have been beneficial as N would have maintained the legal relationship with her birth family and it would have protected N from the potential impact of her mother's alcohol abuse, if she were to suffer another lapse. However, it would not necessarily have been as equally effective as non-consensual adoption.

Although the decision in *R and H v. UK* was not necessarily the wrong one, it is arguable that the Court's reasoning and analysis could have been better. The analysis would have been stronger if the ECtHR had provided a more in-depth examination of whether adoption is the most proportionate measure in the light of rights-based considerations (under the UNCRC for example) or whether other less restrictive measures could provide a the grandmother was considered but this option was rejected. Furthermore, despite the parents' ability to raise O, a full sibling of N, it was decided by the Court of Appeal that it was in N's best interests to be adopted. Although the ECtHR reiterated that the State is not required to undertake endless measures to reunite children and parents, it is suggested that there were viable alternatives to adoption here which would have served N's interests equally well as adoption and would have afforded better protection to N's Article 8 right

to have a relationship with her parents and siblings (and her UNCRC rights to know and be cared for by her parents under Article 7, for example).

The Court accepted the domestic court's assessment that adoption was in N's best interests, without considering how N's rights may have been affected or how these best interests and rights were linked with her parents' rights. In fact, N not only lost the legal tie with her birth parents and siblings but also lost the opportunity to be raised within her birth family even though her parents were capable of caring for her (arguably an important right which is protected under UNCRC Article 7). Based on N's continued relationship with her parents and siblings, it may have been possible for her to have been reintegrated into her family. Even though it may have been possible to have reunited N with her birth parents, the question is whether or not this would have been an equally effective alternative to non-consensual adoption?

Interestingly, despite the fact that there was no Article 8 violation in respect of the aforementioned arguments, the Court considered the issue of post-adoption contact in some depth. In *R and H*, the parents were concerned that there would be no contact with N after the adoption and it was one reason why the parents refused to consent to N's adoption. Expert witness, Professor Triseliotis had made submissions to the Court that direct contact between N and her parents would be beneficial and that direct contact should have been sought. The Court agreed that the parents were justified in refusing to agree to adoption without knowledge of whether contact would occur. However, one factor which may have influenced the Court was an unusual feature in this case which was that post-adoption contact was still ongoing at the time the case was heard, even though there was no specific legal order in place to enforce this contact.

It could be argued that a contact order might have provided some protection for N and her parents' Article 8 right to maintain their relationship, as a fear of loss of contact was the main reason why the parents disputed the adoption. It has been argued in this thesis (see for example Section 5.5) that in some cases non-consensual adoption with direct contact may be an effective way of striking the balance between protecting children's rights and best interests on the one hand and parental rights on the other. However, in *R and H v. UK* while the parents were given assurances by the local authorities that contact would

continue, no formal court order was in place which protected N and her parents' mutual right to contact.

It is interesting that there were some dissenting judgments in this case: one in the ECtHR and the other in the House of Lords. The brief dissenting judgment of Judge Kalaydjieva in the ECtHR referred to Lady Hale's dissenting judgment in the House of Lords. Lady Hale had questioned: 'whether it is necessary and proportionate to sever the links with the family of birth if a new (adoptive) family has not yet been identified'.[958] Judge Kalaydjieva held that freeing orders helped authorities to search for prospective adopters but they did not 1) provide a proper assessment of the child's best interests or 2) provide an assessment of the parents' rights and how they would be impacted by the freeing order and the likelihood of a subsequent adoption order.

Simmonds has suggested that *R and H v. UK* demonstrates that the Court is placing a greater weight on children's rights in the field of child protection and adoption than in other areas of child law. She has argued that in contrast to relocation cases (such as *Neulinger*), for example, the ECtHR does not conduct a substantive analysis of the content or the weight to be given to the child's best interests.[959] Simmonds argues that children's rights are better protected due to the Court's acknowledgement of paramountcy in cases such as *R and H v. UK*. She claims that the ECtHR protects parents' rights in contact, residence and relocation cases but that it is 'happy to side-line parental rights' in child protection and adoption cases. Nonetheless, she has approved of the paramountcy approach taken by the Court and has suggested that ECtHR rulings now 'comply more fully' with the UNCRC as far as adoption is concerned,[960] in contrast to the approach in the earlier case of *Johansen v. Norway*[961] which involved balancing the interests of the child in remaining in care on the one hand and the parents' interest in being reunited with their children on the other.

While Simmonds has observed that the Court has side-lined parental rights in child protection and adoption cases, she has emphasised that these cases provide increased

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[958] *Down Lisburn Health and Social Services Trust and another (AP) (Respondents) v. H (AP) and another (AP) (Appellants) (Northern Ireland)* [2006] UKHL 36.
[959] Claire Simmonds 'Paramountcy and the ECHR: A Conflict Resolved?' [2012] 71 *CLJ* 448 at 500.
[960] *Ibid* at 501.
[961] (Application no. 17383/90) 7 August 1996.

protection for children's rights. However, it can be argued that not only did the Court in *R and H v. UK* fail to consider N's rights (e.g. under Articles 5, 7, 8 and 9) but it also failed to give sufficient consideration to her best interests because of the narrow approach it took in accepting that adoption was the best option at the time for N. The evidence suggested that N had formed a good relationship with her birth parents and family and that loss of contact had the potential to be distressing for her. Adoption would also have had the effect of severing the legal ties with a full sibling who remained with their parents, as well as half-siblings. Because of the existence of the facts mentioned above, weighing these up alongside the other considerations of the Court, it can be argued that adoption might not have been in N's best interests. Furthermore, if N's rights had been considered by the Court, perhaps it would have given greater consideration to the importance of protecting the legal tie between N and her birth parents and her relationships with her wider birth family. As was mentioned above, N's parents were allowed to look after a younger full sibling O, who had never been subject to care proceedings.

While it was necessary and proportionate to remove N from her parents' care, it is arguable that freeing N for adoption (which had the effect of severing the legal tie between N and her birth parents) may not have been proportionate to the aim of protecting N's best interests which appeared to include maintaining contact with her birth parents. Here, it would have been appropriate for the Court to have considered less restrictive measures which still would have had the effect of protecting N's best interests, such as long-term foster care with a contact order in place enabling N to maintain a relationship with her birth parents. This case is an acute demonstration of the Court's tendency to shy away from considering whether adoption itself is proportionate, seemingly regarding it as falling within the wide margin of appreciation afforded to domestic authorities in cases of this nature. It also demonstrates that despite stressing the importance of post-adoption contact (of which Social Services had managed to arrange in this case), the Court did not assert that the child has the right to post-adoption contact despite the benefits that can be derived from this arrangement. These benefits can include the contribution that post-adoption contact may have to the child's identity development

and the atmosphere of trust and openness which may be created with the adoptive parents due to the open lines of communication with birth parents.[962]

6.2.2 Y.C. v. UK

This was the first case to be heard by the European Court of Human Rights involving a non-consensual adoption in England made under the Adoption and Children Act 2002. Y.C. was the mother of K, a boy, and P.C. was her partner. The three of them had lived together until reports of domestic violence and Social Services intervention led to the removal of K (then aged 7) by way of an emergency protection order under the Children Act 1989. In foster care, K seemed stable and content and the local authority (on the basis of recommendations by a psychologist) proposed that K's best interests would be best served by adoption. Y.C. sought to address the local authority's concerns; namely that her relationship with P.C. was abusive, that witnessing and intervening in domestic violence had been traumatic for K, and that Y.C's own behaviour was affected adversely by drinking, thereby impacting on K. She gave up drinking alcohol, ended the relationship with P.C and found a new property to live in. She sought to be the sole carer of K, in the light of these new circumstances, but the UK courts refused to perform a fresh parenting assessment to see if K could be safely placed with her because it had been decided that it was in K's best interests to be placed for adoption.

By the time that the facts had reached the ECtHR, the applicant had accepted that the passage of time rendered adoption the best option for her son. She nonetheless, alleged that her Article 8 right to respect for private and family life had been violated for two main reasons. The first was that the UK courts had not assessed her as a sole carer for K. The second was that the UK courts had failed to take into account all of the relevant considerations when making the placement order, preceding the adoption, which meant that no reasoned argument had been provided for making the adoption order which permanently severed the links between Y.C and K.

The ECtHR was satisfied that Y.C's Article 8 right was engaged in respect of both her arguments. The Court agreed that refusal of the assessment did constitute an interference

[962] E Neil *et al* 'Supporting post adoption contact in complex cases –briefing paper' http://www.adoptionresearchinitiative.org.uk/briefs/DFE-RBX-10-04.pdf

with Article 8 but the decisive issue was one of the 'necessity and proportionality of the measure'.[963] The Court had to consider whether, in the light of the case, as a whole, the measures were 'relevant and sufficient'[964] (the substantive aspect of Article 8) and whether the decision-making process was fair and afforded due respect to the applicant's rights (the procedural aspect of Article 8).[965] The best interests of the child were regarded as paramount in cases concerning the permanent severance of ties between parent and child. Identifying the child's best interests and performing the proportionality assessment depended on considering a number of non-exhaustive factors, including those contained in the CA 1989, s1(3) and the ACA 2002, s1(4).

The first argument on the assessment of Y.C as a sole carer was interwoven with the second argument concerning lack of procedural safeguards. The first argument was dismissed because it was in K's best interests to ensure the existence of a stable and secure environment for him to live in. The Court took the view that another assessment would not have been in K's best interests because it would threaten the stability of his existing arrangements. The ECtHR accepted the national authorities' conclusion that any assessment made would not have had an impact on the decision to make a care order, which would have been made in any event.

The second argument involved a close examination of the procedure which led to the placement order being made. The domestic court (the Family Proceedings Court) had to consider an application for a care order and a placement order for K. The Court made an interim care order with a direction for a further assessment. In doing so, no specific reference was made to the Children Act 1989, s1(3), although reference was made to the CA 1989, s31(2) with an indication that the 'threshold' criteria were met. The local authority and K's Guardian appealed against the Court's direction ordering that the assessment take place and sought a final care order and a placement order. The County Court held that the Family Proceedings Court was mistaken in not making a final care order but the County Court made no reference to the ACA 2002, s1(4) welfare checklist. There was also no reference to Article 8 or to the rights of the parents and children. The judge stated that the conditions needed for making a care order existed, and therefore

[963] *Y.C v. UK* (Application no. 4547/10) 13 March 2012 at para 131.
[964] *Ibid* at para 144.
[965] *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) 6 July 2010.

approved the placement order. Despite the fact that the County Court judge had made no reference to the s1(4) welfare checklist, the appeal courts in the UK accepted that it was a finely balanced case and that the County Court judge had applied his mind to the checklist.[966]

The ECtHR asserted that the lack of direct reference to or consideration of s1(4) could have been remedied by Y.C requesting clarification from the judge. She was invited to do so by the County Court judge,[967] but it is unclear from the facts of the case why she did not seek further clarification from the judge as to his reasons for making the placement order. Furthermore, the ECtHR was satisfied that as the threshold for making a care order had been met, it was satisfactory to make a placement order without a care order in place on the basis that the UK had a margin of appreciation to do so. The approach of the ECtHR was to hold that it was irrelevant that the usual procedure had not been followed on the basis that the outcome would have been the same in any event. A care order would have been made. The ECtHR concluded that there had been no violation of Article 8. The Court also held that the welfare checklist under s1(4) of the ACA 2002 broadly reflected elements in assessing necessity under Article 8(2).

Ifezu and Rajabali have argued that the decision in *Y.C v. UK* shows that the ECtHR approves of the approach in English Law which 'reflects a substantial shift in its attitude toward children, at least in cases concerning adoption'.[968] However, it can be argued that certain aspects of the judgment are unsatisfactory. Thus, for example, the Court did not consider the lack of procedural safeguards for the parents which were available in this case. *Y.C v. UK* has been subject to approval by the UK Supreme Court which regarded the case as providing some clearer guidance. In *ANS and another v. ML (AP) (Scotland)*[969] (a non-consensual adoption case discussed in Chapter 4) where the Supreme Court opined that *Y.C* made it clear that the factors laid down in the welfare checklist in the ACA 2002 were factors considered when determining the proportionality of making

[966] For the House of Lords judgment in this case, see*: Down Lisburn Health and Social Services Trust and another (AP) v H (AP) and another (AP)* [2006] UKHL 36. Also, see: *Y.C. v. UK* (Application no. 4547/10) 13 March 2012 at para 5 for the dissenting judgment of Judge De Gaetano which refers to the Court of Appeal judgment.
[967] *Y.C v. UK* (Application no. 4547/10) 13 March 2012 at para 82.
[968] *ANS and another v. ML (AP) (Scotland)* [2012] UKSC 30 at pars 75.
[969] [2012] UKSC 30.

an order. In *ANS*, Lord Carnwath stressed the importance of both *Y.C* and the earlier *Neulinger* decision, and stated that there is:

> '…currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount…'[970]

The two-limb test which was first articulated in *Neulinger*[971] was referred to in *Y.C v. UK*[972] but, as Lord Carnwath pointed out, there is some inconsistency within the ECtHR jurisprudence.[973] In other words, *Y.C* seemed to demonstrate that these two limbs were to be considerations borne in mind rather than fixed tests to be applied in each case.[974] The approaches in these cases therefore differ with the approach in *Y.C v. UK* indicating that there was flexibility as to whether or not the test should be applied whereas *Neulinger* seemed to suggest that these two limbs must be applied in cases concerning the rights and best interests of children. In *Neulinger*, the ECtHR has arguably and potentially given itself the power to look more closely at the substance of decisions made in adoption proceedings.

The problem is that adoption may be regarded by the ECtHR as quite a different factual context from that of *Neulinger* which was a case involving international child abduction and which may be fact-specific. The above interpretation of *Neulinger* and the approach taken in adoption cases is supported by Simmonds who argues that, despite the approach taken in *Neulinger*, the Court had nonetheless been moving towards a 'paramountcy' approach in the context of adoption proceedings whereby children's best interests take precedence over those of their parents.[975] It is argued in this thesis that although the ECtHR must defer to national authorities and respect their greater knowledge and possession of the facts in any given case, performing its own best interests assessment in adoption cases would have the benefit of encouraging courts at all levels to provide a more detailed analysis of the child's best interests in such cases.

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[970] *ANS and another v. ML (AP) (Scotland)* [2012] UKSC 30 at para 68.
[971] Family ties ought only to be severed in exceptional circumstances and if and when appropriate, the State must help to 'rebuild' the family.
[972] 1) 'the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, 2) 'it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development'.
[973] *ANS and another v. ML (AP) (Scotland)* [2012] UKSC 30 at paras 75-76.
[974] *Ibid* at para 75.
[975] Claire Simmonds 'Paramountcy and the ECHR: A Conflict Resolved?' [2012] 71 *CLJ* 448 at 500.

With respect to the facts in *Y.C. v. UK*, the UK courts placed a great deal of emphasis on the stability that K was offered via adoption. However, this was not weighed against other considerations, such as K's close relationship with his mother. When analysing the decision of the County Court, the ECtHR did not examine the extent to which the rights of K were considered by that court or the lack of weight that was placed on K's apparent bond with his mother and suggestions that the child had expressed a desire to return home to his mother. The decision shows that the ECtHR adopts a rather deferential approach to the national courts without the detailed scrutiny that might be considered to be appropriate in cases where the consequences flowing from this alleged rights violation are so severe, namely the permanent severance of the legal tie between a boy and his birth parents.

As Sloan has observed, the Court of Human Rights in *Y.C* 'saw no incompatibility between assertions'[976] that the child's best interests are paramount and that 'family ties may only be severed in very exceptional circumstances and . . . everything must be done to preserve personal relations and, where appropriate, to "rebuild" the family'.[977] In the light of these important principles, it is arguable that the ECtHR should have conducted a more thorough analysis of the facts and of K's best interests and rights. Judge De Gaetano, in *Y.C. v. UK*, gave a dissenting judgment in which he emphasised that the consequences of adoption warranted a greater protection of rights and that safeguards were needed to prevent improper interference with rights:

> '[T]here can be no more draconian measure in the context of the relationship between parent and child than an order which permanently severs family ties. The need for safeguards against arbitrary, or even merely unjustified or unnecessary interference, is compelling…'[978]

He was of the view that Article 8 had been violated because the UK courts had failed to take into account relevant considerations (such as the child's age and his attachment to his mother) and had not provided a reasoned judgment. He described the placement order as being made in a very 'unorthodox' way and he expressed his distaste for the 'cavalier' way in which the Court of Appeal had refused to give the mother permission to appeal.

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[976] Brian Sloan 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' [2013] 25 *CFLQ* 40.
[977] *Y.C v. UK* (Application no. 4547/10) 13 March 2012 at para 134.
[978] *Y.C v. UK* (Application no. 4547/10) 13 March 2012. See Judge De Gaetano's dissenting judgment at para 6.

He was highly dissatisfied with the analysis of the UK courts and the fact that no reference had been made either to the Article 8 rights of the child and parents or the principle of proportionality.[979] He also disapproved of the ECtHR's decision to concede to the UK's margin of appreciation in this matter. He referred to *Saviny v. Ukraine*[980] in order to emphasise the severity of severing family ties, despite States enjoying a margin of appreciation:

> '…not withstanding a margin of appreciation enjoyed by domestic authorities in deciding on placing a child into public care, severing family ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances…'[981]

He also suggested that there had been insufficient consideration given to the age of K, who was not a newborn or a young child but an 8-year-old boy who had lived with his parents from birth. The age of the child in this case seems particularly relevant as most cases concerning adoption tend to involve younger children who will have little or no memory of their birth parents (as seen in *R and H v. UK* above and most of the cases referred to in Chapters 3, 4 and 5). Although the best interests of K were considered by the domestic courts and by the ECtHR, it seems that the analysis was narrowly confined to factors proposed by the UK (i.e. his stability and security) rather than to overt reference being made to the bonds that existed between K and his mother (who were described as having a good relationship), the possibility of the grief that K might suffer as a consequence of the adoption and considerations of identity and relationships with his wider birth family.

Fenton-Glynn argues that the decision in *Y.C.* demonstrates that paramountcy is no longer so 'alien' to the ECtHR.[982] She argues that the decision in *Y.C.* demonstrates that a greater weight has been given to children's rights in the area of child protection and adoption as there is no longer a strict balancing process[983] or a vigorous analysis of the proportionality of a measure (such as adoption) and that there is no substantive analysis of the content or weight of the best interests by the ECtHR.[984] The author of this thesis

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[979] *Y.C v. UK* (Application no. 4547/10) 13 March 2012. see dissenting judgment of Judge De Gaetano at para 4.
[980] For further detail on this case see: Section 3.4.6.
[981] (Application no. 39948/06) 18 March 2009.
[982] Claire Simmonds 'Paramountcy and the ECHR: A Conflict Resolved?' [2012] 71 *CLJ* 448 at 499-500.
[983] *Ibid*.
[984] Claire Simmonds 'Paramountcy and the ECHR: A Conflict Resolved?' [2012] 71 *CLJ* 448 at 500.

respectfully disagrees with Fenton-Glynn's argument that greater weight has been given to children's rights on the basis that the ECtHR failed to consider K's relationship rights with Y.C under ECHR Article 8 or other potentially applicable rights under the UNCRC (such as Articles 7, 8 and 9) in the light of his attachment to his mother and expressed wishes to maintain contact with her. Furthermore, K's adoption was arguably not a necessary measure to protect his rights under UNCRC Articles 6 and 19, and under UNCRC Article 21 it could be said that considering the gravity of the measure that a greater analysis was required than the bare welfare test applied by the domestic courts (see also Section 2.3.3 and 2.3.5).

However, Fenton-Glynn has rightly argued that the same is not true in respect of the views of the child. She claims that, in this area, children have not been helped by the 'conservative jurisprudence' of the ECtHR. She has further observed that in Europe there is no clear consensus on at what age children should (if at all) be able to consent to adoption, of the weight to be given to their views in the context of adoption proceedings, or if they should be given any weight at all.[985] The importance of the voice of the child in court proceedings (see Chapter 2) is emphasised in UNCRC Article 12 (the child's right to be heard) but at the domestic level in the UK and in the ECtHR, there was very little discussion of K's wishes. The ECtHR simply affirmed the English Court's best interests assessments, without considering the child's wishes, even though a child's wishes may form part of an assessment of best interests under the law in England and Wales.[986]

In general, whereas society and the courts are increasingly placing more emphasis on ascertaining the wishes of the child,[987] *Y.C v. UK* shows that there is insufficient consideration of the voice of the child at ECtHR level in the context of adoption proceedings.[988] Considering the age of K, even though there was no legal requirement to listen to his opinion, it is suggested in this thesis that his thoughts and feelings should have been an important consideration in determining his future because of his age and his

[985] Claire Fenton-Glynn, 'The Child's Voice in Adoption Proceedings: A European Perspective' [2014] 22 *International Journal of Children's Rights* 135.
[986] See English Law: The Children Act 1989 s1(3) refers to the wishes and feelings of the child as a consideration for the judiciary when deciding whether or not to make a court order. The Adoption and Children Act 2002 s1(4) also refers to the wishes and feelings of the child as a consideration the court can have regard to when deciding whether to make an adoption order.
[987] See discussion in Family Justice Review (November 2011).
[988] Claire Fenton-Glynn, 'The Child's Voice in Adoption Proceedings: A European Perspective' [2014] 22 *International Journal of Children's Rights* 135.

likely ability to understand the consequences of his adoption. Although it has been acknowledged by Gilmore and Herring, that the greater the weight that is attached to children's perceptions, the greater the likelihood that children may be manipulated into saying what adults want them to say, they have argued that the benefits of listening to children may outweigh potential fears that they may be manipulated.[989] *Y.C. v. UK* is a case where it would have been appropriate to have listened to the views of K and to have attached some weight to them.

Furthermore, it is argued that the Court ought to have undertaken a more thorough analysis of less restrictive alternatives to non-consensual adoption as it did in cases such as *Pontes v. Portugal*,[990] *R.M.S. v. Spain*,[991] *Zhou v. Italy*,[992] and *SH v. Italy*.[993] While none of these cases involved a child witnessing domestic violence, *SH v. Italy* did involve a mother who faced difficulty in parenting her children due to mental illness. In this case, the Court held that the State ought to have continued to offer State assistance, a less restrictive alternative to removal for adoption. With respect to *Y.C. v. UK*, it is argued that the potential detriment to K in being adopted might have outweighed the benefits that he would have obtained from the arrangement. It is also argued that the Court of Human Rights in *Y.C v. UK* should have taken more cognisance of the fact that K was aged eight and was likely to have a strong sense of identity vis-à-vis his birth family, an important right which is protected by UNCRC Article 8 and relevant in the context of this right since the adoption resulted in the legal severance of K between him and his mother and the loss of his de facto relationship with her. Furthermore, his strong attachment to his mother meant that it would be potentially more difficult for him to adjust to an adoption placement than a younger child or a child of the same age with a weaker attachment to a parent.

Therefore, in the light of these considerations it could be argued, for example, that the State could have made more concerted efforts to see if K could have been safely placed with his mother, who had separated from her partner, and wanted to be considered as a sole carer. It is possible that with State assistance, for example, in the form of therapeutic

[989] Stephen Gilmore and Jonathan Herring, 'Listening to Children… whatever' [2014] 130 *LQR* 531.
[990] (Application no. 19554/09) 10 April 2012.
[991] (Application no. 28775/12) 18 June 2013.
[992] (Application no. 33773/11) 21 January 2014.
[993] (Application no. 52557/14) 13 October 2015.

support and visits from social workers, that such a placement could have worked. Alternatively, a special guardianship order could have been considered, as it was envisaged by the government in England and Wales as a less restrictive alternative to adoption for older children for whom it would be desirable to maintain legal ties with the birth family.[994] A special guardianship order (see Section 5.4) would have allowed Y.C to retain her status as the legal parent of K and respected the bond between Y.C and K, while ensuring certainty for K. Thus it is argued (as considered in Section 2.3.5) that less restrictive (and potentially equally effective) measures could have been undertaken to protect K's rights under UNCRC Articles 6 and 19 and his right to freedom from torture or inhuman or degrading treatment under ECHR Article 3.

6.4 Conclusion

It is beneficial and in line with the approach taken by most domestic courts and international law for the ECtHR to place emphasis on the best interests of the child. However, doing so in conjunction with allowing a wide margin of appreciation to Member States in determining these best interests acts as a disservice to both children and parents because, as considered in *R and H v. UK* and *Y.C. v. UK*, will automatically mean that State measures with regard to non-consensual adoption are likely to be justified. It is suggested that best interests is one aspect of children's rights (see for example, UNCRC Article 3) but that the interests of children would actually be better protected by the ECtHR if it also considered children's rights in adoption cases (both under ECHR Article 8 and under the UNCRC). Although the Court is not compelled to consider the rights of children in adoption cases when they have not been argued before the Court, it is argued that examining the rights of children would improving the reasoning of both the ECtHR judgments and potentially domestic court judgments. A clear articulation of the rights of children in cases like those discussed above would enrich case law on children's rights and might, in the words of Van Bueren, even act as a 'catalyst'[995] for vicarious protection of the rights of other family members, including parents.

It can be concluded that the Court of Human Rights has shown more deference to the UK authorities in *R and H v. UK* and *Y.C v. UK* than it has to other national authorities in

[994] See discussion in: *White Paper, Adoption: the new approach*, Cm 5017 (DfES, 2000). Also see: Julia Nelson 'Special Guardianship Orders – an Introduction' [2005] *Fam Law* 573.
[995] Geraldine Van Bueren, 'Protecting children's rights in Europe – a test case strategy' [1996] *EHRLR* 171.

cases concerning non-consensual adoption (considered in this Chapter and also in Sections 3.4 and 3.5). In other words, the Court has been openly critical of many adoption proceedings which originated in other Member States and has placed more emphasis on the use of State assistance and need for less restrictive alternatives. Despite the fact that the Court of Human Rights has the discretion to provide an in-depth assessment of children's best interests, based on the authority of *Neulinger and Shuruk v. Switzerland* and also, *R and H v. UK*, the Court chose not to do so in the cases discussed in this chapter. If it had undertaken a best interests assessment in these cases, it would have improved the quality of the Court's reasoning and it would also have afforded greater protection to children's and parents' rights in adoption cases. It has been argued that due to the severity and permanence of adoption, that it would be appropriate for the Court to provide a more in-depth consideration of children's best interests in adoption cases.

In particular, it is suggested that the Court ought to have given more consideration to the potential availability of less restrictive alternatives in these cases. In fact, less restrictive alternatives were available in both cases, although with regard to *R and H v. UK* it is difficult to assess whether or not the alternatives (returning N to her parents or placing her with her grandparents) would have been equally effective to protect N's welfare and rights. In contrast, it is argued that *Y.C. v. UK* is a non-consensual adoption which was neither necessary nor proportionate as alternatives (namely special guardianship or the child being returned to his mother as a sole carer) would have been equally effective.

Chapter 7: Conclusion

This chapter concludes this thesis on the proportionality of non-consensual adoption by providing an overview of the thesis, an analysis of its main research findings and suggestions for further research.

7.1 An Overview

This thesis has examined the proportionality of the law on non-consensual adoption in England and Wales under the Adoption and Children Act 2002. The purpose behind this thesis has been to determine the circumstances in which a non-consensual adoption may (or may not) be regarded as a proportionate measure. In doing so, this thesis has referred to relevant provisions of the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of the Child (UNCRC) and has considered the importance of the best interests (or welfare) principle. This thesis has considered how ECHR and UNCRC rights as well as European Court of Human Rights (ECtHR) jurisprudence could assist in determining when non-consensual adoption would be the least restrictive measure available and the circumstances in which alternatives might be more proportionate.

In performing this analysis, the thesis has explained and assessed the approach taken by the High Court and the Court of Appeal in England and Wales, the UK Supreme Court and by the ECtHR in cases where children have been adopted without parental consent. Thus, this thesis has examined whether or not non-consensual adoption has been the least restrictive measure which could have been chosen. In doing so, it has discussed the alternatives to non-consensual adoption which may have been as equally effective as non-consensual adoption and which may also have amounted to less of an interference with children's and parents' rights, not only under ECHR Article 8, but also under the UNCRC (e.g. Articles 5, 7, 8, 9, 18, 19, 20 and 21).

This thesis has argued that the approach towards less restrictive alternatives to non-consensual adoption is underdeveloped and that greater clarity and a consistent use of the proportionality principle are needed to provide optimal protection for children's and parents' rights. This thesis has considered how the proportionality principle can be applied in cases where alternatives to adoption may be available and has distinguished

between cases where children can be returned to their parents safely and cases where children cannot be returned to them.

7.2 Main Research Findings

The main findings from this research are based on an analysis of the relevant legislation and case law relating to the issue of non-consensual adoption. In particular, the case law of the European Court of Human Rights has been of crucial importance when assessing the circumstances in which non-consensual adoption might, or might not be, a proportionate measure. In non-consensual adoption cases, such as *R.M.S. v. Spain*,[996] *Zhou v. Italy*[997] and *Pontes v. Portugal*,[998] the ECtHR observed that less restrictive alternatives were available to the State, but that despite the existence of these alternatives, the national authorities in these cases nonetheless chose to place the children for adoption without parental consent (see Chapter 3). An important conclusion reached by the ECtHR in these cases was the importance of providing State assistance (such as financial or practical assistance including housing and support from social workers) to ensure that the States in question satisfied their positive obligations under ECHR Article 8 to reunite the children with their parents (see Section 3.4.5). These decisions make it clear that the State is compelled to use financial and practical resources to attempt to reunite children and parents, where this is possible. The difficulty is that, due to the loosely defined nature of Member States' positive obligation under Article 8, it is unclear the extent to which national authorities must actively assist and support families in staying together before determining that it is in a child's best interests to be removed into care and placed for adoption without parental consent. However, factors (such as the existence of any form of State intervention, the length of time for which State assistance was offered and the potential effectiveness of the type of State assistance offered) ought to be important factors which make it more or less likely that the State has satisfied its positive obligations under ECHR Article 8.

In other words, in this thesis, it has been argued that if the State does not provide practical or financial assistance to families before removing children from their parents and placing them for adoption, this may in some cases amount to a failure of the State's positive

[996] (Application no. 28775/12) 18 June 2013.
[997] (Application no. 33773/11) 21 January 2014.
[998] (Application no. 19554/09) 10 April 2012.

obligation to provide assistance under ECHR Article 8. In contrast, where the State has intervened to protect children from harm and has provided birth parents with assistance which has proven to be ineffective, then in the absence of other less restrictive alternatives (such as kinship care) non-consensual adoption is likely to be the least restrictive measure available which will effectively protect a child's welfare (see Section 3.5 and Chapter 5).

This thesis has argued that, in some cases, both kinship care and special guardianship may be as equally effective as adoption (see Chapter 5). Thus, kinship care may be appropriate to enable children to maintain relationships with their birth relatives. Kinship care also has the potential to protect children's ECHR and UNCRC rights (e.g., the child's right to know his or her identity under UNCRC Article 8). This thesis shows that social, psychological and educational outcomes for children in kinship care are comparable to the outcomes for children who have been adopted (see Section 5.3). This is a strong argument in favour of increasing the use of kinship care since, not only is it a potentially less restrictive alternative to non-consensual adoption, it may also protect children's rights. This thesis has, however, drawn attention to the potential barriers which kinship carers may face in becoming carers and it has argued that these problems should be addressed at policy level by the government. It has been argued in this thesis therefore that kinship care may, in some cases, be an equally effective alternative to non-consensual adoption as it provides greater recognition of and protection of children's rights under ECHR Article 8 and UNCRC Article 8. For this reason, the UK government needs to invest in kinship care so as to ensure that information is available to potential kinship carers and so that they can readily access practical and financial support which they are entitled to receive (see Section 5.3.3).

This thesis has acknowledged that special guardianship orders (SGOs) are also an important potential alternative to non-consensual adoption (see Section 5.4). SGOs are often made in favour of birth relatives who, as considered above, may provide care for children who cannot be raised by their birth parents. As considered above, the outcomes of kinship care are comparable to the outcomes for non-consensual adoption. Thus, it could be argued that SGOs made in favour of birth relatives may offer similar positive social, educational and psychological outcomes for children. SGOs are also ideal for particular groups of children such as older children or children from different cultures,

including cultures which may not recognise the validity of an adoption arrangement. Although the use of SGOs has been supported by Munby P, they are still less frequently used than non-consensual adoption.[999] This is despite the potential effectiveness of SGOs in protecting children from harm on the one hand and protecting their rights under the ECHR and the UNCRC rights on the other. This thesis has also shown that there has been a growth in the use of concurrent planning. It has discussed the pros and cons of concurrent planning by reference to the Coram Concurrent Planning Project (see Section 5.2.3). In doing so, this discussion has shown that concurrent planning has the potential to protect children's and parents' rights under ECHR Article 8, provided the parenting skills classes and mechanisms for attempting to reunite children with their birth parents or to place them with other relatives, are effective.

Another matter which this thesis has addressed is whether contact between parents and their children should be promoted more in non-consensual adoption cases (see Section 5.5). It has been argued in this thesis that contact post-adoption might be appropriate in some cases, thereby rendering some non-consensual adoptions more proportionate. In other words, non-consensual adoption with direct contact might protect children's best interests and protect their rights under UNCRC Article 8 (the right to know one's identity) and prevent violations of parents' and children's rights under ECHR Article 8. This thesis has acknowledged, however, that in some cases of non-consensual adoption it might be contrary to children's best interests for post-adoption contact to take place. In some circumstances, facilitating such contact could be traumatic, and not in children's best interests and could violate their rights under the ECHR (e.g. Article 3) and under the UNCRC (e.g. Article 6 which protects the child's inherent right to life and Article 19 which concerns the child's right to be protected from abuse). In cases where children openly express wishes to State officials that they do not wish to live with their parents or maintain contact with them, to pursue contact might also violate children's rights (e.g. under UNCRC Article 12 which protects the child's right to be heard). In cases where children are likely to be harmed by contact with their birth parents, less restrictive measures such as non-consensual adoption with direct contact or even special guardianship would clearly not be appropriate.

[999] J. Munby, 'Special Guardianship: A Judicial Perspective', in L. Jordan and B. Lindley, *Special Guardianship: What Does it Offer Children who Cannot Live with their Parents?* (London: Family Rights Group, 2006).

Despite the fact that there are circumstances where non-consensual adoption is a a necessary and proportionate interference with children's and parents' rights, there are circumstances where a non-consensual adoption might be regarded as a disproportionate measure. Such situations could include cases where parents' circumstances have changed so dramatically that they have become able to parent their children, or may be able to do so with appropriate State assistance (see Section 5.2). In circumstances where children cannot be returned to their family home without harming children's best interests (and potentially violating their rights under ECHR Article 3 and UNCRC Articles 6 and 19), this thesis has shown that it may still be possible for children to be placed in kinship care (see Section 5.3).

Another argument put forward in this thesis is that there is insufficient discussion and analysis of children's rights in the context of judicial decision-making in non-consensual adoption cases. Thus it has been shown that, although children's best interests (and in some cases) children's rights have been analysed by the courts in England and Wales and by the European Court of Human Rights, these courts are somewhat reluctant to refer expressly to children's rights. Although the courts in England and Wales and on appeal before the UK Supreme Court refer to children's rights in general terms, in some cases (e.g. *In the Matter of B*[1000]), they do not always explain or analyse what these rights may be or what State action might be required to afford protection to these rights (see Chapter 4).

It has therefore been argued in this thesis that interpreting children's best interests in the light of children's rights (including their UNCRC rights) would have a significant impact in non-consensual adoption proceedings. It would mean that children's relationships with their parents, siblings and other relatives would be better protected in that the State (whether it be the courts and/or local authorities) might be more willing to consider the use of less restrictive alternatives to non-consensual adoption (such as State assistance, kinship care or special guardianship). In other words, it has been argued that children's rights under the ECHR (e.g. Articles 2, 3 and 8) and under the UNCRC ought to be important considerations when the courts and local authorities are determining whether or

[1000] [2013] UKSC 33.

not a non-consensual adoption is proportionate. Thus, instead of focusing, in the context of non-consensual adoption, on whether violations of parental rights can be justified on the basis of children's best interests, the rights of children themselves should be taken into consideration when determining whether a non-consensual adoption is a proportionate measure. If the ECtHR was more willing to expressly consider children's rights then the courts in the UK and elsewhere in Europe might be more willing to do so.

Using the language of rights of children rather than children's best interests would arguably 'sharpen' the courts' consideration of the different parties' interests.[1001] Referring to both the ECHR rights of parents and children and the UNCRC rights of children would afford greater recognition to the interests of birth parents and children. It would also allow for a more thorough consideration of children's own rights to know and be raised by their birth parents (under UNCRC Articles 7 and 9). The UNCRC ought to be considered by the ECtHR and the domestic courts as it forms part of international law. An important aspect of the UNCRC which is crucial for the purposes of this thesis is that it can be implied from various UNCRC provisions that less restrictive alternatives to non-consensual adoption ought to be chosen, where possible. This thesis has argued, in particular, that UNCRC Article 21 is an important right in adoption cases and requires a more detailed analysis beyond a bare welfare test, when domestic authorities are deciding whether or not a non-consensual adoption ought to take place.[1002] In other words, a welfare analysis should include a consideration of important UNCRC rights such as Article 7 (the right to know and be cared for by one's parents) and Article 9 (the right not to be separated from one's parents). Furthermore, in the light of the indivisibility of the provisions of the UNCRC, it can be argued that the collective family rights which are protected by UNCRC Article 5 are relevant when determining whether or not an adoption ought to take place. In other words, key provisions in the UNCRC (including Articles 5, 7, 8, 9, 18, 20 and 21) as well as the UN Guidelines for the Alternative Care of Children all support the argument that both parents' and children's rights should be considered in non-consensual adoption cases, and less restrictive alternatives to non-consensual adoption ought to be explored and, where appropriate, implemented (see Chapter 2).

[1001] David Nelken 'Choosing rights for Children' in Gillian Douglas and Leslie Sebba, *Children's Rights and Traditional Values*, (Hants: Dartmouth Publishing, 1998) p325.
[1002] Brian Sloan, 'Fostering and Adoption as a Means of Securing Article 6 Rights in England' [2015] 26 *Stellenbosch Law Review* 363 at 370-371.

A particular issue in determining when less restrictive alternatives to non-consensual adoption may be more proportionate, is the extent to which State resources have influenced pro-adoption policy in England and Wales. Existing pro-adoption policy is, in part, based on the premise that non-consensual adoption is less expensive when compared with alternatives such as State assistance (see Section 5.6). This thesis has argued, however, that the cost of non-consensual adoption compared with other alternatives is not clear-cut and that further investigation needs to be undertaken to determine how cost-effective non-consensual adoption is compared with its alternatives. Just because parents have failed to fulfil their duties in respect of their children, thereby making State intervention to protect children a necessity, does not mean that non-consensual adoption is always necessary or proportionate. In other words, there may be cases where parents are able to fulfil their duties with the help of the State (see the discussion in Chapter 5). When UNCRC provisions (e.g. Articles 7, 8, 9, 18, 19, 20 and 21) are read in conjunction with the best interests principle in UNCRC Article 3, they can be seen to emphasise that Member States ought to use the least restrictive measure possible to protect children from harm (see Chapter 2) which may include the provision of assistance from the State.

It has been concluded that in cases of severe neglect and abuse where ECHR Articles 2 and/or 3 would be engaged, that non-consensual adoption may be a proportionate measure (see Chapter 3). Nevertheless, it has been shown that there are cases where non-consensual adoption might not have been a proportionate measure. In some of these cases it can be argued that the children could have remained in the care of their parents with appropriate State assistance in place, or that kinship care or non-consensual adoption with direct contact may have been less restrictive alternatives which may have been as equally effective as non-consensual adoption. If such alternatives had been thoroughly explored but found to be unsuitable as not being in the best interests of the child, then a non-consensual adoption would be shown to have been both necessary and proportionate. In other words, such an adoption would not be a violation of the human rights of children and their families. The following section of this chapter considers some suggestions for further research relating to the issue of non-consensual adoption.

7.3 Suggestions for Further Research

This study has been limited by the nature of the methodology used which has been library-based rather than the product of empirical research conducted by the writer of this thesis. This study has also been adversely affected by the lack of availability of judgments from the lower courts in England and Wales. Access to these judgments would have made it possible to assess the extent to which the lower courts consider children's rights and whether or not less restrictive alternatives to non-consensual adoption might have been available in these cases. The analysis, in this thesis, of cases from the High Court and the Court of Appeal in England and Wales, the UK Supreme Court and the European Court of Human Rights has shown that there is a lack of consistency in examining alternatives to non-consensual adoption. Furthermore, by the time that some of these cases have reached the appeal courts, it is potentially in children's best interests to remain with their adoptive parents. This can be seen, for example, in the case of *Webster and another v. Norfolk County Council*[1003] (see Section 4.3).

The limitations of this study (see above) have made it difficult to assess the true extent of the numbers of unnecessary non-consensual adoptions, and whether or not the claims, like that of John Hemming (that over 1,000 unjustified non-consensual adoptions take place every year) are true.[1004] Although a small-scale case study has been undertaken by Luckock and Broadhurst examining the procedural approaches taken by the lower courts in non-consensual adoption cases,[1005] more work needs to be undertaken to establish whether the concerns highlighted by high-profile figures such as John Hemming and the media[1006] can be proved via a quantitative and qualitative analysis of court judgments. Such analysis could involve examination of the courts' references to the ECHR, the UNCRC and an examination of the quality of the best interests analysis. Further research would be welcome, particularly in the light of concerns that the lower courts are not

[1003] [2009] EWCA Civ 59.
[1004] 'MP claims 1,000 children 'wrongly' adopted every year' (13 December, 2011) http://www.bbc.co.uk/news/uk-politics-16157124 ; Children first: the child protection system in England, Fourth Report of Session 2012-13, Volume II Q370-374.
[1005] Barry Luckock, and Karen Broadhurst, *Adoption cases reviewed: an indicative study of process and practice* (Department for Education, 2013).
[1006] 'MP claims 1,000 children "wrongfully" adopted every year' (13 December 2011) http://www.bbc.co.uk/news/uk-politics-16157124
'Rape victims children face 'barbaric' adoption' (27 March 2014) http://www.bbc.co.uk/news/uk-26768256
'Families flee UK to avoid forced adoption' (6 October 2001) http://www.bbc.co.uk/news/uk-29502832
'Adoption: Thousands of children forcibly taken into care' (2 February 2015) http://www.bbc.co.uk/news/uk-31089412

following Court of Appeal and Supreme Court decisions which emphasise that non-consensual adoption is to be regarded as a last resort.[1007]

An important question raised in this thesis is whether or not non-consensual adoptions are more cost-effective than less restrictive alternatives such as kinship care or the provision of practical or financial State assistance. Although this thesis has not explored all of the possible alternatives to non-consensual adoption and compared the cost-effectiveness of these alternatives, it has shown that research findings thus far on the cost-effectiveness of non-consensual adoption appear to have been contradictory (see Section 5.6). Less restrictive alternatives, which are as equally effective as non-consensual adoption, may in some cases afford better protection to children's and parents' rights (including those under ECHR Article 8, for example). If these alternatives are less expensive, and in certain cases are less likely to violate children's and parents' rights, it is difficult to justify not using these alternatives. This thesis has argued that the fact that insufficient State resources are available to provide assistance to birth parents or kinship carers, is in part due to the government's decision to redirect funding from State assistance towards the promotion and provision of a non-consensual adoption policy for children in care.[1008] The continued existence of the government's pro-adoption policy fails to recognise that non-consensual adoption may not be in the best interests of all children in care and that such a measure may, in some cases, have the potential to violate children's ECHR and UNCRC rights as well as parents' ECHR rights (see Chapter 4).

This thesis has referred to the growth in the use of concurrent planning and, in particular, it has emphasised the need for further scrutiny of concurrent planning to determine whether it is as equally effective as non-consensual adoption (see Section 5.2.3). In the light of the likely growth in the use of concurrent planning and the lack of independent research which has been undertaken to assess its effectiveness, further research needs to be conducted to ensure the effectiveness of concurrent planning schemes and to establish whether such schemes are human rights compliant under the ECHR and the UNCRC.

7.4 A Final Word

[1007] Lucy Sprinz, 'Adoption in 2014' [2014] *Fam Law* 335.
[1008] See for example, the Education and Adoption Bill 2015-2016.

This thesis has discussed *Webster and others v. Norfolk County Council*[1009] in depth (see Chapters 1 and 4) and highlighted the injustice and potential lack of proportionality of the non-consensual adoption of the Websters' three children. The analysis, in this thesis, of *Webster* and other non-consensual adoption cases heard in the courts in England and Wales and in the European Court of Human Rights has revealed the complexity in determining the circumstances in which non-consensual adoptions might or might not be a proportionate interference with children's and parents' rights under ECHR Article 8 (the right to respect for private and family life) (see Chapters 3 and 4).

A conundrum which has been highlighted in this thesis is that if the State does not put sufficient effort into reuniting children with their parents, this might constitute a violation of the children's and parents' rights under ECHR Article 8, but if children are returned to an abusive family situation this might constitute a violation of children's rights under ECHR Article 3 (the right to freedom from torture or inhuman or degrading treatment)[1010] or even ECHR Article 2 (the right to life) (see Chapters 3 and 5). Local authorities and the courts therefore have a difficult balancing act to undertake when considering how to protect children from significant harm, while at the same time ensuring that the rights of children and their parents are not violated. When a child has been severely neglected and/or abused by his or her parents, removal from the family home is likely to be a necessary measure to protect the child's rights under ECHR Article 3 and also under ECHR Article 2. Thus, in such cases, where it can be shown that the parents are unwilling or are unable to change the behaviour(s) which have caused significant harm to a child, a more serious intrusion into family life such as a non-consensual adoption may be a necessary and proportionate measure.

It has been argued in this thesis, however, that the existence of good reasons for removing children from the family home and for deciding that they should not be returned into the care of their parents, does not mean that a non-consensual adoption can necessarily be regarded as a proportionate measure (see Chapter 4). This thesis has argued throughout that, in certain cases, less restrictive measures of intervention may strike the appropriate balance between protecting children's and parents' rights on the one hand and children's best interests on the other. The issues raised in this thesis necessitated untangling

[1009] [2009] EWCA Civ 59.
[1010] *In the Matter of J (Children)* [2013] UKSC 9 at para 1 *per* Lady Hale.

complex matters and showed the impact of such a draconian measure on children, parents and other birth relatives. However, despite the serious injustices which have occurred in the context of non-consensual adoption, as highlighted by Mr and Mrs Webster's case, and the need for consideration of less restrictive alternatives, adoption still has an important role to play so as to protect children in care from significant harm and to provide these children with lifelong security and stability.

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