ALLIANCE DEFENSE FUND

Introduction

1. The Alliance Defense Fund [**ADF**] is an international not-for-profit legal association of more than 1700 allied lawyers, dedicated to the protection of the traditional family and other human rights. ADF is accredited with the United Nations, European Parliament, European Fundamental Rights Agency and the Organization for Security and Co-operation in Europe. Having been involved in nearly 20 cases before the European Court of Human Rights, many in the field of educational and children's rights, ADF is among the leading experts in this area of human rights legislation.
2. The issues proposed in the new "children's rights" bill are of the highest institutional concern to ADF. ADF opposes the proposed legislation on two grounds: (1) redundancy and lack of legal clarity; (2) an unlawful curtailment of parental rights. ADF hereto forth registers its strong objection to the adoption of the new "Child Act".

I. Redundancy and Lack of Legal Clarity

3. A serious question arises as to the necessity of proposing new legislation regarding the rights of the child under Bulgarian law. First and foremost, the Law for the Protection of the Child of 2000 provides more than sufficient legal protection and legal certainty with regard to the rights of the child. The law, including the creation of a state agency to monitor and protect children's rights under the law, makes the adoption of further legislation nonsensical and even counter-productive because of the competing interests established in the two pieces of legislation.
4. In addition, Bulgaria's family code provides further detailed protections for the rights of the child and parental rights. Moreover, the Civil Procedure Code, the Law for Protection

Against Discrimination, the Law on People's Education, and the Law for Protection against Domestic Violence are all laws that already contain provisions that the draft-law attempts to regulate.

5. The proposed legislation would further not withstand the scrutiny of a challenge under the European Convention of Human Rights and its collective drafting principles because of lack of legal certainty. For the state to lawfully restrict freedoms guaranteed by the European Convention of Human Rights, it must meet three criteria: (a) the interference must be prescribed by law; (b) the interference must have a legitimate aim; and (c) the interference must be necessary in a democratic society. Generally speaking, the interference in question must be the act of a state[1]; however, the European Court of Human Rights has held that any *inter partes* intervention by a court constitutes interference if this intervention challenges a *de facto* situation safeguarded by the Convention[2] or if it gives effect to law that conflicts with prevailing European Convention law[3].

(a) <u>Prescribed by Law</u>:

6. In order to be prescribed by law, the law in question must be accessible and foreseeable in its effects. It thus cannot suffer from vagueness: the "quality" of the law must clearly and precisely define the conditions and forms of any limitations on basic Convention safeguards and must be free from any arbitrary application.[4]

[1] ECHR, 23 November 1993, *A v. France*, Series A, No. 277-B, § 36.
[2] ECHR, 23 June 1993, *Hoffman v. Austria*, Series A, No. 255-C: JDI, 1994, p. 778, § 29.
[3] ECHR, 20 April 1993, *Sibson v. the United Kingdom*, Series A, No. 258-A, § 27.
[4] See: ECHR, 26 April 1979, *Sunday Times v. the United Kingdom*, Series A, No. 30 § 49 *et* seq; ECHR, 24 March 1998, *Olsson v. Sweden*, Series A, No. 130 § 61f; *Kruslin v. France*, *op. cit.*, § 36. Also *cf.* ECHR, 22 November 1995, *SW v. the United Kingdom*, Series A, No. 335-B, § 36, on how the development of criminal law by the courts should be reasonably foreseen.

7. The Court, in *Metropolitan Church of Bessarabia* held that domestic law, to meet the clarity requirement, must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention: "in matters affecting fundamental rights it would be contrary to the rule of law- one of the basic principles of a democratic society enshrined in the Convention- for a legal discretion granted to the executive to be expressed in terms of an unfettered power; consequently the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise."[5]

8. The proposed "Child Act" creates unnecessary legislation which is at odds with existing and well established law. As such, the clash of rights inherent in the new legislation provides a lack of legal certainty unacceptable under Convention law. Precisely stated, under the new legislation, those affected by the law would be unable to foresee the legal requirements of the law and would therefore be unable to govern their actions appropriately. It would therefore violate numerous articles of the European Convention of Human Rights including but not limited to Articles 8, 9 and 14.

(b) <u>Legitimate Aim</u>:

9. The second prong of the analysis of interference is whether the interference in question pursues a legitimate aim. Restrictions on rights guaranteed by the European Convention of Human Rights must be narrowly tailored, must be adopted in the interests of public and social life as well as the rights of other people within society.[6] The creation of unnecessary,

[5] ECHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, Reports 2001-XII, § 109: JDI 2002, p. 313.

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

redundant and overly restrictive legislation cannot be said to serve a legitimate aim. The state has a significant interest in the best interests of the family; however, the only purpose the proposed legislation seems to serve is the appeasement of outside special interest groups.

10. For example, under Article 34(3) of the proposed Act, the argument that a legitimate aim is being pursued in regulating mandatory school attendance, both for public order and the protection of health and morals, is far from convincing and again reflects an uninformed view of home education. As home education has become a staple among Western democracies, it cannot be said that laws forbidding education at home serve a legitimate aim; particularly where either social conditions or curricula are so damaging to the ability of parents to raise their children according to their religious or philosophical convictions, that the guarantee provided by the second clause of Protocol 1, Article 2 is obliterated.
11. Moreover, Article 29(1) providing for "sexual and reproductive" health at the pre-school level ultimately hurts the health and morals of very young children and does damage to the Protocol 1, Article 2 rights of parents. Article 29(2) calling for participation of special interest groups, ultimately with a financial interest in the provision of abortion services, unduly sexualizes children at an unconscionably young age. Article 29 serves absolutely no legitimate interest.

(c) <u>Necessary in a Democratic Society</u>:

12. The final criterion that must be met for government interference into Convention protections to be legitimate is that the interference in question must be necessary in a democratic society. The European institutions have stated that the typical features of a democratic society are

pluralism, tolerance and broadmindedness.[7] For such an interference to be necessary in a democratic society it must meet a pressing social need whilst at the same time remaining proportionate to the legitimate aim pursued.[8]

13. The state has a duty to remain impartial and neutral, since what is at stake is the preservation of pluralism and the proper functioning of democracy, even when the state or judiciary may find some of those views irksome.[9]

14. Under the proposed "Child Act" Interference with parental rights and family rights, both under Article 8 and Protocol 1, Article 2 of the Convention are significant. The mandatory requirement of state education and the prohibition of home education under Article 34(3), as will be detailed in length below, cannot be deemed to be necessary in a democratic society. Article 29 and the promotion of "sexual and reproductive rights" to children at very vulnerable ages is neither necessary in a democratic society nor proportionate to any legitimate aim in promoting the best interests of the child. Rather, the provision does violence to the health and morals of young children and violates the rights of parents as the primary caregivers and educators of their own children.

15. Article 11 of the proposed Act is not only not necessary in a democratic society; it in fact violates international law by promoting abortion targeting the disabled. Such eugenic policies cannot be tolerated under Article 2, Article 3 or Article 14 of the Convention.[10]

---

[7] ECHR, 30 September 1976, *Handyside v. the United Kingdom*, Series A, No. 24, § 49 *et seq*.

[8] ECHR, *Sunday Times v. the United Kingdom*, *op. cit.*, § 63 *et seq*.

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

[10] Regarding interference with the right to life, *cf. V.C. v. Slovakia*, Application no. 18968/07, Council of Europe: European Court of Human Rights, 8 November 2011, available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=V.C.%20%7C%20Slovakia&sessionid=82225410&skin=hudoc-en [accessed 22 November 2011].

16. In conclusion, it is clear that the lack of necessity, lack of legal precision and foreseeabilty, coupled with the redundancy of the proposed "Child Act" require that the legislation not be adopted.

II. Parental Rights

(a) <u>Home Education:</u>

17. Article 2 of the First Protocol specifies that the state shall respect the right of parents to ensure education and teaching in conformity with their own philosophical convictions. The scope of this clause is broad and encompasses all methods of knowledge transmission and every type of educational structure including, moreover, those outside the school system.[11] The rights of parents to educate their children according to their own philosophical beliefs and desires as to what may be in their child's best interest must be safeguarded in order to provide the possibility of pluralism in education, this being essential for the preservation of a democratic society. Therefore, Article 34(3) of the proposed Act is not in conformity with international legal standards.

18. The term "philosophical convictions" must be interpreted by the Convention as a whole, thus being worthy of respect in a democratic society and not incompatible with human dignity.[12] Philosophical beliefs should be extended to include pedagogical beliefs; those being the parents' beliefs as to the best way of educating their children.

19. Unlimited freedom of choice with regard to the means of education is obviously not what is envisioned by Article 2 of the First Protocol; however, the Court has held that the freedom to

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

[12] ECHR, 25 February 1982, *Campbell and Cosans v. the United Kingdom*, Series A, No. 48, § 36: CDE, 1986, p. 230.

choose by parents the means of their child's education is a necessity. This interest must also be balanced against what is in the best interests of the child.[13]

20. The Grand Chamber of the European Court of Human rights, in *Folgero and Others v. Norway*[14], held that exemptions should be allowed for students from religious education where parent's religious beliefs were offended. The natural progression of this holding is to allow for exemption from education which parents believe is damaging to their Convention rights and which retard the educational development of their children.

21. As the Court has held: "It is in the discharge of a natural duty towards their children – parents being primarily responsible for the "education and teaching" of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education."[15]

22. Based on the twin needs of ensuring that parents' wishes are met as to the education and best interests of their children, and that the State ensures objective compliance with academic standards as mandated by the Ministry of Education within Bulgaria, home education serves as not only a viable option, but a preferential option under circumstances as currently exist within the Bulgarian education system. A prohibition of home education would not be proportionate to the best interests of children in Bulgaria and cannot be balanced with the respect for parental rights called for by Protocol 1, Article 2.

[13] ECHR, 8 September 1993, *Bernard v. Luxembourg*, 75 DR 57.

[14] Application No. 15472/02, Judgment of 29 June 2007. Affirmed most recently in *Case of Hasan and Eylem Zengin v. Turkey*, Application No. 1448/04, Judgment of 9 October 2007.

[15] ECHR, *Case of Hasan and Eylem Zengin v. Turkey*, *op. cit*., § 50.

23. Numerous international documents confirm parents as primary and principal educators of their children. By that fact alone, parents have the greatest rights and the greatest responsibility in the education of their children. State institutions should assist them in this task; schools must seek the cooperation of parents and should not in any case artificially displace the rights of children and the rights of parents by imposing on the children an education contrary to the one they receive from their parents.

24. The Universal Declaration of Human Rights, Article 26 (3), states that, "Parents have a prior right to choose the kind of education that shall be given to their children."

25. The United Nations Convention on the Rights of the Child clearly states that among the most important rights of the child, besides the right to life, are precisely the right to parental love and the right to education. The Convention also explicitly notes that the rights of parents are not juxtaposed to the rights of children. Moreover, the parents, being the ones who love their children most, are those most called upon to decide on the education of their children. The pertinent excerpts of the Convention read thus:

> 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. [Emphasis added]
>
> Article 18: 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. **Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.** The best interests of the child will be their basic concern.
> 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, **States Parties shall render appropriate assistance to parents and legal guardians** in the performance of their child-rearing

> responsibilities and shall ensure the development of institutions, facilities and services for the care of children.[Emphasis added]

26. Equally pertinent, the International Covenant on Civil and Political Rights (ICCPR), states in Article 18 (4) that, "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

27. Further, the Convention against Discrimination in Education holds in Article 5(1)(b) that it is essential that States, "respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction."

28. The European Convention of Human Rights, Protocol 1, Article 2, clause mirrors this same idea: "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." The term philosophical convictions are interpreted by the European Convention of Human Rights as a whole[16] and extend to include pedagogical beliefs; those being the parents' beliefs as to the best way of educating their children.

[16] ECHR, 25 February 1982, *Campbell and Cosans v. the United Kingdom*, Series A, No. 48, § 36: CDE, 1986, p. 230.

29. Undoubtedly therefore parents must be at the centre of the decision making process when it comes to curricula which deeply affect the value system of the child. The school systems should therefore work on harmonizing institutional education with parental upbringing. Home education must be an option provided to parents precisely because it serves the best interests of the child.

(b) <u>Private School Curriculum</u>

30. Freedom of choice for parents is a necessity. International treaty law (including the European Convention of Human Rights) guarantees respect for parental upbringing of children according to their religious and philosophical convictions. The safeguarding of the possibility of pluralism in education is essential for the preservation of a democratic society.[17] Parents must be able to choose their children's schools, whether public or private.[18] While state subsidization of private or confessional schools is not guaranteed by Protocol 1, Article 2[19], the right to establish private or confessional schools is.[20]

31. In private schools, religious and philosophical teaching may be entirely independent with the caveat that the state may lay down certain conditions relating to the qualifications of teachers, the teaching of certain subjects or the internal organizations of schools.[21] While religious indoctrination is forbidden in schools[22], the state does not have any discretion to determine whether religious beliefs or the means used to express those religious beliefs is

[17] ECHR, *Kjeldsen, Busk Madsen and Pederson v. Denmark*, Judgment of 7 December 1976, Application No. 5095/71, 5920/72, 5926/72, § 50.
[18] ECHR, 5 December 1990, *Graeme v. the United Kingdom*, 64 DR 158.
[19] *See e.g.*: ECHR, *X and Y v. the United Kingdom, App. No. 9461/81*, Eur. Comm'n H.R. Dec. & Rep. 210 (1982).
[20] *Id.*
[21] *Id.*
[22] *Kjeldsen, Busk Madsen and Pederson v. Denmark, op. cit.*

legitimate.[23] The state may only demand that any teaching be provided in an objective, critical and pluralistic manner.[24] Nor does the fact that private or confessional schools exist excuse the state of respecting the rights of parents with regard to the raising of their children according to their own religious and philosophical beliefs.[25]

32. The requirement to maintain religious or confessional schools is of fundamental importance to the maintenance of a religiously pluralistic society.[26] The European Court of Human Rights has elevated the right to freedom of religion as one of the cornerstones of a democratic society.[27] The Court has held that religious freedom is one of the vital elements that go to make up the identity of believers and their conception of life.[28] Article 9 has taken the position of a substantive right under the European Convention.[29]

33. The freedom to choose one's faith and live it out is an inviolable freedom protected under the European Convention. Discriminatory treatment of a religion for historic, ethnic or content based reasons, which has the effect of diminishing this freedom of choice is prohibited. A mandatory curriculum for all schools, including confessional schools, would be tantamount to indirect discrimination of religious belief based on the elimination of plurality in education and the stifling of parental rights under the second clause of Protocol 1, Article 2

[23] ECHR, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749, § 47.
[24] *Kjeldsen, Busk Madsen and Pederson v. Denmark, op. cit.*, § 53.
[25] *Id.*, at 25, 28.
[26] *See e.g.*: Natan Lerrner, *Group Rights and Discrimination in International Law*, Chapter 10 (1991) noting the overwhelmingly strong lobby in favor of guarantees for religious education under the *Minorities Treaty* established by the League of Nations.
[27] ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658.
[28] ECHR, 20 September 1994, *Otto-Preminger-Institut v. Austria*, Series A, No. 295-A: JDI, 1995, p. 772.
[29] *Kokkinakis op.cit.*; ECHR, 23 June 1993, *Hoffmann v. Austria*, Series A, No. 255-C: JDI, 1994, p. 788; ECHR, 20 September 1994, *Otto-Preminger-Institut v. Austria*, Series A, No. 295-A: JDI, 1995, p. 772; ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, *op. cit.*, p. 749.

34. Protocol 1, Article 2 does not allow a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire state education programme.[30] That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account".[31]
35. As the Court held, "It is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education."[32] Second and equally pertinent, that "democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."[33]
36. Freedom of choice in education precisely means that diverse curricula may be taught by confessional schools under the European Convention of Human Rights.
37. The right to education and respect for parental authority over their children assumes some level of freedom. One aspect of this right is that State schools cannot exercise a monopoly in education. As Article 13 of the International Covenant on Economic, Social and Cultural Rights dictates [ICESCR]: "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their

[30] *Kjeldsen, Busk Madsen and Pederson v. Denmark*, *op. cit.*, § 52. See also: *Case of Folgero and Others v. Norway*, App. No. 15472/02, judgment of 29 June 2007., § 84(c).
[31] *Case of Folgero and Others v. Norway*, *op. cit.*.
[32] *Id*., § 84(e).
[33] *Id*., § 84(f).

children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions."[34]

38. Therefore, while Bulgaria may set minimum standards in education it cannot create a national curriculum by which all freedom of educational choice will be eliminated. Nor can it create a curriculum which would stifle religious teaching or exercise within education. Such a deprivation would likely hinder the evolving capacities of the child and be to the detriment of the best interests of the child standard set in international law.[35] Furthermore, as the Council of Europe has recently stated that: "history has proven that violations of academic freedom…have always resulted in intellectual relapse, and consequently in social and economic stagnation."[36]

39. Both the European Court of Human Rights and the ICESCR guarantee the right of establishment of private schools.[37] The right to establish private educational institutions also assumes the right of parents to choose between public and private education; or between different private or confessional schools. Again, the distinction would be illusory and therefore meaningless is some level of academic freedom was not allowed in the development of school curriculum.

---

[34] United Nations, *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966.

[35] *See e.g.*: United Nations, *Convention on the Rights of the* Child, , G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 9.2.1990, Article 14.

[36] Parliamentary Assembly of the Council of Europe, Recommendation 1762, *Academic Freedom and University Autonomy*, 30 June 2006, § 4.3.

[37] *See e.g.*: ECHR, 5 December 1990, *Graeme v. the United Kingdom*, 64 DR 158; ECHR, *X and Y v. the United Kingdom*, *App. No. 9461/81*, Eur. Comm'n H.R. Dec. & Rep. 210 (1982). *See also*: ICESCR, *supra n.* 21, Article 13(4).

40. In conclusion, noting the language of ICESCR in Article 13(4), that private schools may only be required to set minimum standards of conformity with state mandated education. This means that while a requirement that a private school may have broadly equivalent standards of curriculum, it cannot unduly interfere with the content being taught in privately established schools as this would clearly set a maximum standard rather than minimum standard and be violative of Bulgaria's obligations under the ICESR.[38]

(c) Custodial Taking of Children and "Social Support Agency"

41. The Alliance Defense Fund has serious concerns regarding Chapter IV and V of the "Child Act" regarding custodial taking of children with relation to the Bulgarian Social Support Agency. ADF again reiterates the redundancy of these provisions in light of existing regulations, primarily the Law for the Protection of the Child of 2000. Furthermore, the liberality and possibility for abuse of discretion under the proposed Act violates parental rights under Article 8 of the Convention.

42. Any removal of a child from their natural parent and taking them into public care is a *prima facie* interference.[39] In order to be prescribed by law, a law regarding removal of a child from their parents' care must be accessible and foreseeable in its effects. It thus cannot suffer from vagueness; that the "quality" of the law must clearly and precisely define the conditions and forms of any limitations on basic Convention safeguards and must be free from any arbitrary application.[40] A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its

[38] ICESCR, *supra n*. 21, Article 13(4).
[39] See e.g. ECHR, *Olsson v. Sweden*, (No 2) (1992) 17 EHRR 134, [1992] ECHR 13441/87.
[40] See: ECHR, 26 April 1979, *Sunday Times v. the United Kingdom*, Series A, No. 30 § 49 *et* seq; ECHR, 24 March 1998, *Olsson v. Sweden*, Series A, No. 130 § 61f; *Kruslin v. France*, Series A, No. 176-A, § 36.

exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.[41] The proposed legislation, both with regard to the lack of foreseeabilty for parents and the unlawful scope of powers provided to Bulgarian social services, fails to meet the standards of being prescribed by law.

43. ADF acknowledges the wide latitude given to States by the European Court of Human Rights in this area, and does not dispute that the taking into wardship by the State for the protection of a child's health and morals is a legitimate aim in limited circumstances. What is at issue is that in determining this aim, the Government has impermissibly provided seemingly unbridled discretion to Bulgarian social services in violation of parental rights. The state cannot supplant the right of parents to be the primary caregivers of their children through broad powers conferred upon the Social Services Support agency.

44. Such powers are consistent with being necessary in a democratic society. The term "necessary in a democratic society" has not been deemed to be synonymous with "indispensable"…neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".[42] The Court has elaborated, stating: "the notion of necessity implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued."[43]

45. The Court has stated that two of the defining characteristics of a democratic society are tolerance and broadmindedness.[44] Implicit in Article 8, it is stressed, that the rule of law in a

[41] See: ECHR, *the Gillow judgment* of 24 November 1986, Series A no. 109, p. 21, § 51.
[42] *Handyside v. the United Kingdom*, 5493/72 [1976] ECHR 5 (7 December 1976).
[43] *Olsson, op. cit.*.
[44] ECHR, *Dudgeon v. the United Kingdom*, application no. 7525/76, judgment of 22 Oct. 1981, para. 53.

democratic society be given paramount importance and that there be freedom from arbitrary interference with Convention rights. To this extent, the Court has relied on striking a balance between the rights of the individual and the public interest, through the application of the principle of proportionality.[45] The proposed "Child Act" does not meet this burden of proportionality and fails to protect the individual rights of parents from arbitrary removal of their children.

46. The State must take all measures reasonably necessary in the circumstances to enforce parents' rights to custody or access. Where such efforts are inadequate or unsuccessful, and responsibility cannot be attributed to the parents seeking enforcement, then a violation of Article 6+ Article 8 occurs.[46]

47. The Court has frequently stated that: "inherent in the whole Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[47] In its balancing of the rights of the individual and the interests of the State, the Court refrains from substituting its opinion on the merits of an individual case over the judgments of a national court. Nonetheless, its role is, when a case is taken as a whole, to decide whether the authorities had "relevant and sufficient reasons" for taking the contentious measures.[48] The proposal for the new children's laws lacks sufficient safeguards for parents from arbitrary state action. The proposed legislative framework initiates protection not only of children who are at risk, but of all

[45] See e.g. *Dudgeon, op. cit.*, para. 53; *Handyside v. the United Kingdom*, 5493/72 [1976], ECHR 5 (7 December 1976), para. 49; *Young, James and Webster v. the United Kingdom*, 7601/76; 7806/77 [1981] ECHR 4 (13 August 1981), para. 63.

[46] See: *Nuutinen v. Finland*, no. 32842/96, § 108, ECHR 2000-VIII.

[47] *Soering v. the United Kingdom*, 14038/88 [1989] ECHR 14 (7 July 1989).

[48] *Olsson v. Sweden, op. cit.*

children. Such an aggressive interference with the right to privacy and family guaranteed under Article 8 of the Convention, even in cases where no legitimate interest is served, runs afoul of the Convention. No longer are the interests of parents, who are the best suited and most properly placed to raise their children, viewed with respect. Rather the legislation creates a fallacy by suggesting that the best interests of the child are paramount in all decisions regarding their upbringing; where really what the legislation intends is to do is replace an objective standard of the best interests of the child with a state created standard.

48. No proportionality exists between the proposed measures found within the Act and respect for either parental rights or the actual best interests of the child. Factors involved in determining proportionality include the interests to be protected from interference, the severity of the interference and the pressing social need which the State is aiming to fulfill. In regards the interests to be protected, this Court has noted that "the mutual enjoyment by parent and child or each other's company constitutes a fundamental element of family life.[49] The Universal Declaration of Human Rights states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[50]

49. With regard to children already taken into custodial care, authorities must take all necessary steps to facilitate contact as could be reasonably demanded in all the special circumstances of the case.[51] The Court itself has stressed that it has the ultimate task of judging whether a domestic court's refusals to allow access are justifiable under the provisions of paragraph 2.[52]

---

[49] *Elsholz v. Germany*, ECHR decision of 13 July 2000, Report of Judgments and Decisions 2000- VIII, § 43.

[50] *The Universal Declaration of Human Rights*, G.A. Res. 217(A)(III), U.N. Doc. A/810 at 71 (1948), Article 16(3).

[51] *Glaser v. United Kingdom*, App. No. 32346/96 [2000] ECHR (19 September 2000).

[52] No. 7911/77, *X v. Sweden*, in Vol. 12 D. and R., p. 192.

50. The Court has also held on the matter in *Olsson*, that despite the legitimacy of protecting public morals, that it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child; as the [European] Commission rightly observed, it is not enough that the child would be better off if placed in care.[53] Yet the proposed Act supplants the state's view on what is in the best interests of the child, without the necessary neutrality required by the Convention, over the sanctity of the parent/child relationship.

51. The Court has noted the extreme diligence required in such matters because of the danger of irreversible harm to both the family structure and the child.[54] Nor does the perceived or actual delays brought upon by the parents in such matters excuse the government of its duty for expediency.[55]

52. Parents, and where relevant other family members, must be involved in any decision concerning their children to a degree sufficient to provide them with a requisite protection of their interests.[56] Any limit placed on communication or access between parent and child must be based on relevant and sufficient reasons designed to protect the best interest of the child and to further reunification of the family in particular. There must be proportionality between the restrictions imposed on contact and the need served by these restrictions.[57] This goal of child reunification with the family is paramount and must be the underlying basis for all care decisions.[58]

---

[53] *Olsson*, 11 Eur. H.R. Rep. 259 P. 72.
[54] *H v. United Kingdom*, (judgment of 8 July 1987, Series A No. 120, pp. 59-63, para. 85.
[55] *See e.g. Buchholz judgment* of 6 May 1981, Series A No. 42, p. 15, para.50.
[56] Appl. No. 12404/86, *Price v. the United Kingdom*, judgment of 14 July 1988.
[57] *See e.g. Andersson v. Sweden*, judgment of 25 February 1992.
[58] See: *Olsson, op. cit*, para. 81.

53. The Court also placed emphasis on the procedural protections available to the parents, noting that judicial review safeguards against the "arbitrary" use of the power of preventive removal.[59] These safeguards are unfortunately not found within the proposed “Child Act.”

54. The Court also held that Article 8 requires removal to be treated as a temporary measure, to be discontinued as soon as circumstances permitted, and any measures of implementation should have been consistent with the ultimate aim of reuniting the family.[60] Moreover, ease of administration simply could not justify keeping families separate longer or more completely than is necessary; "in so fundamental an area as respect for family life, such considerations cannot be allowed to play more than a secondary role."[61] Nonetheless, the proposed legislation does not sufficiently take into account the fundamental protections afforded to the family in protecting the right of parents’ to their children, and nor does it protect the right of children to their parents’ protection and love.

Conclusion

55. Both with regards custodial taking of children and parental rights in education, the draft Act is deficient in safeguards of fundamental Convention rights. Clearly, with an existing and functioning framework already in place regarding these issues, the current proposed legislation does much more harm than good. Beyond violating the European Convention of Human Rights on several points, the draft legislation would end up being damaging both to the social structure of Bulgaria and to its international reputation. Therefore, the proposed legislation cannot stand.

[59] *Olsson*, id.
[60] *Olsson*, para. 81.
[61] *Olsson*, para. 82.