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CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Constitutional Affairs	
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Adoption without consent

STUDY FOR THE PETI COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

PETITIONS

Adoption without consent

STUDY

Abstract

At the request of the PETI Committee and on the basis of petitions submitted on the matter of adoption without parental consent in England and Wales, this study examines the law and practice in England and Wales, in comparison to other jurisdictions within the European Union. It further details the procedures followed by the English courts in relation to child protection proceedings involving a child who has a connection to another EU Member State, and gives recommendations for cooperation between States in future proceedings.

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EXECUTIVE SUMMARY

Background

This report was commissioned by the Policy Department on Citizens' Rights and Constitutional Affairs at the request of the PETI Committee to address the issues raised in a series of petitions received by the EP related to the growing number of children from European Union Member States being taken into public care in England and Wales, and subsequently being placed for adoption. In the majority of these cases, the children are placed for adoption without parental consent; consent having been dispensed with in the "child's best interests".

As such, this report seeks to explain and analyse the law on child protection and adoption in England and Wales, and the obligations of social workers, local authorities and judges, against the background of the petitions received by the EP. It further explores the specific requirements on these actors where a child has a connection to another jurisdiction, either as a citizen, through their parents, or as a place of habitual residence.

Aim

- To illustrate the law concerning adoption without consent in England and Wales;
- To undertake a comparative analysis of the laws concerning adoption in EU Member States;
- To analyse the Brussels II a Regulation in relation to child protection cases with cross-border elements, and in particular the implementation of articles 15, 55 and 56 in this respect;
- To provide information concerning issues raised in petitions put before the Petitions Committee of the EU Parliament relating to this practice, including:
 - Contact between children and birth families when a child has been taken into public care;
 - The maintenance of the child's links with their nationality and ethnicity;
 - The approach of English courts with regard to cases where the child has links to another jurisdiction;
 - The transparency of family proceedings and reporting restrictions on parents.
- To provide recommendations to address the issues raised by the petitioners, that could be taken into consideration by the authorities of the UK and the European Union.

1. BACKGROUND

1.1. The Evolution of English Law

Adoption was introduced relatively late into English law under the 1926 Adoption Act.¹ Under this Act, and the subsequent 1939 Adoption of Children (Regulation) Act, adoption remained a **largely private practice**, where individuals arranged with each other, or through an adoption society, for the transfer of a child.² Adoption under this legislation was largely intended to offer a discrete solution to the stigma and hardship faced by mothers who bore a child out of wedlock, but also to provide children for couples who were otherwise childless.

At this time, adoption catered largely for children who had been voluntarily relinquished by their parents. While the legislation did make provision for the dispensation of parental consent to adoption by the courts, this was interpreted very narrowly, and was viewed as “such a serious invasion of parental rights...[that it] cannot reasonably be assumed within the competence of the Court in the absence of abandonment or desertion...”³ As such, **adoption was viewed as a predominantly adult-focused institution**, focused on satisfying the needs of adults rather than children.⁴

By the Hurst Report of 1954,⁵ views on adoption had changed considerably; private arrangements were discouraged and local authorities took a greater role in placing children. However, it was not until the Houghton Committee of 1972 and the ensuing **1976 Adoption Act** that adoption began to be seen as part of the wider child protection system, capable of catering also for children who had been abused or neglected in their biological family and had been taken into public care. In light of this, the Act introduced a **stronger recognition of the power of courts to dispense with parental consent to adoption** where there had been harm suffered by the child.

Under the Adoption Act 1976, parental consent could be dispensed with for adoption on one of six grounds, of which by far the most frequently used was that the parent was **withholding consent “unreasonably”**.⁶ The English courts took an objective approach to the test, considering the decision to refuse consent from the position of the hypothetical reasonable parent “with a mind and temperament capable of making reasonable decisions after having had regard to the totality of the relevant circumstances.”⁷ Such a parent would consider the welfare of the child, the nature of the current placement, the prospect of rehabilitation, the extent and regularity of contact, the age of the child, and the length of time in care.⁸

¹ Although the practice of adoption occurred informally prior to this. This report will refer to “England” and “English law” to include the law of Wales.

² However, less than a quarter of adoptions involved such a society, leaving adoption predominantly a transaction between private individuals (Stephen Cretney, *Family Law in the Twentieth Century: A History* (2005, OUP, Oxford) 609-10).

³ *Re JM Carroll* [1931] 1 KB 317 CA.

⁴ Andrew Bainham and Stephen Gilmore, *Children: The Modern Law* (2013, Jordans).

⁵ Report of the Departmental Committee on the Adoption of Children (1954, Cmnd. 9248) “*Hurst Report*”, [30]-[43].

⁶ s16(2)AA. The other grounds were that the parent:

- (a) cannot be found or is incapable of giving agreement;
- (b) is withholding his agreement unreasonably;
- (c) has persistently failed without reasonable cause to discharge his parental responsibility for the child;
- (d) has abandoned or neglected the child;
- (e) has persistently ill-treated the child;
- (f) has seriously ill-treated the child.

⁷ *Re M (Adoption or Residence)* [1998] 1 FLR 570, 598, per Ward LJ.

⁸ Malachy Higgins, “Freeing for Adoption – the Legal Context” (1999) 5(3) *Child Care in Practice* 232, 239. Although Justice Higgins was a Northern Ireland Lord Justice of Appeal, these comments apply equally to the English context.

Most importantly, however, the courts made clear that they were not judging whether the parent had made the “right” or “wrong” decision, but whether it fell within a band of reasonable decisions which a parent might take.⁹ As Lord Halisham found in the seminal case of *Re W*, “[t]wo reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting the title to be regarded as reasonable.”¹⁰

In this way, **the law continued to focus on parental rights and the autonomy of the family from state interference.** Although the welfare of the child was a consideration in determining whether the parent is considered “reasonable” or not,¹¹ it did not dictate the outcome, and considerable discretion was still afforded to birth parents.¹²

However, through the 1980s, awareness of children’s rights began to develop, culminating on the international stage in the UN Convention on the Rights of the Child. At the domestic level, the English parliament passed the **Children Act 1989, which made the child’s welfare the paramount consideration in all decisions concerning them.** The Children Act was a revolutionary instrument in English law, bringing together both the public and the private law on children into one codified piece of legislation. However, it did not include adoption, which remained under the 1976 Act.

The Children Act moved away from the concept of parental rights, focusing instead on parental responsibility and children’s interests. This was emphasised by Baroness Hale in the House of Lords case of *Re G (Children)*, where she stated that “[t]here is no question of a parental right”,¹³ while Lord Kerr in *Re B (A Child)* held that “[i]t is only as a contributor to the child’s welfare that parenthood assumes any significance.”¹⁴

The system of adoption in England and Wales must be understood in the context of the wider child protection system. In 2002, the parliament passed the **Adoption and Children Act**, with the primary aim of bringing the principles of adoption law in line with the Children Act 1989, and as such to establish continuity between the different areas of child law. This Act will be discussed in more detail in Part 2.

The system of child protection under the Children Act is underpinned by three important principles: the welfare principle, making the child’s best interests the paramount consideration in any decision concerning him or her; the no delay principle, recognising that delay in decision-making can be detrimental to the child’s welfare; and finally, the philosophy of non-intervention of the state in family life.

As Lord Mackay put it:

The integrity and independence of the family is the basic building block of a free and democratic society, and the need to defend it should be clearly perceivable in the law. Accordingly, unless there is evidence that a child is being or is likely to be positively harmed because of a failure in the family, the state, whether in the guise of a local authority or a court, should not interfere.¹⁵

This philosophy is reinforced by the principle of proportionality, required by article 8 ECHR. Local Authorities and courts must ensure that every step they take causes the least interference possible with the family, while still providing the requisite protection for the

⁹ *Re W* [1971] AC 682.

¹⁰ *Ibid.*

¹¹ In *Re L (An Infant)*, Lord Denning made clear that “in considering whether [the mother] is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is best for the child.” ((1962) 106 SJ 611, CA).

¹² *Re M (Adoption or Residence)* [1998] 1 FLR 570, 594.

¹³ *Re G (Children)* [2006] UKHL 43, [30].

¹⁴ *Re B (A Child)* [2009] UKSC 5, [37].

¹⁵ Lord Mackay, “Joseph Jackson Memorial Lecture” (1989) 137 *NLJ* 505, 507.

child. There is a strong focus on working in partnership with parents and families, and in preserving the child's familiar relationships where possible.

Under the Children Act 1989, **Local Authorities are under a general duty to safeguard the welfare of children within their area who are "in need"**,¹⁶ and so far as is consistent with this, to promote their upbringing by their families, by providing a range of services (s17(1)). Such services include providing temporary (voluntary) accommodation where needed, but also facilities such as day care and after-school care; advice, guidance and counselling; occupational social, cultural or recreational activities; home help, including laundry and other household tasks; assistance for the child and family to have a holiday; financial assistance in the form of a loan, cash payments or payments in kind; and family centres.

As such, the first step for any Local Authority if it realises that a family is in difficulty is to consider the provision of **voluntary assistance, before compulsory action is contemplated**. However, there will obviously be cases where this is not an adequate response, and the Children Act also sets out the basis for intervention with the family.

1.2. Taking a Child into Public Care

1.2.1. The threshold test

A child can only be removed from his or her family with the authorisation of the court. No child can be taken from their parents without express approval from the court, save in cases of emergency by a police officer – who can then only hold the child for 72 hours before being required to either return the child to their parents or seek court authorisation for continued care.¹⁷

The courts have made clear that it is always important – and usually vital – for the decision-maker to **consult with all relevant parties** before making a decision. In the context of care proceedings and adoption, this means that a child should not be removed from the family "unless and until there has been due and proper consultation and an opportunity to challenge the proposal."¹⁸

The weight to be attached to the views of the parents is a matter for the decision-maker, but it is clear that they must be taken into account. Consultation with parents must not take the form of the mere provision of information, but must include the opportunity to discuss and give opinions, and possibly change the plans of the local authority.¹⁹ This applies not only before child protection proceedings are launched, but also during the period in which proceedings are taking place, and during the implementation of the order.²⁰

This is in line with the requirements of article 8 ECHR, which is consistently cited by the English courts as providing not only substantive protection for parents and family members, but procedural safeguards also. Importantly, it has been recognised as not only applying to the judicial process, but to other decisions made by the local authority too.

¹⁶ s17(10): A child is considered to be in need if (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority; (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or (c) he is disabled,

¹⁷ s46 Children Act 1989. See *R (G) v Notts CC* [2008] EWHC 152.

¹⁸ *H v Kingston upon Hull City Council* [2013] EWHC 388 (Admin) [54]. This case concerned an interim care order, but is applicable also to other proceedings.

¹⁹ *Ibid.*, [60].

²⁰ *Re G (Care: Challenge to Local Authority Decision)* [2003] EWHC 551 (Fam).

The **family courts exercise extensive scrutiny over the decision-making of local authorities**, and where they have acted unlawfully, or even inappropriately, have made this very clear.²¹ Local authority plans for the children are not automatically accepted as a matter of formality, but are scrutinised carefully.

Before the court can order the removal of the child from their family,²² a **“threshold” level of harm** must be passed. This is contained in s31(2) of the Children Act, which reads :

A court may only make a **care or supervision order** if it is satisfied:

- (a) that the child concerned is suffering, or is likely to suffer, **significant harm**; and
- (b) that the harm, or likelihood of harm, is attributable to:
 - (i) the **care** given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
 - (ii) the child's being beyond parental control.

This “threshold test” is also important for adoption, as no child may be adopted without first passing this level, as will be discussed below.

In relation to a child being beyond parental control, this provision is invoked usually where the child has stopped attending school, is committing crimes or is involved in antisocial behaviour, which the parents have failed to regulate.

The government has set out Guidance on this, setting out that this causal condition

[r]equires the court to determine whether as a matter of fact, the child is beyond control. It is immaterial who, if anyone, is to blame. In such cases, the local authority will need to demonstrate how the child’s situation will improve if the court makes an order – how his behaviour can be brought under control, and why an order is necessary to achieve this.²³

In *Re O (A Minor)*, Ewbank J commented in relation to a 15 year old truant:

Where a child is suffering harm in not going to school and is living at home, it will follow that either the child is beyond her parents’ control or that they are not giving the child the care that it would be reasonable to expect a parent to give.²⁴

Harm, as referred to by s31(2)(a), is defined by the legislation as meaning “ill-treatment or the impairment of health or development, including for example, impairment suffered from seeing or hearing the ill-treatment of another” (s31(9)). **“Ill-treatment”** includes sexual abuse and non-physical forms of ill-treatment, while **“development”** is defined as meaning “physical, intellectual, emotional, social or behavioural development” and **“health”** as meaning “physical or mental health”.

²¹ See, for example, *Re F* [2008] EWCA Civ 439.

²² A court can alternatively order removal under an Emergency Protection Order, where there is reasonable cause to suspect that a child is suffering, or likely to suffer, significant harm. This order allows the Local Authority to remove the child from their family for up to eight days (with the possibility of extension for another seven, but no more) (s44 Children Act 1989).

²³ Department for Children, Schools and Families, “The Children Act 1989 Guidance and Regulations Volume 1, Court Orders” (2008)

²⁴ [1992] 1 WLR 912.

Ill-treatment or impairment of health are seen as alternatives, and therefore either will be sufficient. As such, ill-treatment in itself will be proof of harm, and there is no need to show that there was any consequences of this for the child's health or development.

Lady Hale drew the distinction between the two concepts in the case of *Re B (A Child) (Care Proceedings: Threshold Criteria)*

Ill-treatment will generally involve some active conduct, whether physical or sexual abuse, bullying or other forms of active emotional abuse. Impairment may also be the result of active conduct towards the child, but it could also be the result of neglecting the child's needs, for food, for warmth, for shelter, for love, for education, for health care.

In this way, **the courts have given the meaning of harm a very wide scope**. However, while the definition of harm is broad, as a balance to this, the Children Act 1989 requires the harm to be deemed "**significant**". The term "significant" is **not defined** in the Act, but judges have described it as "noteworthy or important"²⁵ and "it must be something unusual: at least something more than commonplace human failure or inadequacy".²⁶

In the case of *Re L*, Hedley J held that:

Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting.²⁷

In this same vein, Lady Hale in *Re B* stated:

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 and drugs, who suffer from physical and mental illnesses or who espouse antisocial political or religious beliefs.²⁸

In this respect, the term "significant" has important implications for the compatibility of s31(2) with article 8 ECHR. It serves to emphasise that there must be relevant and sufficient reason for crossing the threshold.

A major problem with **the law prior to 1989 was that it required proof of existing harm, based on the balance of probabilities**. The local authority could not take a pre-emptive step to protect a child from apprehended harm, causing significant difficulties, in particular with newborn babies. As such, the inclusion in the Children Act of the future element of "is likely to suffer" was an important innovation, introduced to provide a remedy where the harm had not occurred but there were **considerable future risks to the child**.²⁹ However, this has also been the cause of some **controversy**, as the answer as to whether a child will suffer harm in the future is necessarily an indeterminate and probabilistic one.

²⁵ *Humberside County Council v B* [1993] 1 FLR 257

²⁶ *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050.

²⁷ *Ibid.*

²⁸ *Re B* [2013] UKSC 33.

²⁹ For discussion of how to determine whether a risk of future harm exists, see *Re S-B* [2009] UKSC 17, *Re J* [2013] UKSC 9.

The key issue here is how the assessment of future harm should be conducted, and, in particular, from what is a court permitted to infer a risk or likelihood of harm. The **courts have developed a two stage test** to deal with this issue. As such, the judge must:

- (1) make a finding on the balance of probabilities as to the existence of the alleged facts giving rise to the application – on what basis is future harm predicted?;
- (2) based on that finding, assess the likelihood of future harm.

In this way, the court first has to look at the allegations of the current situation or incidents that have happened in the past: are they proved to have happened on the balance of probabilities (that is, more probable to have occurred than not)? If yes, then they can be used to form the basis of potential future harm. If no, then the court cannot take them into consideration.

Once the court moves on to the second stage, it is looking at the likelihood of future harm. When assessing this, the standard is a lot lower. The House of Lords has unanimously held that “likely” represents a real possibility that could not sensibly be ignored, having regard to the nature and gravity of the feared harm in the particular case. This is lower than the test of more likely than not.

As Lady Hale made clear in the later case of *Re S-B*

The law has drawn a clear distinction between probability as it applies to past facts and probability as it applies to future predictions. **Past facts must be proved to have happened on the balance of probabilities, that is, that it is more likely than not that they did happen. Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventative action.**³⁰

1.2.2. The decision at the welfare stage

If the court determines that the threshold test in s31(2) has been met, **it then has to make a decision concerning the welfare of the child: what order would be in the child’s best interests?** This may involve leaving the child with his or her family, but with supervision from the local authority, or it may involve placing the child away from his or her parents with foster carers. Equally, it may involve the court ordering no action be taken at all. This determination revolves solely around the **needs of the child**, and is guided by a checklist of factors, including: the ascertainable wishes and feelings of the child concerned; physical, emotional and educational needs; the likely effect of any change in his circumstances on the child; the child’s age, sex, background and any characteristics of his which the court considers relevant; any harm the child has suffered or is at risk of suffering; and how capable the child’s parents are of meeting his or her needs.³¹

The UK Supreme Court has made clear that although the child’s interests are paramount at this stage, this does not mean that the birth family is completely sidelined. The courts’ consideration of the child’s welfare must include recognition of the interest that the child has in being brought up by his or her natural family, and any assessment of the parents’ capacity to meet the child’s needs must include a consideration of the **support that the state could offer** them in doing so.³² It is in this light that the court will consider whether a child needs to be removed from the family environment, either temporarily, or on a more permanent basis.

³⁰ *Re S-B* [2009] UKSC 17, [9].

³¹ s1(3) Children Act.

³² *Re B* [2013] UKSC 33, [26]-[28].

2. ADOPTION UNDER ENGLISH LAW

2.1. Background

As has been explained in Part 1, child protection measures, and the removal of a child from their family, are governed by the Children Act 1989. However, if after the child has been removed under the Children Act, the local authority wishes to place the child for adoption, the procedures to be followed then fall under the Adoption and Children Act 2002.

The **Adoption and Children Act 2002** was intended to bring the practice of adoption into line with the rest of child law in England, by **placing the focus solely on the rights and interests of children**.³³ The **welfare principle** was also strengthened in this legislation, with the child's welfare going from the "first consideration" under the 1976 Adoption Act,³⁴ to the "**paramount** consideration".³⁵

This change also brought the practice of adoption in England in line with the UN Convention on the Rights of the Child. Article 21 of this Convention states that States Parties shall ensure that the best interests of the child shall be the paramount consideration in making decisions concerning adoption.

This change of approach was also driven by the **poor outcomes of children who were growing up in the care system**, who in 1999 were four times more likely to be unemployed, 60 times more likely to be homeless, and constituted a quarter of the adult prison population.³⁶ The Prime Minister's Review of Adoption in 2000 put forward the belief that the system was not delivering the best for children, as decisions about how to provide a secure, stable and permanent family were not addressed early enough. As such, it **advocated an increase in the use of adoption** to provide children with permanency at an earlier stage. The Review gave the opinion that there was too great a focus on rehabilitation with the birth family, at the expense of the child's welfare.³⁷ It emphasised that the first choice should always be a return to the birth family, but where this was clearly not an option, adoption should be seen as a key means of providing permanence. Foster care, on the other hand, was viewed as a transitional measure, which should be used only as a temporary option.³⁸

Following on from this, the government produced a White Paper entitled *Adoption: A New Approach*, which outlined the government's plan to promote the wider use of adoption for looked after children, establishing the **target of increasing adoption by 40-50 per cent by 2004-2005**.³⁹ The White Paper also announced that the government would require local authorities to make a plan for permanence – returning home, placement for adoption, or special guardianship⁴⁰ – for a child within 6 months of being continuously looked after.⁴¹

It was in this context that **the Adoption and Children Act 2002 was introduced, with the explicit aim of promoting the greater use of adoption**.⁴² The Act changed the process of adoption itself, by making the welfare of the child the paramount consideration for courts and adoption agencies in all decisions relating to adoption, including in deciding whether to **dispense with the birth parents' consent to adoption**.

³³ See Performance and Innovation Unit, "Prime Minister's Review: Adoption" (July 2000).

³⁴ s6 1976 Adoption Act.

³⁵ s1(2) Adoption and Children Act.

³⁶ Performance and Innovation Unit, "Prime Minister's Review: Adoption" (July 2000)16.

³⁷ *Ibid.*, 53.

³⁸ *Ibid.*

³⁹ Secretary of State for Health, "Adoption: A New Approach" (December 2000).

⁴⁰ See Part 2.4 below.

⁴¹ Secretary of State for Health, "Adoption: A New Approach" (December 2000).

⁴² Explanatory notes to the legislation, available at: <http://www.legislation.gov.uk/ukpga/2002/38/notes/division/2>

2.2. The Placement Order

Under the Adoption and Children Act 2002, a child may only be placed for adoption either **with the parents' consent** (s19) or **where the court makes a "placement order"** (s21). A placement order is a court order authorising the local authority to place a child for adoption with any prospective adopters who may be chosen by the authority (s21(1)).

A placement order may only be made by the court if **two conditions** are satisfied.

First, **the child must already be the subject of a care order**, or the court must otherwise be satisfied that it would have the power to make a care order under s31(2) of the Children Act, as discussed above (s21(2)).

Second, **if the parent has not consented** to the placement (under s 19), the court must be satisfied that parental consent should be **dispensed with**. By "parent", the legislation includes only legal parents with parental responsibility.⁴³

Section 52 governs the question of **consent** and applies to both consent to the **placement** of a child for adoption and consent to the making of an **adoption order**. It provides that:

The court cannot dispense with the consent of any parent or guardian of the child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that-

- (a) the parent or guardian **cannot be found or lacks capacity** (within the meaning of the Mental Capacity Act 2005) to give consent; or
- (b) the **welfare of the child** requires the **consent to be dispensed with**.

It is the second criteria that is most frequently used, and causes the greatest complaint.

As stated previously, when coming to any decision relating to the child's adoption, his or her welfare must be the paramount consideration. As such, the courts have recognised that "once the court has reached the conclusion that adoption is in the best interests of the child, it will follow that his or her welfare will require the court to dispense with parental consent to adoption".⁴⁴

In this respect, the court must take into consideration the child's welfare throughout his or her entire life, including the effect of having ceased to be a member of his or her birth family, and the continued value to the child of any existing familial relationship (s1(4)). The term "**requires**" connotes the ECHR concept of "**necessity**", so that any interference with the parents' rights under article 8 must be necessary and proportionate to promote the legitimate aim of protecting the rights and interests of the child. It has "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable".⁴⁵ This is a stringent and demanding test.

The courts have made clear that

what therefore has to be shown is that the child's welfare "requires" adoption as opposed to something short of adoption. A child's circumstances may "require" statutory intervention, perhaps even "require" the indefinite or long-term removal of the child from the family and his or her placement with strangers, but that is not to

⁴³ This has implications for unmarried fathers, who will often not be named as legal parents.

⁴⁴ *Re S (Adoption Order or Special Guardianship Order)* [2007] EWCA Civ 54, [71].

⁴⁵ *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535.

say that the same circumstances will necessarily "require" that the child be adopted.⁴⁶

The courts have also emphasised time and again that the severance of family ties inherent in an **adoption without parental consent is an extremely draconian step and one that requires the highest level of evidence**. In the recent case of *Re B-S*, the **Court of Appeal was extremely critical of the analysis and reasoning of local authorities and courts** in coming to adoption decisions, and highlighted the "serious concerns and misgivings about how courts are approaching cases of what for convenience we call 'non-consensual' as contrasted with 'consensual adoption'; that is, cases where a placement order or adoption order is made without parental consent."⁴⁷ This case has been highly influential, and as will be seen below, **has led to a lower number of adoption orders passing through the courts**.

In determining the application for a placement order, the court is bound by the welfare principle, set out in s1 of the Act. Section 1 states that whenever a court is coming to a decision relating to the adoption of a child, the paramount consideration must be the child's welfare throughout his life. In determining the **child's welfare**, the court must have regard to the following matters:⁴⁸

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

The court must then be satisfied, having considered the whole range of its powers, that making the placement order is better for the child than not doing so.

Once the child is the subject of a placement order, **parental responsibility is given to the local authority** (s25(2)). This means that the local authority obtains the decision-making power concerning the child's life. When the child is placed with prospective

⁴⁶ *Ibid.*, [115].

⁴⁷ *Re B-S* [2013] EWCA Civ 1146, [15].

⁴⁸ This list is non-exhaustive.

adopters, they too gain parental responsibility (s25(3)). While the parents do not lose their parental responsibility over the child, this can only be exercised to the extent permitted by the local authority, which in practice means it is rare for any to be permitted (s25(4)).

A placement order will remain in force until it is revoked, an adoption order is made, or the child turns 18 (s21(4)).⁴⁹ **While a local authority may apply to revoke a placement order at any time, parents may only apply for revocation with the leave of the court, before the child has been placed for adoption with the prospective adoptive parents.** Leave will only be granted where the court is satisfied that there has been a change of circumstances since the order was made (s24(3)).

The object of the legislation was to ensure that the **key decisions, and in particular those concerning parental consent, are taken earlier in the adoption process.** This in turn was intended to provide greater certainty and stability for children, and to minimise uncertainty for prospective adopters, who might otherwise face a contested hearing at the stage of the final hearing for an adoption.

This must be contrasted with the former legislation, which also used a two stage mechanism: first a freeing order, followed by an adoption order. Under the 1976 Act, when the local authority wished to place a child for adoption, it would apply for a freeing order, which had the effect of completely terminating the relationship between the birth parents and the child (as opposed to a placement order, which does not effect such a termination). Only then would the child be placed with prospective adopters. A significant problem arose in this respect where adopters were not found for the children, leaving them as legal orphans. The severe negative consequences that could arise from this were seen in *A and S v Lancashire County Council*,⁵⁰ where the children were freed for adoption, thus severing the ties with their birth family, but were never placed for adoption. Instead, they moved from foster placement to foster placement, "becoming increasingly unsettled and disturbed" and suffering "irreparable harm".⁵¹

As such, the placement order achieves the aim of providing a secure placement for the child with a prospective adoptive parent, without cutting off all ties to the birth family.

2.3. The Adoption Order

After the placement order, the child will be **placed with prospective adopters.** It is only after living with the prospective adopters for a period of time that an **application** may be made for a final adoption order.⁵² The **adoption order** cannot be made unless the court is satisfied that sufficient opportunities to see the child with the prospective adoptive parents have been given (s42(7)).

As with a placement order, the parents must either consent to the adoption order, or have their consent dispensed with under s52. The rules for dispensing with consent are the same in both cases, as was set out above in Part 2.2.

When an order is brought, the Court of Appeal held in this case that there are two essentials that must be satisfied before a care plan for adoption can be approved.

The first of these is that there must be **proper evidence.** The evidence must **address all the options** that are realistically possible and must contain an analysis of the arguments

⁴⁹ It will also cease if the child marries or enters into a civil partnership.

⁵⁰ [2012] EWHC 1689 (Fam).

⁵¹ *Ibid.*, [1].

⁵² The period of time for which the child must live with the prospective adopters varies from ten weeks (if the child is subject to a placement order), six months (in a step-parent adoption), to one year (if the adopters are local authority foster parents). In any other case, the child must have been living with the applicant for three years. (s42)

for and against each option. It is not enough that the court be presented with a plan for adoption, and accepts it at face value. It must consider whether there are other options that might be better for the child, and explain exactly why adoption was chosen instead of these.

The second essential is an **adequately reasoned judgment**. This must include a proper balancing exercise and a proportionality analysis. The judicial task, in the words of the court, is to “evaluate all the options, undertaking a global, holistic and multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option.”⁵³

These options include, for example, “orders providing for the return of the child to the parent's care with the support of a family assistance order or subject to a supervision order or a care order; or the child may be placed with relatives under a residence order or a special guardianship order or in a foster placement under a care order; or the child may be placed with someone else, again under a residence order or a special guardianship order or in a foster placement under a care order.”⁵⁴

The court must thus show why adoption should be preferred to any of these options.

2.3.1. Opposing an adoption order

It is important to note that where a child has been subject to a placement order, **a parent may not oppose the making of the adoption order without the leave of the court** (s47(5)). This means that while their consent will still have to be dispensed with, they will not be able to put further arguments forward, except with the court's permission.

The procedure for granting permission to oppose is a two-step test. First, the parents must establish that there has been a **change of circumstances** sufficient to permit the parents to defend the adoption proceedings. Second, where there has been such a change of circumstances, the judge will have to decide **whether or not to exercise her discretion to grant leave**, with the decision governed by the child's welfare as the paramount consideration, taking into account the checklist of relevant factors in s1.⁵⁵ The courts have made clear that the threshold at this stage should not be set too high, as parents “should not be discouraged from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable”.⁵⁶ When deciding whether to grant leave, the court should in particular consider the parent's ultimate prospect of success in resisting the making of the adoption order, and the impact on the child of the granting of leave.⁵⁷

However, the law has also made clear that the child's welfare is paramount in this respect, and overrides the rights of parents. This can be seen where the welfare of the child requires them to remain in an adoptive placement even though the circumstances of the birth parents have significantly changed, for example, where the child will suffer long-term harm as a result of the placement being disrupted.

2.4. Special Guardianship

In addition to changing the law concerning dispensing parental consent for adoption, the Adoption and Children Act 2002 also introduced a new legal tie called “**Special Guardianship**”.

⁵³ Ibid., [44].

⁵⁴ Ibid., [27].

⁵⁵ *Re P* [2007] EWCA Civ 616

⁵⁶ *CH v London Borough of Merton* [2014] EWHC 3311 (Fam), [6].

⁵⁷ *Re B-S* [2013] EWCA Civ 1146.

Special Guardianship was intended to be a secure alternative to adoption, which nonetheless recognised the importance of identity to a child. Under a Special Guardianship Order, **parental responsibility is granted to the Special Guardian**, which may be exercised to the exclusion of all others. Nevertheless parental responsibility is not removed from the child's birth parents, providing them with ongoing involvement with important decisions in the child's life including changes of name, removal from the UK,⁵⁸ or consent to adoption. However, day-to-day decisions can be taken by the Special Guardian acting alone.⁵⁹

In this way, **Special Guardianship represents a middle ground between adoption and long-term foster care**. It provides for the stability of placement and acquisition of parental responsibility accompanying an adoption order,⁶⁰ however, it also maintains a connection between the child and his or her birth family. As discussed by the government in its White Paper in 2000, Special Guardianship can be a **more suitable alternative where the child is being cared for by members of the birth family,⁶¹ where there are religious or cultural objections to adoption,⁶² or in relation to unaccompanied asylum-seeking children.⁶³** In addition, **where a child is old enough** to know, and have relationships with, his or her birth family, a Special Guardianship Order may be more appropriate, allowing the child to have stability in his or her placement without artificially severing biological ties.

The number of Special Guardianship Orders being made is **increasing rapidly**. In 2014, 3,330 children left care under a Special Guardianship Order, rising from 1,290 in 2010.⁶⁴ This can be contrasted with the 5,050 children who were adopted. In 28 Local Authorities, Special Guardianship was used more frequently than adoption.⁶⁵ Furthermore, the number of young children being placed under Special Guardianship Orders is increasing: while only 160 children under one were placed with a Special Guardian in 2010, this rose to 520 in 2014.⁶⁶

The leading case regarding the choice between Special Guardianship and adoption is that of *Re S (Adoption Order or Special Guardianship Order)*.⁶⁷ This case decided an appeal against three judgments, and posed the question as to which mechanism would best protect the child's best interests. In dismissing the appeals, the Court considered the implications of the proportionality principle under article 8 ECHR, requiring that any interference with family life must be proportionate, and no more than necessary. In doing so, it noted that "it is a material feature of the special guardianship regime that it is 'less intrusive' than adoption. In other words, it involves a less fundamental interference with existing legal relationships."⁶⁸ In particular, the Court noted that "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 to tip the balance."⁶⁹

However, Special Guardianship also has its **drawbacks**. In particular, where the Special Guardian is a family member, he or she may be conflicted towards the child's parents, including the possibility that the Special Guardian is unable to accept that abuse or neglect

⁵⁸ However, these can be granted by leave of the Court (s 14B(2)).

⁵⁹ See s 14C, *Children Act 1989*.

⁶⁰ Albeit the parental responsibility has some limitations on it, and is not removed from the birth parents, as outlined above.

⁶¹ So as not to distort family relationships. See *Re S (Adoption Order or Special Guardianship Order)* [2007] 1 FLR 819, [51]; *A Local Authority v Y and Z* [2006] 2 FLR 41; *S v B and Newport City Council* [2007] 1 FLR 1116.

⁶² For example, under Islamic Law.

⁶³ Secretary of State for Health, "Adoption: A New Approach" (December 2000) White Paper Cm 5017, [5.8].

⁶⁴ Department for Education, "Statistics: looked-after children" (30 September 2014).

⁶⁵ *Ibid*.

⁶⁶ BBC News, "More babies with 'special guardianship orders' as adoptions fall" (22 May 2015), <http://www.bbc.co.uk/news/uk-32840224>

⁶⁷ *Re S (Adoption Order or Special Guardianship Order)* [2007] 1 FLR 819.

⁶⁸ *Ibid*, [49].

⁶⁹ *Ibid*.

have occurred at the parents' hands.⁷⁰ It has been found that kinship carers are less likely to enforce contact restrictions on parents, thereby creating a greater risk of reoccurring abuse.⁷¹ Furthermore, some have argued that mistreatment of children is learnt behaviour, and that placing a child under a Special Guardianship order with family is simply moving the child to, as Martin Narey put it, "just another branch of the same dysfunctional family".⁷²

It must also be considered that **Special Guardianship ceases when the child reaches the age of 18**. For special needs children this can be particularly problematic, as in many cases it is necessary to create lasting legal ties to ensure their care, and to provide authority for a parent to make medical decisions on their behalf.⁷³ Adoption can be highly beneficial for children in such circumstances, providing a life-long legal relationship between the parent and child. English courts have also recognised the importance of creating a formal legal relationship between parents and children in relation to inheritance,⁷⁴ and citizenship rights,⁷⁵ which Special Guardianship does not confer.

2.5. Overturning an Adoption Order

Adoption in English law effects a permanent and irrevocable legal transplant of the child from one family to another. The relationship of the child with his or her birth parents is completely terminated, and the adoptive parents step into their place.

While it is **possible to overturn an adoption order** that has been lawfully made, this will **only be granted in highly exceptional circumstances**. In particular, a finding that a parent had not in fact harmed their child will be insufficient to overturn an order. This was seen in the case of *Webster*, where three years after the adoption, experts suggested that the children's injuries were the result of nutritional difficulties, rather than abuse. The courts found that **even if a serious injustice had occurred, public policy considerations made it impossible to overturn adoption orders**. This was based on two considerations. First, the welfare of the children was emphasised – they had already been living in new homes for four years, and had ceased to see their birth parents.⁷⁶ Second, the court highlighted the vast social importance of not undermining the irrevocability of adoption orders. As such, a change of circumstances of the parents, or even a realisation that the original grounds for making the adoption order were incorrect, will not be sufficient to overturn an order for adoption. Once validly made, an adoption order is practically irrevocable.

However, **where there has been a fundamental breach of natural justice, the courts have ordered an adoption to be set aside**. This refers to procedural irregularities, rather than substantive issues regarding the original order. An example of this can be seen in the case of *Re K*,⁷⁷ a young Bosnian child had been brought to England for medical treatment in 1992, during the war. At the time her family was unknown, and she lived with foster parents in England, who later wished to adopt her. Their application for adoption was granted, despite the fact that all adoptions from Bosnia had been stopped, and that her grandfather and aunt had been traced and wanted the child back. The court found that the procedural irregularities in the case were sufficiently serious to amount to a denial of natural justice, having regard to the public policy considerations.

⁷⁰ Joan Hunt, Suzette Waterhouse and Eleanor Lutman, "Parental Contact for Children Placed in Kinship Care Through Care Proceedings" (2010) *Child and Family Law Quarterly* 71.

⁷¹ Ibid. This problem was highlighted in the case of *EH v London Borough of Greenwich* [2010] EWCA Civ 344 where the children were initially placed in the care of the maternal grandparent but removed when it was found that she could not protect them from the abusive father.

⁷² Martin Narey, "The Narey Report: A Blueprint for the Nation's Lost Children" (5 July 2011) *The Times*.

⁷³ *Re D (A Minor) (Adoption Order: Validity)* [1991] 2 FLR 66.

⁷⁴ *Re D (An Infant)* [1959] 1 QB 229.

⁷⁵ *Re H (A Minor) (Adoption: Non-Patrial)* [1982] Fam 121.

⁷⁶ *Webster v Norfolk CC* [2009] EWCA Civ 59

⁷⁷ *Re K (Adoption and Wardship)* [1997] 2 FLR 221.

3. THE POLICY DEBATE IN ENGLAND AND WALES

3.1. Adoption Statistics

In the year ending 31 March 2014, **5,050 children were adopted** from public care, an **increase** of 26% from 2013, and of 58% from 2010. **Adoptions are now at their highest point** since the start of complete collection of data.⁷⁸ Full statistics can be found in Annex I.

Of the child placed for adoption, **4,870 were completed without parental consent**, with only 130 the result of voluntary placements on the part of the parents.⁷⁹ This constituted **96%** of all adoptions. This percentage has increased since 2010, when only 85% of adoptions were completed without parental consent.

The breakdown of age of children at the time of adoption, and the reasons for adoption, are set out below.

Table 1: Age at time of adoption

Age of child	Percentage of all adopted children
Under 12 months	4%
1 to 4 years	76%
5 to 9 years	19%
10 to 15 years	1%
Average:	3 years, 5 months

Source: Department for Education, 2014

⁷⁸ While adoptions hit a peak of over 20,000 children in the 1960s, these numbers significantly decreased after the introduction of birth control, increased availability of abortion, and changing social perceptions concerning single parenthood and birth outside marriage.

⁷⁹ A further 50 were placed after a care order was given.

Table 2: Reasons for adoption

Reason for adoption	Percentage of all adopted children
Abuse or neglect	72%
Child's disability	0.002%
Parents' illness or disability	4%
Family in acute stress	5%
Family dysfunction	15%
Socially unacceptable behaviour	0.004%
Low income	None
Absent parenting	2%

Source: Department for Education, 2014

While the year ending 31 March 2014 was a record year for adoptions in England, this looks set to change. **Since the Court of Appeal decision in *Re B-S***, discussed above, we have seen a **drop** in the number of applications for **placements for adoption**. Between 1 September 2013 and 30 June 2014, local authority decisions that children should be adopted fell by 47% from the same time the year before, and applications for placement orders fell by 34%. Placement orders granted by the courts also decreased by 54%.⁸⁰

Decreased intervention of child protection services may also be a result of austerity measures in place in the United Kingdom. Between 2010/11 and 2012/13, Local Councils cut spending on social services staff by £746 million (adults) and £147 million (children). The impact of this can be seen in the increased workload of individual workers, with 61% stating that their ability to make a difference day to day was affected by cuts to budgets and resources.⁸¹ In addition, 39% of respondents who had a formal system to manage caseloads said that their allocation was "over the formal limit".⁸²

A study of 600 social workers found that the vast majority (88%) of respondents said austerity measures in their council have left children at increased risk of abuse, while 73% said they lack the time, support or resources to prevent children from experiencing serious harm.⁸³

The National Society for the Prevention of Cruelty to Children, the leading UK charity in this area, has said that amid funding pressures and high demand for services, child protection is becoming more tightly "rationed".⁸⁴ More than half of local authorities in England and Wales have started to accept fewer referrals into social care in the past three years, not because

⁸⁰ Family Law Week, "Mythbuster Guide as to the effect of *Re B-S* published" (12 November 2014) <http://www.familylawweek.co.uk/site.aspx?i=ed136692>

⁸¹ Social Work Watch, *Inside an Average Day in Social Work* (2014) <http://www.unison.org.uk/cuts-in-social-service-budgets-laid-bare-in-accounts-of-day-in-life-of-social-workers>

⁸² Ibid.

⁸³ Camilla Pemberton, "Community Care survey exposes how rising thresholds are leaving children in danger" (19 November 2013) <http://www.communitycare.co.uk/2013/11/19/community-care-survey-exposes-rising-thresholds-leaving-children-danger/>

⁸⁴ NSPCC, *How Safe Are Our Children* (2014) <http://www.nspcc.org.uk/preventing-abuse/research-and-resources/how-safe-are-our-children-2014/,6>

there is an absence of demand for services, but because the threshold for accepting cases is being set at a much higher level.⁸⁵

3.2. Influences on adoption rates

3.2.1. Promotion of greater use of adoption

Looking at Parliamentary debates on adoption in recent years – including on the Children and Families Bill 2014⁸⁶ and the Education and Adoption Bill 2015-6⁸⁷ – they show cross-party support for adoption as an institution. Within Parliament, there is an All-Party Parliamentary Group on Adoption and Fostering, whose purpose is to promote and disseminate knowledge of adoption and fostering to ensure best policy and practice. This group was established to assist in bringing about a change to adoption law by making it easier for couples to adopt children.

As discussed above, in 2000 the English government produced a White Paper entitled *Adoption: A New Approach*, which outlined the government's plan to promote the wider use of adoption for looked after children, establishing the target of increasing adoption by 40-50 per cent by 2004-2005.⁸⁸

While this target was not achieved – although a substantial rise of 38% did ensue⁸⁹ – the **government has continued to push adoption as the solution for children in government care**. Martin Narey, the government's adoption advisor and former head of Barnado's (a children's charity), compiled a report in 2011 that called on local authorities and the government to "radically to increase the number of adoptions in England".⁹⁰ Subsequently, Prime Minister David Cameron and then Secretary of State for Education Michael Gove outlined their plans for wide-ranging adoption reform in 2012,⁹¹ with Gove announcing:

I can assure you that I will not settle for a modest, temporary uplift in adoption numbers, nor a short-lived acceleration in the process. Nothing less than a significant and sustained improvement will do.⁹²

While national adoption targets were set for some years, these ceased in 2006. The government emphasised that targets were intended to make sure more children who had been adjudged to need an adoptive placement were found permanent homes. They were not intended to affect the judgment of whether the child was in need of an adoption. However, despite the government's statements, there is a danger that such targets do impact on such an evaluation, or at the very least, create the perception that they do so. Moreover, the government's focus on adoption risks disadvantaging those children in care for whom adoption is not suitable. In the year ending 31 March 2014, only 16% of children who left the English care system were adopted, with others returning home, being placed with relatives, or with a special guardian, among other options.⁹³ As such, an excessive focus on adoptive placements can mean that these others do not receive sufficient attention.

⁸⁵ Ibid.

⁸⁶ This Act removed the specific requirement that ethnicity be considered when placing children for adoption, as set out in section 5.2 below.

⁸⁷ This Act intends to create regional, instead of local, adoption registers, to ensure that the widest range of adoptive parents is available for children.

⁸⁸ Secretary of State for Health, "Adoption: A New Approach" (December 2000).

⁸⁹ Department for Education: "An Action Plan for Adoption: Tackling Delay" (March 2012).

⁹⁰ Martin Narey, "The Narey Report: A Blueprint for the Nation's Lost Children" (5 July 2011) *The Times*.

⁹¹ Department for Education, "An Action Plan for Adoption: Tackling Delay" (March 2012).

⁹² Family Law Week "Government to Launch Adoption Action Plan in March" (23 February 2012) <http://www.familylawweek.co.uk/site.aspx?i=ed95941>

⁹³ Department for Education, "Statistics: looked-after children" (30 September 2014).

There is some **controversy surrounding whether local authorities were given bonuses for meeting targets**. The government denies that this was the case, however, some, such as former MP John Hemming claims that there is documentary evidence of financial incentives offered to local councils.⁹⁴ However, in response to a freedom of information request to Kent County Council in 2012 on pay structures and targets, the following response was received:

Social Workers do not receive any other specific non-monetary bonuses or commissions. However, they may be entitled to a non-cash award, which would be at the manager's discretion. Non-cash awards can potentially be awarded to any KCC member of staff and are not exclusive to Social Workers. Non-cash awards are awarded to individuals or teams as an immediate recognition of extra effort or one-off successes. The value of the non-cash award will not exceed £50 for an individual.⁹⁵

Putting the issue of payments aside, for those children who cannot return home, targets for the increase of adoptions should be understood in the context of the **care system as a whole**. As stated above, the statistics on outcomes for children in care in 1999 showed severe disadvantages for this group. In 2014, the Department of Education noted that looked after children continue to have poorer educational outcomes than other children, and 66.6% have special educational needs.⁹⁶ In the year prior to March 2014, 5.2% of looked after children from 10-17 had been convicted or subject to a final warning or reprimand, while 3.5% of all looked after children had a substance misuse problem.⁹⁷ Of children aged 16 and 17, the rate of conviction, final warning or reprimand raised to 10%, and the rate of substance abuse 10.8%.⁹⁸ Statistics also showed that looked after children were also twice as likely to have been excluded from school, and around only 50.4% of looked after children had emotional and behavioural health that was considered "normal", with 12.8% more "borderline", and 36.7% "cause for concern".⁹⁹

We can thus see that there is a **tension between leaving children in public care**, where the outcomes for children are dire, **and the placement of children for adoption without parental consent**. There is no doubt that many children do not thrive in public care in England, and thus leaving them in this environment is detrimental to their welfare. The response has been to place more children in adoption, rather than to address the reasons why public care is so harmful. Statistics on the number of children in public care in England are set out in Annex II.

As such, we see that the Department for Education publication *An Action Plan for Adoption* in 2012 emphasised that it is the delays in the adoption system that cause lasting harm for vulnerable children. Quoting Dr Julie Selwyn, the report stated that "delay in decision-making and action has an unacceptable price in terms of the reduction in children's life chances and the financial costs to local authorities, the emotional and financial burden later placed on adoptive families and future costs to society."¹⁰⁰ It is for this reason that the local authority must consider whether adoption or another form of permanent care is best for the child as early as possible, and Statutory Guidance requires that this decision be made **within four months** of the child entering care.¹⁰¹

⁹⁴ 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>.

⁹⁵ Child Protection Resources, <http://www.childprotectionresource.org.uk/are-bonuses-paid-to-social-workers/>.

⁹⁶ Department of Education, "Outcomes for children looked after by local authorities in England as at 31 March 2014 (10 December 2014).

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ J Selwyn et al, *Costs and outcomes of non-infant adoptions* (BAAF, 2006).

¹⁰¹ Department for Education, "An Action Plan for Adoption: Tackling Delay" (March 2012), 8.

This is not only an issue that arises in England, however. A tension exists in every state surrounding how best to provide long term care for children who cannot live with their families, for whatever reason. **In some countries, foster care is the preferred mechanism, in others institutional care. Adoption is not the only solution** that should be considered, and the decision rests on how the state can best fulfil the long-term needs of the child. The dilemma was highlighted by the UK Parliament's Select Committee on Adoption Legislation in 2013, which stated

The Government wishes to increase the number of children being adopted; we agree that there is the potential for more children to benefit from adoption which is in many ways unique in its benefits. Adoption is, however, only one of several solutions for providing vulnerable children with the love, stability and support they need. Long-term fostering, friends and family care, and special guardianship also play a significant role in meeting the needs of many of the children who cannot be cared for by their birth parents, and for whom adoption may not be appropriate. We are concerned that the Government's focus on adoption risks disadvantaging those children in care for whom adoption is not suitable. Improving the outcomes for all children in care should be the priority; all routes to permanence merit equal attention and investment.¹⁰²

As the European Court of Human Rights has pointed out in the case of *Neulinger and Shuruk v Switzerland*, there are two considerations that must be balanced when determining the **child's best interests**: first, the maintenance of family ties except in cases where the family has proved particularly unfit; and second, the development of the child in a safe and secure environment.¹⁰³ In other words, states must balance the benefits that the child gains from maintaining a connection with his or her biological family with the need to be provided with a secure and permanent home and family life, even if that family is adoptive, rather than biological.

3.2.2. Campaigns for change

There are a small number of **groups that work on the issue of adoption without consent** in the United Kingdom. Several websites contain reports and statistics on what they sometimes refer to as "forced adoption", including for example, "No Punishment without Crime",¹⁰⁴ "Pound Pup Legacy",¹⁰⁵ and "Association of McKenzie Friends".¹⁰⁶ In addition, the former Member of Parliament John Hemming has been a strong advocate on these issues for a number of years.¹⁰⁷

Having reviewed the links provided in the petitions, it appears that the information given on such websites often comes from a point of view that is not representative of mainstream research. In addition, the reports lack an empirical basis or indeed a basis in law.

Links were also provided for media reports alleging that parents are leaving Britain to avoid their children being taken by child protection services. It is not possible to assess from the limited information given in a media report the full reasons why child protection measures were considered, and therefore the appropriateness of such protection measures being taken cannot be assessed.

Media reports and reports from these websites can be useful to highlight issues of concern for further research, and are indeed important for this very reason, but should not be relied upon in the absence of corroborative academic study.

¹⁰² Select Committee on Adoption Legislation, *Adoption: Post-Legislative Scrutiny* (2013, HL Paper 127).

¹⁰³ [2010] ECHR 1053, [136].

¹⁰⁴ <https://punishmentwithoutcrime.wordpress.com>

¹⁰⁵ <http://poundpuplegacy.org>

¹⁰⁶ <http://mckenzie-friends.co.uk>

¹⁰⁷ He sat in Parliament as a member of the Liberal Democrat party from 2005 to 2015.

While there is no doubt that **there have been cases where the child protection system in England has not operated effectively, and local authorities have acted improperly, the legal requirement that judges scrutinise any decisions made to remove a child from a family, and give their express authorisation for this, means that there is a double check to ensure proper practice.** Judges have clearly condemned circumstances where social workers or Local Authorities have acted outside their remit, and extensive guidance has been drafted to direct these individuals and bodies as to best practice.¹⁰⁸ It cannot be said that injustices do not occur in some cases, but mechanisms are put in place to limit such occurrences, ensure that the best possible protection is given to the children involved.

This was emphasised in 2008 by Wall LJ in the case of *P v Nottingham City Council*. He said:

Nobody who works in the Family Justice System regards it as perfect: most of us see it as under-resourced and struggling to deal with the work loads thrust upon it. Constructive criticism, particularly from those in a position to bring about change, is to be welcomed. I am myself in no doubt that the system must change and adapt, and I have spoken many times in public in support of my belief that there needs to be greater transparency in order to combat the partial, tendentious and inaccurate criticisms made against the system.¹⁰⁹

3.2.3. Responses to the issues raised in the petitions

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.¹¹⁰

Latvia's parliament has formally complained to the House of Commons that children of Latvian descent are being adopted by British families, without parental consent. The letter, sent to the speaker of the Commons, John Bercow MP, was signed by the Chair of the Human Rights Committee and the Deputy Chair of the Social and Employment Committee of the Saeima. It complained of the failure of the British authorities to examine the option of involving their Latvian counterparts, and consider placing the child in the custody of family members or relatives in Latvia.¹¹¹ The complaint was issued following the granting of permission to Latvia to intervene in an appeal in the case of *LB v London Borough of Merton*, where the child was subsequently placed with British adopters.¹¹²

The **Bulgarian** authorities have also been involved in proceedings regarding their citizens, as can be seen in the case of Megan Pavey. The Embassy of Bulgaria was an observer in this case in a non-participatory capacity, and suggested several options for the alternative care of the child, rather than her adoption in England. These suggestions were not followed, and the child was adopted by a British family.

With regards to **Slovakia**, media reports suggest that in September 2012, several hundred protesters gathered outside the British Embassy in Bratislava over concerns about Slovak children adopted in Britain. This was prompted by a case concerning two young boys.¹¹³ A month earlier, the Slovakian Ministry of Justice had published on its website concern the issue of "adoption of children without relevant reasons in the UK", expressing serious

¹⁰⁸ See, for example, *Re B-S*.

¹⁰⁹ [2008], EWCA Civ 462, [127].

¹¹⁰ Zoe Fleetwood, "Adoption orders with cross-border elements" (26 March 2015) www.dawsoncornwell.com/en/.../Adoption_orders_cross_border.pdf.

¹¹¹ Owen Bowcott, "Latvia complains to UK parliament over forced adoption" (The Guardian, 9 March 2015) <http://www.theguardian.com/uk-news/2015/mar/09/latvia-complains-to-uk-parliament-over-forced-adoptions>

¹¹² [2013] EWCA Civ 476. See also <http://www.familylawweek.co.uk/site.aspx?i=ed143661>.

¹¹³ Christopher Booker, "Slovaks protest at Britain's 'illegal child snatching'" (The Telegraph, 22 September 2012) <http://www.telegraph.co.uk/comment/9559657/Slovaks-protest-at-Britains-illegal-child-snatching.html>.

concerns regarding the child protection system in England, and suggested that a case could be brought before the European Court of Human Rights on the issue.¹¹⁴ In May 2015, a **Round Table discussion on Child Protection Issues of EU Minors in the UK was held at the Slovak Embassy in London**. The event included speeches by the several high ranking English judges, including the President of the Family Division, Sir James Munby.

England is not the only state that has been accused of "forced adoptions". The **Czech Republic and Lithuania have recently been stridently protesting against the child protection system in Norway**, with the Czech President even going so far as to compare the foster care system with Nazi Germany.¹¹⁵ With regard to Lithuania, according to media reports, the fallout has become so severe that the Norwegian ambassador has hired a public relations team to dispel the negative image.¹¹⁶

As such, it is clear to see that this is currently an area of great **tension within Europe that must be addressed with urgency**.

¹¹⁴ <http://www.justice.gov.sk/Stranky/aktualitadetail.aspx?announcementID=1631>.

¹¹⁵ "Similar to Nazi foster care': Czech president slams Norwegian child welfare" (RT, 10 February 2015) <http://rt.com/news/230951-czech-president-norway-nazi/>

¹¹⁶ 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>.

4. EUROPEAN APPROACHES TO ADOPTION WITHOUT PARENTAL CONSENT

4.1. Position in European Member States

Contrary to popular opinion, **every country in Europe has a mechanism for permitting adoption without parental consent**, in certain circumstances. However, it must be acknowledged that **few – if any – States exercise this power to the extent to which the English courts do**.

Disaggregated statistics on numbers of **adoptions** are not widely available for each jurisdiction;¹¹⁷ however, statistics from some states are set out below.

Table 3: Number of domestic adoptions, 2013¹¹⁸

Country	Number of children adopted
Belgium	348
Bulgaria	705
England and Wales ¹¹⁹	5050
France ¹²⁰	731
Germany	3293
Latvia	112
Lithuania	107
Luxembourg	2
Romania	752
Slovenia	28

Source: Hague Conference for Private International Law

It is not clear how many of these adoptions were undertaken without parental consent, but this is an area in which the European Union could play a role in ensuring greater information was available concerning this subject.

When looking at ways in which an adoption order can be made without parental consent, I have identified **three different mechanisms** that are used throughout Europe: where parental consent is not necessary because of **abandonment or lack of interest** in the child; where consent is not necessary because of **parental misconduct or deprivation of parental rights**; and where consent is dispensed with because the parents have refused consent **unjustifiably**, or because it is in the **child's best interests**. Some States use a

¹¹⁷ A questionnaire was sent to governments by the European Commission in 2005, which compiled information concerning domestic and intercountry adoption within Member States of the European Union. However, this information is now ten years old.

¹¹⁸ It should be noted, however, that these statistics do not state whether step-parent adoptions are included, which can make comparisons between them difficult.

¹¹⁹ Year ending 31 March 2014.

¹²⁰ 2012.

combination of these approaches, allowing consent to be dispensed with in a number of different ways, while others rely simply on one ground. An overview of these mechanisms is set out below, and can also be seen in Annex III and IV.

4.1.1. Parental consent is not necessary on the basis of abandonment, lack of contact with the child, lack of interest in the upbringing, disinterest

One mechanism for permitting adoption without parental consent is where a child who has been deemed **abandoned** by their parents.

The precise **grounds** for not requiring consent in this area **vary significantly**, including:

- abandonment (Cyprus, Italy);¹²¹
- not contacting the child (Hungary, Malta);¹²²
- not showing interest (Portugal);¹²³
- being manifestly disinterested (France);¹²⁴
- not participating in his or her upbringing (Czech Republic);¹²⁵
- parents' whereabouts or residence is unknown (Slovenia, Austria, Hungary, Estonia).¹²⁶

Different **time limits** are also placed on authorities before they can dispense with consent for these reasons, ranging from:

- three months (Portugal);¹²⁷
- six months (Austria, Czech Republic, Hungary);¹²⁸
- twelve months (France, Hungary, Luxembourg, Slovenia);¹²⁹
- eighteen months (Malta);¹³⁰
- "an extended period of time" (Estonia).¹³¹

4.1.2. Parental consent is not necessary because parents have been deprived of parental rights or on the grounds of parental misconduct

The **most common way** in which consent is dispensed with is where the parents have been **deprived of parental rights**.¹³²

This is the case in:

- Belgium;¹³³
- Croatia;¹³⁴
- Denmark;¹³⁵

¹²¹ Cyprus: s5(1)(a) Family Law 1995; Slovenia: Art 8 Law 184 of 4 May 1983.

¹²² Hungary: s48A Family Law 1952; Malta: Art 117(1)(a)(vi) Civil Code.

¹²³ Not showing interest: Art 1978(1) Civil Code.

¹²⁴ France: Art 350 Civil Code; Luxembourg: Art 352 Civil Code.

¹²⁵ s68(1)(a) Act 94/1963.

¹²⁶ Slovenia: Art 141(1) Marriage and Family Relations Act; Austria: Art 181(2) Civil Code; Hungary: s48A Family Law 1952; Estonia: Art s152(5) Family Law.

¹²⁷ Art 1978(1) Civil Code.

¹²⁸ Austria (whereabouts unknown: Art 181(2) Civil Code); Czech Republic (not manifested proper interest: s68(1)(a) Act 94/1963); Hungary (whereabouts unknown: s48A Family Law 1952).

¹²⁹ France: (manifestly disinterested: Art 350 Civil Code); Hungary (not contacted: s48A Family Law 1952) Luxembourg (manifestly disinterested: Art 352 Civil Code); Slovenia (residence unknown: Art 141(1) Marriage and Family Relations Act).

¹³⁰ Unjustifiably not having had contact: Art 117(1)(a)(vi) Civil Code.

¹³¹ Estonia (whereabouts unknown: s152(5) Family Law). Switzerland similarly allows dispensing of consent when the parents' whereabouts are unknown for "some length of time" (Art 265c(1) Civil Code).

¹³² The length of this paper prevents any in depth analysis of these mechanisms by which, and on what grounds, parental rights are deprived in these countries.

¹³³ A loss of parental authority will only carry with it a loss of the right to consent to adoption if the judge expressly stipulates this (Article 8 of the Law of April 24, 2003 modifying article 33 of the Law of Protection of Youth).

¹³⁴ Art 130 Family Act 2003.

¹³⁵ s7 Adoption (Consolidation) Act.

- Estonia;¹³⁶
- Greece;¹³⁷
- Latvia;¹³⁸
- Lithuania;¹³⁹
- Luxembourg;¹⁴⁰
- Poland;¹⁴¹
- Slovakia;¹⁴²
- Slovenia;¹⁴³
- Spain.¹⁴⁴

Other countries do not require deprivation of parental rights for consent to be dispensed with, but instead focus on the **specific conduct of the parents**.

These vary from:

- neglect or persistent mistreatment (Cyprus, Malta)¹⁴⁵
- abuse of parental authority (Netherlands);¹⁴⁶
- risk of compromising the child's health or morals (France);¹⁴⁷
- persistently grossly violating parental duties (Germany)¹⁴⁸

In some countries, the deprivation of rights must have lasted for a set **period of time** before an adoption can be granted, for example:

- where the parents have failed in their duty towards the child for 12 months (Ireland);¹⁴⁹
- where the parents have been deprived of parental rights for a period of one year (Slovenia).¹⁵⁰

4.1.3. Dispensing with parental consent by overriding an unjustified refusal, or in the child's best interests

Another common mechanism for allowing adoption without consent is where **the parents' refusal is overridden** in certain circumstances:

- if the court adjudges the consent to be "unreasonably" withheld (Cyprus, Malta);¹⁵¹
- "refusal without justification" (Austria);¹⁵²
- if the refusal is "abusive", (France)¹⁵³ or consent is "abusively denied" (Greece)¹⁵⁴

¹³⁶ s152(5) Family Law Act 2009.

¹³⁷ Art 1552(b) Civil Code.

¹³⁸ s169(3) Civil Law.

¹³⁹ Art 3.214 Civil Code.

¹⁴⁰ Art 351-2 Civil Code.

¹⁴¹ Art 119(1) Family Code.

¹⁴² Art 181(2) Act No 36/2005 on Family.

¹⁴³ Art 141(1) Marriage and Family Relations Act.

¹⁴⁴ Art 177(2)(ii) Civil Code, Art 1827 Civil Procedural Law.

¹⁴⁵ Cyprus: s5(1)(a) Adoption Act 1995; Malta: Art 117(1)(a)(ii) Civil Code.

¹⁴⁶ Or where the parent has grossly neglected his or her parental duties (Art1:228(2)(b) Civil Code).

¹⁴⁷ France: Art 384-6 Civil Code.

¹⁴⁸ And if it would be disproportionately advantageous to the child if the adoption did not take place. (s1748(1) Civil Code). Parental consent may also be substituted if the violation of duty, although not persistent, is particularly serious and it is probable that it will permanently not be possible to entrust the child to the care of the parent.

¹⁴⁹ s54 Adoption Act 2010.

¹⁵⁰ Art 141(1) Marriage and Family Relations Act, Yves Brulard and Letitia Dumond, "Comparative Study Relating to the Procedures for Adoption among the Member States of the European Union, Practical Difficulties Encountered in this Field by European Citizens within the Context of the European Pillar of Justice and Civil Matters and Means of Solving these Problems and of Protecting Children's Rights" (2007) JLS/2007/C4/017-30-CE-0157325/00-64, 446.

¹⁵¹ Cyprus: s5(1)(c) Adoption Act 1995; Malta: Art 117(1)(a)(iii) Civil Code.

¹⁵² Art 181(2) Civil Code.

¹⁵³ Art 384-6 Civil Code.

¹⁵⁴ If the child has been living with the prospective adoptive family for one year (Art 1552(e) Civil Code).

However, in Romania, even if parents are deprived of parental rights, their consent is still needed.¹⁵⁵

On the other hand, **some jurisdictions have shifted to a process that is more explicitly based on the welfare of the child**. This position is in line with the requirement under the UN Convention on the Rights of the Child. Article 21 of this Convention, which deals with adoption, is the only article under which the child's rights must be the **paramount**, rather than merely the primary, consideration.¹⁵⁶

Such legislation can be seen in the following jurisdictions:

- if the parents' refusal of consent is clearly contradictory to the child's welfare (Poland);¹⁵⁷
- if the refusal is not sufficiently justified taking into account the best interests of the child (Finland);¹⁵⁸
- if it is of decisive importance to the welfare of the child (Denmark);¹⁵⁹
- if it is in the best interests of the child (Malta, England and Wales).¹⁶⁰

4.2. Jurisprudence of the European Court of Human Rights

Traditionally, the European Court of Human Rights approached the rights of children in the area of alternative care and adoption in a **cautious** manner, holding that these rights could, depending on their nature and seriousness, override the interests of biological parents.¹⁶¹ This reflected the **balancing approach** inherent in article 8 ECHR – the court must first examine the rights of the applicant (usually the parent), then determine whether any interference was proportionate to a legitimate aim pursued.

However, in recent cases the Court has been taking a significantly **more child centred approach**. Thus, in the case of *R and H v the United Kingdom*,¹⁶² it held that "[i]f it is in the child's interests to be adopted, and if the chances of a successful adoption would be maximised by [the relevant order], then the interests of the biological parents must inevitably give way to that of the child".¹⁶³

This was also seen in the 2012 case of *YC v the United Kingdom*.¹⁶⁴ In this case, the applicants challenged the principle that the child's interests should be the paramount consideration in adoption proceedings, arguing that it was inconsistent with the balancing of rights inherent in the ECHR, and contrary to the rights of the parents. However, the court "reiterated"¹⁶⁵ that in cases concerning adoption, the best interests of the child are paramount and held that "the considerations listed in section 1 of the 2002 Act¹⁶⁶... broadly reflect the various elements inherent in assessing the necessity under article 8 of a measure placing a child for adoption".¹⁶⁷

¹⁵⁵ This can be dispensed with if the refusal of consent is abusive, and the adoption order is in the child's best interests (Art 12(2), 13 Law 272/2004).

¹⁵⁶ Article 3 of the UNCRC generally requires that in all decisions concerning the child, his or her welfare must be the primary consideration.

¹⁵⁷ Art 119(2) Family Code.

¹⁵⁸ s9 Adoption Act.

¹⁵⁹ s9(2) *Adoption (Consolidation) Act*,

¹⁶⁰ Art 117(1)(a)(vii) Civil Code.

¹⁶¹ See *Johansen v Norway* [1996] ECHR 31.

¹⁶² A case originating from Northern Ireland, considered by the UK Supreme Court in *Down Lisburn Health and Social Services Trust v H* [2006] UKHL 36

¹⁶³ (2012) 54 EHRR 2, [77].

¹⁶⁴ [2012] 55 EHRR 967.

¹⁶⁵ Despite the use of the term "reiterates", the ECtHR had previously used the formulation under *Johansen v Norway* set out above, stating that they were a primary consideration that could outweigh parental rights, depending on their weight and seriousness.

¹⁶⁶ Set out in Part 2.2 above.

¹⁶⁷ *YC v United Kingdom*, [35]. For a further discussion of this case, see Claire Simmonds, "Paramountcy and the ECHR: A Conflict Resolved?" (2012) 71(3) Cambridge Law Journal 498.

In a judgment very similar to that of *Re B-S* (which would follow the next year in the English Court of Appeal), the ECtHR held that:

In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing 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.¹⁶⁸

In this way, the ECtHR found that **England's legislation on adoption, and in particular the mechanism for dispensing with parental consent if it is in the best interests of the child, is in conformity with the requirements of article 8 ECHR.**

¹⁶⁸ *Re B-S* [2013] EWCA Civ 1146, [134].

5. ISSUES RAISED BY THE PETITIONS

The petitions raised several issues concerning the adoption of children where parental consent had been dispensed with. While it is not possible to comment on individual cases in the absence of more extensive factual information, this part will discuss the following general issues raised by the petitions:

- (i) Contact between the child and the birth family;
- (ii) The maintenance of the child's links with their nationality and ethnicity;
- (iii) Child protection cases with cross-border elements
- (iv) Transparency of family proceedings and reporting restrictions on parents.

5.1. Contact with the birth family

The child's continued contact with the birth family must be considered at three different stages: first, when the child is in public care, but before adoption is considered; second, when a placement order for adoption has been made; and finally, after the child's adoption.

5.1.1. Contact while the child is in public care

Section 34 of the Children Act 1989 provides that where a child is in the care of the local authority, the authority must allow the child **reasonable contact** with their parents or guardians. In addition, authorities are also required to endeavour to promote contact between all looked after children and other relatives such as grandparents or siblings.¹⁶⁹

The local authority is only permitted to **refuse** to allow contact between the parents and child where it is necessary to do so in order to safeguard or promote the child's welfare, and it is a matter of urgency. This refusal must not last for more than seven days, after which time the full details must be put before the court for its consideration and authorisation (s34(6)).

Furthermore, before making any care order with respect to a child, the court must consider the arrangements that the authority has made for affording contact between the child and the family, and invite the parties to comment on those arrangements (s34(11)).

5.1.2. Contact at placement stage

Where a child has been placed for adoption, ss 26 and 27 of the Adoption and Children Act 2002 govern the question of contact. **Any contact** that has previously been awarded to parents under s34 of the Children Act 1989 will be **terminated**.

An **application** under this section can be made by a child, any parent or relative, or on the court's own initiative. The **court** may then make an order under s26(2) to allow the child to visit their family, or otherwise have contact with them.

Where this has been ordered, contact may only be **refused** where it is necessary to do so in order to safeguard or promote the child's welfare, and the refusal is decided as a matter of urgency and lasts no more than seven days (s27(2)). After this, the matter must return to court.

¹⁶⁹ paragraph 15 of Schedule 2, Children Act 1989.

As with a care order, before making a placement order, the court must consider the arrangements that the authority has made for affording contact between the child and family, and invite the parties to comment on these arrangements (s27(4)).

5.1.3. Contact after adoption

The situation after the final adoption order has been made is somewhat different. The **traditional view has been that adoption severs completely the tie between natural parent and child** and that therefore continuing contact with the natural family would be inconsistent with the very nature of adoption. As such, the courts have emphasised the finality of the adoption order, and the importance of letting the new family find its own feet.¹⁷⁰

However, since the Children Act 1989, there has been a significant **shift in policy** on this issue, and the Children and Families Act 2014 brought in **new provisions concerning post-adoption contact**.

When making the adoption order or at any time afterwards the **court** may either make an **order for contact** between a child and their former relatives (ie. birth family) (s51A(2)(a) Adoption and Children Act 2002, as amended by the Children and Families Act 2014). When deciding whether to grant permission to apply for an order for contact after the adoption, the court must consider the possible harm that might be caused to the child by the proposed application, the applicant's connection to the child, and any representations that are made to them by the child, the person who has applied for the adoption order, or the child's adoptive parents (s51A(4)(c)).

Furthermore, under s46(6), before making an adoption order, the court must consider whether there should be arrangements for allowing any person contact with the child, must consider any existing or proposed arrangements and must take account of the views of the parties. Such contact can either be indirect, through the exchange of photographs and letters, or direct, involving face-to-face meetings, phone calls and other electronic communication.

Despite these provisions, the **jurisprudence of the English courts shows that it will be rare for direct contact to be awarded against the wishes of the adoptive parents**. Although their wishes will not be *determinative*, as the decision will be determined by the child's welfare, the courts have recognised that it will not usually be in the child's best interests to impose an obligation on the adoptive parents that they are unwilling to agree upon. This is based on the premise that the welfare of the child depends on the stability and security of the adoptive parents, and a decision that undermines this will be damaging to the child.¹⁷¹

This position fails to take into account the changing nature of the driving forces behind adoption. When it was first introduced in English law, it provided a mechanism for single mothers to place their infants with an adoptive family without anyone being the wiser. Birth outside wedlock was a social stigma for both the mother and the child, and as such, the adoption would cut all legal ties with her, and there would be a complete legal transplant from one family to the other, under the shroud of secrecy. However, in the current era, the majority of children that are adopted are older, and have an established relationship with their parents, siblings and wider relations. Even where circumstances dictate that they require alternative care, it does not necessarily require that there be no further contact with their birth family. As such, this is an area in which English law needs to evolve so that greater recognition is given to the child's pre-existing ties with the birth family.

¹⁷⁰ See *Re T* [1995] 2 FLR 251.

¹⁷¹ *Re J (A Child) (Adopted Child: Contact)* [2010] EWCA Civ 581.

5.1.4. Contact in the child's native language

When a child has been taken into public care, **any contact between the child and his or her parents and wider family will be supervised**. This is because the local authority is responsible for the child's safety during contact, and also because the supervisor will continue to assess the relationship between the child and parent.

In the letter from Emily Whitehead, UK Department for Education, to the PETI Committee of 23 January 2015, it was stated that the reason for prohibiting parents and children from conversing in their native language is a **child-focussed measure**, as having an interpreter would mean more adults in the room, and that the conversation would be slowed for the interpreter to translate for the supervisor.

However, it is clear that the requirement that the conversation be in English is not an absolute rule, as Ms Whitehead states that decisions in individual cases will be down to the supervising **social worker**, taking into account the circumstances of each case.

While it is important to ensure the child's safety during any contact with parents and family, **article 30 of the UN Convention on the Rights of the Child** prohibits states from denying a child from a linguistic minority the right to use his or her own language. The right of a child and parent to converse in a language they choose falls within the scope of the right to respect for private and family life under **article 8 ECHR**, meaning that any measure that restricts this must pursue a legitimate aim, and be proportionate to this aim pursued.

Looking to the reasons put forward by the UK government for prohibiting the use of the native language – ie. not wanting more adults in the room, and the slowing of the conversation – **it appears doubtful that they would pass this test**. This is particularly the case where family reunification is still being contemplated. As such, this is an area that needs re-evaluation by the UK authorities.

5.2. Maintenance of the child's links with their nationality and ethnicity

5.2.1. Alternative placement with a member of the child's family

As was discussed above, before making an adoption order, authorities must determine that the child's welfare requires adoption in that "nothing less will do".¹⁷² This extends also to child protection proceedings: before the local authority brings an application before the court for a care order under s31(2) of the Children Act, **voluntary arrangements for other family members to look after the child should be considered**.¹⁷³ The Department of Education has made clear that the policy of local authorities should be to seek to enable those who cannot live with their parents to remain with members of their extended family or friends.¹⁷⁴

Statutory guidance on the Children Act requires that a local authority should take steps as soon as possible to explore whether care for the child can be safely provided by a relative of friend.¹⁷⁵ Furthermore, Practice Directions given by the Family Court require local authorities to demonstrate that they have considered family members and friends as potential carers at each stage of the decision-making process.¹⁷⁶

¹⁷² See Part 2.3 above.

¹⁷³ Department for Education, *Family and Friends Care: Statutory Guidance for Local Authorities* (March 2011) 11.

¹⁷⁴ *Ibid.*

¹⁷⁵ *The Children Act 1989 Guidance and Regulations Volume 1, Court Orders*, DCSF 2008

¹⁷⁶ Practice Direction: Public Law Proceedings Guide to Case Management, President of the Family Division April 2010

In order to determine whether a member of the child's wider family is a suitable carer, the local authority must undertake a viability assessment, in line with the Fostering Service Regulations 2011.¹⁷⁷ The Care Planning Regulations 2010 set out timescales for the completion and ratification of this assessment. Consideration must be given to any established relationship and the quality of the relationship between the child and potential carer; their age and health; whether there have been previous concerns about their parenting and whether there are any significant criminal convictions or concerns that would preclude them from being suitable to care for the child.

Social workers will often hold **family group conferences** – a decision-making meeting in which the child's wider family network comes together to make a plan about the future arrangements for the child – to eliminate or identify the most appropriate carers to assess. While there is no legal requirement that such a meeting be held, they are now often used by local authorities when planning for a child who cannot live at home. At these meetings, the family are given information about the agency's concerns, and are asked to produce a plan that addresses those concerns.

However, there are some circumstances in which a family group conference will not be used, including where the family has a history of intergenerational sexual abuse, where there is an on-going child protection enquiry under s47 of the Children Act 1989,¹⁷⁸ and where there is a high risk of violence at the conference.

5.2.2. Placement with adopters of the same national and ethnic background

Under article 20(3) of the UN Convention on the Rights of the Child, when considering alternative care for a child "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".

Prior to 2014 this was reflected in the Adoption and Children Act 2002. Under s1(5) of that Act, when placing a child for adoption authorities were required to give "**due consideration...to religious persuasion, racial origin and cultural and linguistic background**" as part of the determining whether the adoption order would be in the child's best interests. **However, s3 of the Children and Families Act 2014 removed the requirement in England**, although it still remains in relation to Wales.

The government contends that these aspects of the child's background will continue to be considered under the requirement that the agency give due consideration to "the child's needs, background and any other relevant characteristics", but that the shift of emphasis away from an explicit consideration of ethnicity will help to ensure that the disproportionate number of children in care from ethnic minorities are not faced with **long waiting periods** for an adoption by a family of the same ethnic origin.¹⁷⁹ This was a concern expressed by the UN Committee on the Rights of the Child in its 2008 Concluding Observations on the United Kingdom.¹⁸⁰

In the meantime, it may be in the best interests of the children involved to grow up in a family environment, even if it is not within their own ethnic, racial, linguistic or cultural group. This is the approach that has been taken by the **European Commission of Human Rights** the only time it has been faced with the issue of the maintenance of cultural identity. The case of *ED v Ireland*¹⁸¹ was brought by the father of a child placed for

¹⁷⁷ Schedule 3.

¹⁷⁸ Where a local authority has reasonable cause to suspect that a child who lives in the area is suffering, or likely to suffer significant harm, they have a duty to make such enquiries as are necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare.

¹⁷⁹ Department for Education, *Consideration of the Children and Families Bill Provisions in Light of the European Convention on Human Rights and the United Nations Convention on the Rights of the Child* (March 2013) [13]-[17].

¹⁸⁰ (20 October 2008) CRC/C/GBR/CO/4, [46].

¹⁸¹ (Appl. No. 25054/94) Decision of 18 October 1995.

adoption. He and the children's mother were both members of the travelling community, and although he admitted that he could not currently provide care for the child, he argued that adoption would mean the loss of the child's access to his traveller heritage and his "true" identity. Instead, he argued for the child to be placed in long-term fostering, while being educated concerning his heritage, and upon adulthood he could choose which life he wished to lead.

The Commission held that it was **within the state's margin of appreciation** to decide that the child's need for a permanent family was greater than the need to maintain his cultural heritage, and that it would not interfere with the balancing process undertaken by the domestic authorities.

Nevertheless, even with the removal of the explicit requirement to consider the child's cultural and linguistic origins, the UK government must ensure that they do indeed continue to give due consideration to the child's needs and background, and place the child in a compatible placement wherever possible. This is a consideration that will arise in relation to a choice of jurisdiction for child protection hearings, especially where the child is of an ethnic minority.

5.3. Child protection cases with cross-border elements

When considering the obligations of the English authorities when dealing with child protection cases concerning children from other EU Member States, **Council Regulation (EC) No 2201/2003 of 27 November 2003 ("Brussels II a")** is of particular importance.

This is an area in which there have been significant difficulties identified in local authority practice, and for this reason the courts have been active in laying down rules to be followed when dealing with cross-border cases.

5.3.1. Working with foreign authorities

Article 55 of Brussels II a provides for **cooperation** on cases specific to parental responsibility. It requires that Central Authorities in Member States collect and exchange information on the situation of the child, on any procedures under way, and on decisions taken concerning the child. Central Authorities must also facilitate communications between courts in such matters.

The President of the Family Division of the High Court, Sir James Munby, has emphasised that "English courts must be assiduous in providing, speedily and without reservation, information sought by the Central Authority of another Member State. At the same time judges will wish to make appropriate use of this channel of communication to obtain information from the other Member State wherever this may assist them in deciding a care case with a European dimension."¹⁸²

The UK Department for Education has set out advice for local authorities, social workers, service managers and children's service lawyers when dealing with child protection cases involving children with connections to a foreign country.¹⁸³

It emphasises that **social workers should consider working with foreign authorities from the very beginning**:

¹⁸² [2014] EWHC 6 (Fam).

¹⁸³ Department of Education, "Working with Foreign Authorities: Child Protection Cases and Care Orders" (July 2014)

- when carrying out an assessment under s47 of the Children Act 1989,¹⁸⁴ where the child has links to a foreign country, in order to understand the child's case history and/or to help them to engage with the family;
- when a child with links to a foreign country becomes the subject of a child protection plan, has required immediate protection, or is made subject to care proceedings, the social worker should consider informing the relevant foreign authority, unless doing so is likely to place the child or family in danger; and
- when contacting or assessing potential carers abroad (such as extended family members).¹⁸⁵

The Guidance notes that where the relevant foreign Embassy has not been informed of child protection proceedings prior to the case going to court, the court should normally do so itself without delay.¹⁸⁶

In the 2014 case of *Re E (A Child)*,¹⁸⁷ the President of the Family Division set out **good practice** that **courts** must follow in any care or other public law cases dealing with a child with connections to a foreign jurisdiction:

1. The court should not in general impose or permit any obstacle to free communication and access between a party who is a foreign national and the consular authorities of the relevant foreign state. In particular, no injunctive or other order should be made which might interfere with such communication and access, nor should section 12 of the Administration of Justice Act 1960¹⁸⁸ be permitted to have this effect.
2. Whenever the court is sitting in private it should normally accede to any request, whether from the foreign national or from the consular authorities of the relevant foreign state, for:
 - a) permission for an accredited consular official to be present at the hearing as an observer in a non-participatory capacity; and/or
 - b) permission for an accredited consular official to obtain a transcript of the hearing, a copy of the order and copies of other relevant documents.
3. Whenever a party, whether an adult or the child, who is a foreign national
 - a) is represented in the proceedings by a guardian, guardian ad litem or litigation friend; and/or
 - b) is detained,

the court should ascertain whether that fact has been brought to the attention of the relevant consular officials and, if it has not, the court should normally do so itself without delay.¹⁸⁹

¹⁸⁴ Where a local authority has reasonable cause to suspect that a child who lives in the area is suffering, or likely to suffer significant harm, they have a duty to make such enquiries as are necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare.

¹⁸⁵ Department of Education, "Working with Foreign Authorities: Child Protection Cases and Care Orders" (July 2014) 5.

¹⁸⁶ Department of Education, "Working with Foreign Authorities: Child Protection Cases and Care Orders" (July 2014) 6.

¹⁸⁷ *Re E (A Child)* [2014] EWHC 6 (Fam).

¹⁸⁸ See section 5.4 below

¹⁸⁹ *Re E (A Child)* [2014] EWHC 6 (Fam). [47].

However, the courts have also noted the importance of understanding the different roles of the embassy, and the Central Authority. **Social workers must be acutely aware of the scope of authority of social workers in different jurisdictions, and the scope of their own authority.** In the case of *Leicester City Council v S*,¹⁹⁰ an assessment had been undertaken by an English social worker in Hungary without consideration of whether this was legal, and the local authority had made a request by email to the Hungarian Central Authority for, among other things, the mother's medical and social work records, without knowing whether, or how, such evidence could properly be obtained under Hungarian law.

As such, Justice Moylan highlighted the following **procedural issues** which can arise in care proceedings involving a child who is, or whose relevant family members are, nationals of or resident in another Member State:

- (a) The need to consider, before they commence such work, whether English social workers are permitted to undertake work directly in another EU Member State;
- (b) The agency given primary responsibility for cooperation and communication under Chapter 4 of "Brussels II a" Regulation is the Central Authority;
- (c) Central Authorities (or other foreign State Agencies, including Embassies) are under no obligation, and cannot be placed under any obligation, to comment on or become engaged in proceedings in England. This includes "courts" of another Member State, as defined by "Brussels II a" Regulation, which are under no obligation to make a request under article 15, the obligation being on the courts of England and Wales;
- (d) Embassies and consular officials are given no role in "Brussels II a" Regulation (or the 1996 Hague Child Protection Convention) and should not be used as proxies for Central Authorities;
- (e) Requests under "Brussels II a" Regulation for information (under article 55) must be clearly focused on one or more of its provisions and must be distinguished from requests for evidence which must be made under the Evidence Regulation.¹⁹¹

Local authorities were also reminded that simply because the other Member State had not requested a transfer of jurisdiction, or raised concerns about the application, it could not be assumed that England was the **appropriate forum**. Justice Moylan noted that there may be reasons why a request was not made – for example due to the structure of the Brussels II Regulation or for reasons of comity – and the obligation was on the Court with primary jurisdiction to address issues arising under article 15.¹⁹²

5.3.2. Ensuring parental participation

A difficult problem that has arisen in relation to cross-border cases has been **ensuring that all parties are adequately informed of, and involved in, proceedings**. This was addressed by the English High Court in the case of *Re A (A Child)*, which was highlighted as "another example of the need of the court to grapple with jurisdiction issues at a much earlier stage."¹⁹³

The father in this case was not served with the papers, or given formal notice of the proceedings, until five months after care proceedings were started whereby his son was

¹⁹⁰ [2014] EWHC 1575 (Fam).

¹⁹¹ *Ibid.*, [14].

¹⁹² *Ibid.*, [37].

¹⁹³ [2014] EWHC 604 (Fam), [4].

placed in foster care. This was contrary to the requirement under English law that any person with parental responsibility be an automatic respondent to the proceedings. Even if a parent does not have parental responsibility, there is a mandatory requirement for a legal parent to be given notice of the proceedings.¹⁹⁴

As such, the judge gave guidance as to the action to be taken should one or both **parents of a child taken into public care live abroad**:

- (1) At an early stage every effort should be made to locate, contact and engage a parent who lives abroad. If that other country is one of the signatories to "Brussels II a" Regulation information as to the parent's whereabouts can be obtained through an article 55 request via the Central Authority.
- (2) Once contacted the parties and, if necessary, the court should take active steps to secure legal representation for such parents.
- (3) The court must effectively timetable any issues as to jurisdiction to avoid the delays that occurred in this case. This includes early consideration regarding transfer to the High Court. A party seeking written expert legal advice about the extent of this court's jurisdiction as to habitual residence is not likely to be a helpful step. The question of jurisdiction is a matter to be determined by the court following submissions from the party's legal representatives.
- (4) There needs to be a more hands-on approach by all parties with regard to compliance with court orders. No party should be able to sit back as a spectator and watch non-compliance with orders and not shoulder any responsibility that flow as a result of those failures.¹⁹⁵

It is of crucial importance that this guidance is followed, to ensure that the rights of both the parents and the child are adequately protected.

It is also important that all parties have access to the relevant information that would allow them to participate in proceedings. Where documents are only produced in English, it can be prohibitively expensive for individuals to have these translated, meaning that they may not be able to fully understand the decision-making process, or the reasons for the decision.

5.3.3. Choice of jurisdiction

In *Re E (A Child)*,¹⁹⁶ the President noted that the number of care cases involving children from other European countries has risen sharply in recent years and that "[i]t is one of frequently voiced complaints that the courts of England and Wales are exorbitant in their exercise of the care **jurisdiction** over children from other European countries." Furthermore, he noted that "[t]here are specific complaints that the courts of England and Wales do not pay adequate heed to [the Brussels II a Regulation] and that public authorities do not pay adequate heed to the Vienna Convention."¹⁹⁷

The jurisdiction of English courts in relation to care proceedings is not spelt out in any statutory provision, but the rule developed by the courts is that what normally founds jurisdiction in such a case is the child being either **habitually resident or actually present in England and Wales at the relevant time**.¹⁹⁸

¹⁹⁴ Ibid., [4], [11]. See Family Procedure Rules 2010, Rule 12.3

¹⁹⁵ Ibid., [12].

¹⁹⁶ [2014] EWHC 6 (Fam).

¹⁹⁷ Ibid., [13].

¹⁹⁸ Ibid., [23].

However, where the child in question is from another Member State of the European Union, the **Brussels II a Regulation** will apply. Article 8(1) of this Regulation confers jurisdiction upon the state of **habitual residence**, and therefore the child merely being "actually present" in England and Wales at the relevant time will be insufficient, unless no other place of habitual residence can be established.¹⁹⁹

In urgent cases, article 20 allows for the English courts to take "provisional, including protective, measures", until such time as the court of the Member State having jurisdiction has taken the measures it considers appropriate.

An additional dimension is added by article 15, which allows the court to **request a court of another Member State to assume jurisdiction**. In 2013, the Court of Appeal regretted that "[a]lthough article 15 has been in existence for nearly 10 years now there is no reported case either here or elsewhere in the EU on its interpretation by a court considering whether to make the request...Nor is there any official guidance about it from the Commission. Nor have counsel been able to identify any academic commentary about it."²⁰⁰

Despite this lack of guidance, the English courts have set out the three questions to be considered when deciding whether to exercise their power under this article.²⁰¹

First, the court must determine whether the child has, within the meaning of article 15(3), "a particular connection" with the relevant other member State. This is a question of fact. Article 15(3) includes the former habitual residence of the child, the place of the child's nationality, and the habitual residence of a holder of parental responsibility. The courts have made clear that habitual residence must be given the autonomous definition as established by the Court of Justice of the European Union in *Re A (Area of Freedom, Security and Justice)*²⁰² and *Mercredi v Chaffe*.²⁰³

Second, the court must determine whether the court of that other Member State "would be better placed to hear the case, or a specific part thereof". This evaluation must be undertaken in the light of all the circumstances of the particular case.

Finally, the court must judge whether a transfer to the other court "is in the best interests of the child." This again involves an evaluation undertaken in the light of all the circumstances of the particular child.

It is important to note at this stage that the **evaluation of what is in the best interests of the child relates not to the potential outcome of the case in the foreign jurisdiction, but on the most appropriate *forum* for determining that dispute.**²⁰⁴

To undertake an in-depth best interests enquiry concerning the child's future care would be, in the words of the High Court, a "chauvinistic argument which says that the authorities of the [foreign country] have got it all wrong and that we know better how to deal with the best interests of [their] citizen." He went on to state that "[t]he analysis of best interests only goes to inform the question of forum and should not descend to some kind of divisive value judgement about the laws and procedures of our European neighbours."²⁰⁵ In

¹⁹⁹ Art 13(1).

²⁰⁰ *Re T (A Child: Art 15 BIIR)* [2013] EWHC 521 (Fam), [8]. Although it was found that Mostyn J had misdirected himself as to a certain section of law, this section of the judgment is not relied on here (*Re K (A Child)* [2013] EWCA Civ 895)

²⁰¹ See *AB v JLB* [2008] EWHC 2965 (Fam).

²⁰² (C-523/07) [2009] 2 FLR 1.

²⁰³ (C-497/10) [2011] 1 FLR 1293.

²⁰⁴ See discussion of Lady Hale in *Re I (A Child)* [2009] UKSC 10, concerning Article 12.

²⁰⁵ *Re T (A Child: Art 15 BIIR)* [2013] EWHC 521 (Fam), [37]

particular, the court has made clear that the inability of a foreign court to order non-consensual adoption is irrelevant to the consideration.²⁰⁶

Having said this, the **most appropriate forum may be influenced by future plans for the child**. For example, in the case of *Re A and B (Children)*, the court recognised that the maternal great grandparents, living in the Czech Republic, would be at the forefront of options for long-term care for the child. This was a particularly influential factor in determining whether to transfer jurisdiction.²⁰⁷ The Court noted that any assessments and enquiries undertaken in the foreign state at the request of the English courts "are likely to be cumbersome, may well be incomplete and are likely to be outside the direct control of this Court." It said:

Any assessment undertaken on behalf of the local authority here would suffer from at least two disadvantages. First it would be burdensome to transmit questions in a complete a form as the authority would wish, particularly if there were to be a need for follow up inquiries and further information. Second, the international procedures for obtaining such assessments may fail to achieve their stated aim to the satisfaction of the authority and possibly also the court.²⁰⁸

This is as a result of the limits of the role of consular authorities, and the necessity of using the Taking of Evidence Regulation (EC) 1206/2001 procedure to obtain evidence from other Member States.²⁰⁹

The courts have emphasised that even if affirmative answers were given to all of the three questions there remains discretion whether or not to request a transfer. However it has been acknowledged that if all the questions were answered affirmatively it was difficult to envisage circumstances where it would nonetheless be appropriate not to transfer the case.²¹⁰

In 2014, the Court of Appeal stated that good practice will now require that in any care or other public law case with a **European dimension the court should set out quite explicitly**, both in its judgment and in its order:

- i) the basis upon which, in accordance with the relevant provisions of "Brussels II a" Regulation, it is, as the case may be, either accepting or rejecting jurisdiction;
- ii) the basis upon which, in accordance with article 15, it either has or, as the case may be, has not decided to exercise its powers under article 15.²¹¹

The Court noted that "[t]his will both demonstrate that the court has actually addressed issues which, one fears, in the past may sometimes have gone unnoticed, and also identify, so there is no room for argument, the precise basis upon which the court has proceeded."²¹²

5.3.4. Placement in another jurisdiction

Where a court contemplates the **placement of a child in institutional or foster care in another jurisdiction**, under **article 56** of the Brussels II a Regulation, the Department of Education has given guidance as to the assessment that the local authority must undertake. In particular, it instructs that the **local authority** must make its own

²⁰⁶ *Nottingham Civil Council v M (A Child)* [2014] EWCA Civ 154, [54].

²⁰⁷ *Re A and B (Children) (Brussels II Revised: Article 15)* [2014] EWFC 40.

²⁰⁸ *Ibid.*, [57].

²⁰⁹ *Leicester City Council v S* [2014] EWHC 1575 (Fam), [14]

²¹⁰ *AB v JLB* [2008] EWHC 2965 (Fam). [36]

²¹¹ *Re E (A Child)* [2014] EWHC 6 (Fam) [35].

²¹² *Ibid.*

independent professional **assessment of whether the proposed placement is appropriate**. Whilst the local authority should not re-examine the reasons for the proposed decision on placement made in the other Member State, before consenting to the placement the local authority will need to be satisfied that it has the information necessary to establish that the plan for the child provides him or her with the same safeguards as a comparable plan for the placement of an English child.²¹³

Department of Education guidance on this suggests that the authority may wish to consider such issues as:

- (a) whether based on the information provided about the child's needs and circumstances the placement for the child appears to be appropriate;
- (b) the frequency and suitability of arrangements for keeping the plan under review and assessing the ongoing need for the placement;
- (c) arrangements to ensure the child has equivalent safeguards to children from our own jurisdiction who are in such placements;
- (d) arrangements for family contact (if appropriate); and
- (e) the planned duration of placement and aftercare arrangements.²¹⁴

The **local authority will be entitled to refuse consent**, if following scrutiny of information about the child and the child's plan, the authority reaches the view that the proposed placement is **unsuitable for the individual child**. Examples given for a refusal are that the proposed placement is inappropriate for the child's age, arrangements for review of the plan or for aftercare are not suitable; or because the local authority has information about the quality of the proposed placement indicating its unsuitability in view of any concerns that relate to the care and safety of other children.²¹⁵

5.4. Transparency of family proceedings

The English courts have been acutely aware of the need for transparency in family law proceedings, and the obligation to ensure that justice is not only done, but that it is also seen to be done. It has been a topic that has been the subject of many high profile **campaigns by not only families, but journalists and politicians** also. As a result, there have been several influential cases decided in the past five years on this topic, as well as Practice Guidelines set out by the President of the Family Division, to direct courts as to how to approach this issue.

5.4.1. The legal framework

Section 97(2) of the Children Act 1989 provides that:

No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify –

- (a) any child as being involved in any proceedings before the High Court, a county court or a magistrates court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child ...

²¹³ Department of Education "Advice on Placement of Looked after Children Across Member States of the European Union" (January 2013) 6.

²¹⁴ Ibid., 7.

²¹⁵ Ibid.

This prohibition lasts only until the end of proceedings, at which stage restrictions are lifted.

However, care proceedings and adoption cases are also covered by s12 of the Administration of Justice Act 1960. So far as is material, s12 provides that:

(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say –

(a) where the proceedings ...

(i) relate to the exercise of the High Court with respect to minors...

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

The protection afforded by s12 is without limit of time.

In January 2014, the President of the Family Division issued practice guidelines concerning transparency in family courts and the publication of judgments concerning children. These guidelines direct that in **any judgment concerning care proceedings or adoption**, the starting point is that **permission should be given** for the judgment to be published **unless there are compelling reasons** why the judgment should not be published.²¹⁶

The Guidelines state that in all cases where a judge gives permission for a judgment to be published:

- (i) Public authorities and expert witnesses should be named in the judgment approved for publication, unless there are compelling reasons why they should not be so named;
- (ii) The children who are the subject of the proceedings in the family courts, and other members of their family, and the person who is the subject of proceedings under the inherent jurisdiction of the High Court relating to incapacitated or vulnerable adults, and other members of their family, should not normally be named in the judgment approved for publication unless the judge otherwise orders;
- (iii) Anonymity in the judgment as published should not normally extend beyond protecting the privacy of the children and adults who are the subject of the proceedings and other members of their families, unless there are compelling reasons to do so.²¹⁷

If any party wishes to identify himself or herself, or any other party or person, as being a person referred to in any published version of the judgment, their remedy is to seek an order of the court,²¹⁸ which has the power to either extend or relax the reporting restraints.²¹⁹

²¹⁶ Practice Guidelines, Transparency In The Family Courts: Publication Of Judgments (January 2014).

²¹⁷ Ibid., [20].

²¹⁸ Ibid.

²¹⁹ *Re J (A Child)* [2013] EWHC 2894 (Fam), [22].

5.4.2. The law in practice

The English High Court has stated that there is a “compelling need for transparency in the family justice system” that is demanded both as a matter of principle, and of pragmatism.²²⁰ In the case of *Re J (A Child)*, Sir James Munby stated:

It is vitally important, if the administration of justice is to be promoted and public confidence in the courts maintained, that justice be administered in public – or at least in a manner which enables its workings to be properly scrutinised – so that the judges and other participants in the process remain visible and amenable to comment and criticism.²²¹

This is particularly the case in relation to adoption. In that same case it was emphasised that:

Such cases, by definition, involve interference, intrusion, by the state, by local authorities and by the court, into family life. In this context the arguments in favour of publicity – in favour of openness, public scrutiny and public accountability – are particularly compelling. The public generally, and not just the professional readers of law reports or similar publications, have a legitimate, indeed a compelling, interest in knowing how the family courts exercise their care jurisdiction.²²²

Judges have been acutely aware that they “cannot afford to proceed on the blinkered assumption that there have been no miscarriages of justice in the family justice system.”²²³ Over ten years ago, it was recognised that “[t]his is something that has to be addressed with honesty and candour if the family justice system is not to suffer further loss of public confidence. Open and public debate in the media is essential.”²²⁴

In deciding whether to grant permission for a private judgment to be made public, the court must conduct a **balancing exercise** to weigh the competing interests engaged under articles 6, 8 and 10 of the ECHR.²²⁵ In doing so, the courts have made clear that the **interests of the child**, although not paramount in this case, will be a **primary consideration**. That is, they must be considered first, although they can be outweighed by the cumulative effect of other considerations.²²⁶

The rights to be balanced were set out in the case of *Re K (A Child: Wardship: Publicity)* in 2013. The failings of the local authority in this case were manifest, and the judgement set out “a catalogue of poor social work practice, of failure to engage appropriately with these parents, of failure to keep them informed, of arriving at hasty, ill-informed and flawed judgments about them and of marginalising them.”²²⁷

The court noted that, against this background, not only do the parents have a legitimate interest in telling their story, but the public has a right to hear their story.²²⁸ In addition, from the media's perspective, as a human interest story there are obvious advantages in the story being told by actors involved in that story.²²⁹ However, these interests must be weighed against the child's right to respect for her private life, both in and of itself, as well as because of the consequent welfare implications that may follow. Importantly, however, the court recognised that this right does not self-evidently justify interfering with or

²²⁰ Ibid., [31].

²²¹ Ibid., [32].

²²² Ibid., [27].

²²³ *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [103].

²²⁴ Ibid.

²²⁵ *Re J (A Child)* [2013] EWHC 2694 (Fam), [27].

²²⁶ Ibid.

²²⁷ *Re K (A Child: Wardship: Publicity)* [2013] EWHC 2684 (Fam), [79].

²²⁸ Ibid.

²²⁹ Ibid., [72].

restricting the parents' right to be able to tell their story to the media or the media's right to publish, and a balance must be struck.²³⁰

In this case, the judge noted "the importance in a free society of parents who feel aggrieved at their experiences of the family justice system being able to express their views publicly about what they conceive to be failings on the part of individual judges or failings in the judicial system and likewise being able to criticise local authorities and others."²³¹ He stated that it "would be affront not merely to the law but also, surely, to any remotely acceptable concept of human dignity and, indeed, humanity itself."²³²

However, the willingness of the courts to permit parents to speak out concerning injustice in the system does not automatically carry with it the right to identify – either through name or picture – the relevant child. While there is "an obvious and compelling need for public debate to be free and unrestricted"²³³, there is a balance to be struck with the protection of the child's welfare, which often "imperatively" requires that neither they nor their carers be identified. In the case of *Re E (A Child)*, the court emphasised that neither the public interest in knowing about the case, nor the parents' claims to be allowed to tell their story, would be advanced by identifying the child. As such, the **courts have frequently permitted information to be shared as long as the child's anonymity is protected.**

In this respect, in 2009 the Children's Commissioner for England commissioned a several academics to undertake research on the views of children and young people regarding media access to family courts. The report, published March 2010, found that:

Children and young people said the press sensationalise information, or construct bold headlines that do not reflect the content of cases, and will 'cherry pick' bits of information. They are mostly doubtful that the press will print a truthful story and are doubtful – some cynical – about an educational function.

Children fear 'exposure': they are afraid that personal, painful and humiliating information will 'get out' and they will be embarrassed, ashamed and bullied at school, in neighbourhoods and communities. This expectation is not limited to children in rural communities and is particularly relevant for those from ethnic minority communities. They also appear unconvinced about the capacity of laws and adults to protect them.²³⁴

As such, there is a need to protect the welfare of children, whilst ensuring freedom of expression and the transparency of the system. This is a difficult line to walk, and the balance has not always been appropriately struck in the past. Nevertheless, there are now clear guidelines to deal with this issue, which must be followed by the courts.

²³⁰ *Ibid.*, [78].

²³¹ *Re P* [2013] EWHC 4048 (Fam), [36].

²³² *Ibid.*

²³³ *Re E (A Child)* [2014] EWHC 6 (Fam), [52].

²³⁴ *Re K (A Child: Wardship: Publicity)* [2013] EWHC 2684 (Fam), [68].

6. RECOMMENDATIONS

On the basis of issues raised in the petitions submitted to the PETI committee of the European Parliament and of the analysis and considerations made in this research, a series of recommended actions could be suggested to EU institutions and to the UK government, as following:

Recommendations to the institutions of the European Union:

- That a **guide** to good practice be drawn up by the European Union concerning **cooperation between Member States under the "Brussels II a" Regulation**, and in particular focusing on:
 - Guidance for child protection services in dealing with cross-border cases;
 - Providing information on the workings of child protection systems in different Member States;
 - Setting out guidance as to the correct test for asking another state to assume jurisdiction under article 15.
- That consideration be given to **strengthening the provisions of the "Brussels II a" Regulation**, including:
 - Placing a duty to inform foreign authorities of child protection proceedings before the court be made mandatory, unless the safety or welfare of the child demands otherwise;
 - Including a common, autonomous understanding of habitual residence, as defined by the Court of Justice of the European Union;
 - Strengthening cooperation in cases of placement of a child in another jurisdiction under article 56, including:
 - Creating a specific mechanism for a request for transfer to be made under the Convention;
 - Setting clear rules for when a transfer should take place, and what factors should be considered.
- That a **greater understanding** is encouraged between Member States of the **different approaches** to child protection. In particular:
 - That research be undertaken concerning different forms of public care be used in each jurisdiction, including both short-term and long-term care options;
 - That statistics and information be compiled concerning the outcomes for children in different forms of public care in different jurisdictions;
 - That statistics be compiled concerning the number of adoptions in each jurisdiction, disaggregated by age, gender, reasons for adoption, ethnic and religious minority status, immigration status and socio-economic background, and whether parental consent had been given;
 - That statistics be compiled concerning successful reunifications of the child with their birth family, following a period in state care.

Recommendations to the UK Government:

- That **adequate financial and human resources** be allocated to **local authorities** to be able to fulfil their duties in relation to child protection, and that such services be protected in times of austerity.
 - The government must ensure that social services are adequately staffed with qualified personnel who are paid appropriately for their work.

- That **families** continue to be provided with **assistance** where they are experiencing difficulty, in order to prevent, where possible, children being taken into public care. In particular:
 - Authorities should ensure that all families are able to practically access offered services, and that language is not a barrier in this respect.
- That the right of the child to **communicate in their own language with their family** be recognised, including:
 - That children be permitted to communicate with their parents and family members in their native language;
 - That adequate resources be allocated to ensure that appropriately qualified interpreters are available for the purposes of the social worker.
- That greater emphasis be placed on **improving the outcomes for children in public care**, and developing **alternatives to adoption** for children who cannot return to their families.
 - Where adoption is necessary, emphasis should be placed on establishing open adoptions, and ensuring post-adoption contact between the child and his or her birth family, unless this is contrary to the child's best interests.
 - The complete severance of all legal and social ties between a child and their birth family should only be considered in the most severe and exceptional circumstances, which are not necessarily present in all cases where a child cannot return to their birth family.
- That despite the removal of the explicit requirement to consider the child's cultural and linguistic origins, local authorities continue to give due consideration to the **child's needs and background**, and place the child in a compatible placement wherever possible.
 - This factor should be given particular importance where the child has a connection with another jurisdiction.
- That **disaggregated data** be compiled concerning the frequency with which children from other EU member states are taken into public care, and the rate at which they are placed for adoption.
- That the **good practice** set out by the President of the Family Division in relation to **cooperation with foreign authorities** be included in Practice Directions for the court. In particular, the following should be emphasised:
 - That there should be no obstacle imposed on free communication and access between a party who is a foreign national, and the authorities of the relevant foreign state;
 - That permission be granted for accredited consular officials to be present at hearings as observers in a non-participatory capacity;
 - That permission be granted for an accredited consular official to obtain a transcript of the hearing, a copy of the order and copies of other relevant documents.
- That **social workers** be given **training** on the appropriate steps to be taken when working on a **case involving a child, parents, or potential carers in another jurisdiction**. Such training should include knowledge of the relevant guidance set out by the Department of Education, and involve:
 - Ensuring that when carrying out an assessment of a child, where he or she has links to a foreign country, local authorities consider engaging with social work authorities in the other jurisdiction in order to understand the child's case history and/or to help them to engage with the family;
 - When a child with links to a foreign country becomes the subject of a child protection plan, has required immediate protection, or is made subject to

- care proceedings, the social worker should consider informing the relevant foreign authority, unless doing so is likely to place the child or family in danger; and
- Ensuring that potential carers and care in the foreign jurisdiction are adequately considered.
- That **greater knowledge** of the provisions of the "**Brussels II a**" Regulation be **promoted amongst legal and child protection professionals**, in particular concerning the division of responsibilities under that instrument, including:
 - That requests under the Regulation must be clearly focused on one or more of its provisions and must be distinguished from requests for evidence which must be made under the Evidence Regulation;
 - That the agency given primary responsibility for cooperation and communication under the Regulation is the Central Authority;
 - That Central Authorities, and other foreign State Agencies, are under no obligation, and cannot be placed under any obligation, to comment on or become engaged in proceedings in England;
 - That courts of other Member States are under no obligation to make a request under article 15, the obligation being on the courts of England and Wales;
 - That embassies and consular officials are given no role under this Regulation, and should not be used as proxies for Central Authorities.
- That there continues to be recognition of the importance of **transparency in the family justice system**, including:
 - Ensuring open and public debate in the media;
 - Allowing parents to express their views publicly about their experiences, while recognising the need to protect the child's best interests;
 - Providing clear and easily accessible information to parents concerning their rights in this respect, while also highlighting the reasons why the child's identity cannot, and should not, be revealed.

REFERENCES

United Kingdom Government Documents

Report of the Departmental Committee on the Adoption of Children (1954, Cmnd. 9248)

Select Committee on Adoption Legislation, *Adoption: Post-Legislative Scrutiny* (2013, HL Paper 127)

Secretary of State for Health, "Adoption: A New Approach" (December 2000)

Performance and Innovation Unit, "Prime Minister's Review: Adoption" (July 2000)

Department for Children, Schools and Families, "The Children Act 1989 Guidance and Regulations Volume 1, Court Orders" (2008)

Department for Education, *Family and Friends Care: Statutory Guidance for Local Authorities* (March, 2011)

Department for Education, "An Action Plan for Adoption: Tackling Delay" (March 2012)

Department of Education "Advice on Placement of Looked after Children Across Member States of the European Union" (January 2013)

Department for Education, *Consideration of the Children and Families Bill Provisions in Light of the European Convention on Human Rights and the United Nations Convention on the Rights of the Child* (March 2013)

Department of Education, "Working with Foreign Authorities: Child Protection Cases and Care Orders" (July 2014)

Department for Education, "Statistics: looked-after children" (30 September 2014)

Department of Education, "Outcomes for children looked after by local authorities in England as at 31 March 2014" (10 December 2014).

English Court Practice Directions

Practice Direction: Public Law Proceedings Guide to Case Management, President of the Family Division (April 2010)

United Nations

United Nations Committee on the Rights of the Child, *Concluding observations on the United Kingdom* (20 October 2008) CRC/C/GBR/CO/4

Literature

Andrew Bainham and Stephen Gilmore, *Children: The Modern Law* (2013, Jordans)

BBC News, "More babies with 'special guardianship orders' as adoptions fall" (22 May 2015), <http://www.bbc.co.uk/news/uk-32840224>

Child Protection Resources, <http://www.childprotectionresource.org.uk/forced-adoption/>

Christopher Booker, "Slovaks protest at Britain's 'illegal child snatching' (The Telegraph, 22 September 2012) <http://www.telegraph.co.uk/comment/9559657/Slovaks-protest-at-Britains-illegal-child-snatching.html>

Owen Bowcott, "Latvia complains to UK parliament over forced adoption" (The Guardian, 9 March 2015) <http://www.theguardian.com/uk-news/2015/mar/09/latvia-complains-to-uk-parliament-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-and-finland-have-stolen-their-children-324031>.

Stephen Cretney, *Family Law in the Twentieth Century: A History* (2005, OUP)

Yves Brulard and Letitia Dumond, "Comparative Study Relating to the Procedures for Adoption among the Member States of the European Union, Practical Difficulties Encountered in this Field by European Citizens within the Context of the European Pillar of Justice and Civil Matters and Means of Solving these Problems and of Protecting Children's Rights" (2007, EU) JLS/2007/C4/017-30-CE-0157325/00-64

Family Law Week, "Government to Launch Adoption Action Plan in March" (23 February 2012) <http://www.familylawweek.co.uk/site.aspx?i=ed95941>

Family Law Week, "Mythbuster Guide as to the effect of Re B-S published" (12 November 2014) <http://www.familylawweek.co.uk/site.aspx?i=ed136692>

Zoe Fleetwood, "Adoption orders with cross-border elements" (26 March 2015) www.dawsoncornwell.com/en/.../Adoption_orders_cross_border.pdf

Hague Conference on Private International Law, "Statistics" (2014) http://www.hcch.net/index_en.php?act=conventions.publications&dtid=32&cid=69

Malachy Higgins, "Freeing for Adoption – the Legal Context" (1999) 5(3) *Child Care in Practice* 232

Joan Hunt, Suzette Waterhouse and Eleanor Lutman, "Parental Contact for Children Placed in Kinship Care Through Care Proceedings" (2010) *Child and Family Law Quarterly* 71.

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>.

Lord Mackay, "Joseph Jackson Memorial Lecture" (1989) 137 *NLJ* 505

Martin Narey, "The Narey Report: A Blueprint for the Nation's Lost Children" (5 July 2011) *The Times*.

NSPCC, *How Safe Are Our Children* (2014) <http://www.nspcc.org.uk/preventing-abuse/research-and-resources/how-safe-are-our-children-2014/>

Camilla Pemberton, "Community Care survey exposes how rising thresholds are leaving children in danger" (19 November 2013) <http://www.communitycare.co.uk/2013/11/19/community-care-survey-exposes-rising-thresholds-leaving-children-danger/>

J Selwyn et al, *Costs and outcomes of non-infant adoptions* (BAAF, 2006)

Claire Simmonds, "Paramountcy and the ECHR: A Conflict Resolved?" (2012) 71(3) Cambridge Law Journal 498.

Social Work Watch, Inside an Average Day in Social Work (2014) <http://www.unison.org.uk/cuts-in-social-service-budgets-laid-bare-in-accounts-of-day-in-life-of-social-workers>

"Similar to Nazi foster care': Czech president slams Norwegian child welfare" (RT, 10 February 2015) <http://rt.com/news/230951-czech-president-norway-nazi/>

English Court Cases

A and S v Lancashire County Council [2012] EWHC 1689 (Fam).
A Local Authority v Y and Z [2006] 2 FLR 41;
AB v JLB [2008] EWHC 2965 (Fam).
CH v London Borough of Merton [2014] EWHC 3311 (Fam),
Clayton v Clayton [2006] EWCA Civ 878
Down Lisburn Health and Social Services Trust v H [2006] UKHL 36
EH v London Borough of Greenwich [2010] EWCA Civ 344
H v Kingston upon Hull City Council [2013] EWHC 388 (Admin)
Humberside County Council v B [1993] 1 FLR 257
LB v London Borough of Merton [2013] EWCA Civ 476.
Leicester City Council v S [2014] 1575 (Fam)
Nottingham City Council v M (A Child) [2014] EWCA Civ 154
P v Nottingham City Council [2008] EWCA Civ 462
R (G) v Nottingham City Council [2008] EWHC 152
Re A and B (Children Brussels II Revised: Article 15) [2014] EWFC 40
Re B (A Child) (Disclosure) [2004] EWHC 411 (Fam)
Re B (A Child) [2009] UKSC 5
Re B [2013] UKSC 33
Re B-S [2013] EWCA Civ 1146
Re D (A Minor) (Adoption Order: Validity) [1991] 2 FLR 66
Re D (An Infant) [1959] 1 QB 229
Re E [2014] EWHC 6 (Fam)
Re F [2008] EWCA Civ 439
Re G (Care : Challenge to Local Authority Decision) [2003] EWHC 551 (Fam)
Re G (Children) [2006] UKHL 43
Re H (A Minor) (Adoption: Non-Patril) [1982] Fam 121
Re I (A Child) [2009] UKSC 10
Re J (A Child) (Adopted Child: Contact) [2010] EWCA Civ 581
Re J [2013] UKSC 9
Re J [2013] EWHC 2894 (Fam)
Re JM Carroll [1931] 1 KB 317 CA.
Re K (A Child) [2013] EWCA Civ 895
Re K (A Child: Wardship: Publicity) [2013] EWHC 2684 (Fam)
Re K (Adoption and Wardship) [1997] 2 FLR 221
Re L (An Infant) (1962) 106 SJ 611, CA
Re L [2007] 1 FLR 2050
Re M (Adoption or Residence) [1998] 1 FLR 570
Re O [1992] 1 WLR 912
Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535
Re P [2007] EWCA Civ 616
Re S (Adoption Order or Special Guardianship Order) [2007] EWCA Civ 54
Re S-B [2009] UKSC 17
Re T (A Child: Art 15 BIIR) [2013] EWHC 521 (Fam)
Re T [1995] 2 FLR 251
Re W [1971] AC 682

S v B and Newport City Council [2007] 1 FLR 1116.
Webster v Norfolk CC [2009] EWCA Civ 59

European Commission on Human Rights

ED v Ireland (Appl. No. 25054/94) Decision of 18 October 1995

European Court of Human Rights

Johansen v Norway [1996] ECHR 31
Neulinger and Shuruk v Switzerland [2010] ECHR 1053
R and H v United Kingdom [2012] 54 EHRR 2
YC v United Kingdom [2012] 54 EHRR 967

Court of Justice of the European Union

Re A (Area of Freedom, Security and Justice) (C-523/07) [2009] 2 FLR 1
Mercredi v Chaffe (C-497/10) [2011] 1 FLR 1293

ANNEX I: ADOPTION STATISTICS FOR ENGLAND (1994 – 2014)

Year	Number of children adopted from care
1994	2,300
1995	2,100
1996	1,900
1997	1,900
1998	2,000
1999	2,200
2000	2,700
2001	3,100
2002	3,400
2003	3,500
2004	3,700
2005	3,800
2006	3,700
2007	3,300
2008	3,200
2009	3,300
2010	3,200
2011	3,100
2012	3,470
2013	4,010
2014	5,050

Source: Department for Education

ANNEX II: CHILDREN IN PUBLIC CARE IN ENGLAND

Year	Children in Public Care	Under a care order (s31(2))	Freed for adoption²³⁵	Placement order granted	Voluntarily accommodated²³⁶
1992	55,000	37,500	490	0	17,100
1993	51,200	31,500	930	0	18,400
1994	49,300	29,100	1,000	0	18,800
1995	49,600	28,700	1,100	0	19,500
1996	50,500	29,000	1,200	0	19,800
1997	51,200	30,200	1,400	0	19,200
1998	53,300	32,100	1,600	0	19,100
1999	55,500	34,400	1,300	0	18,800
2000	58,100	36,400	1,400	0	19,300
2001	28,900	37,600	1,600	0	19,100
2002	59,700	38,400	1,800	0	19,000
2003	60,800	39,600	1,900	0	18,900
2004	61,200	39,700	2,500	0	18,800
2005	61,000	39,800	2,600	0	18,300
2006	60,300	39,700	2,200	530	17,700
2007	60,000	38,500	920	3,100	17,200
2008	59,400	36,900	600	4,400	17,300
2009	60,900	36,300	420	4,500	19,400
2010	64,470	38,110	300	5,170	20,630

²³⁵ This mechanism, under the 1976 Adoption Act, ceased to be used after 30 December 2005, so an decreasing number of children had such a status from that time – though as you can see, some children almost 10 years later still had not been adopted, and were still in this legal limbo. Statistics from 1992 to 1998 include children subject to emergency orders, as differentiated statistics are not available.

²³⁶ Under s20 of the Children Act, parents can ask the Local Authority to care for their child on a temporary basis. The parents can end this agreement, and remove the child immediately, at any time.

2011	65,500	38,770	250	6,420	19,670
2012	67,070	39,770	200	8,010	18,900
2013	68,060	40,060	150	9,740	17,780
2014	68,840	39,930	60	9,260	19,230

Source: Department for Education

ANNEX III: COMPARISON OF GROUNDS FOR ADOPTION WITHOUT CONSENT IN EU MEMBER STATES

	Abandonment or Lack of Contact with Child	Deprivation of Parental Rights	Dispensing with Consent
AUSTRIA	Whereabouts or residence unknown (6 months)		Refusal of consent without justification
BELGIUM	Parent has lost interest in the child	Deprivation of parental rights; has compromised his or her health, safety or morals	
BULGARIA	Resident in a foster home or institutional care, and parent has not requested the termination or modification of this measure and the return of the child (6 months)	Parents continuously fail to provide care for the child, do not provide financial support, or raise and educate the child in a manner harmful to its development.	
CROATIA	Abandoned or neglected the child (3 months)	Lost the right to parental care	
CYPRUS	Abandoned or neglected the child	Neglect or persistent mistreatment	Unreasonably withholding consent
CZECH REPUBLIC	Not manifested a proper interest (6 months)	Not trying to rectify their family and social condition within the limits of their possibilities so that they can personally care of the child (6 months)	
DENMARK		Deprivation of parental rights	If dispensing with consent it is of decisive importance to the welfare of the child
ENGLAND AND WALES			If dispensing with consent is in the best interests of the child
ESTONIA	Whereabouts or residence unknown (for "an extended period of time")	Deprivation of parental rights	
FINLAND			If the refusal is not sufficiently justified taking into account the best interests of the child

FRANCE	Manifest disinterest (12 months)	Risk of compromising the child's health or morals	Abusively withholding consent
GERMANY	Shown through conduct to be indifferent to the child	Persistently grossly violating parental duties	Where it would be disproportionately disadvantageous to the child if the adoption did not take place
GREECE		Deprivation of parental rights	
HUNGARY	Not contacting the child (12 months)		
IRELAND		Parents failed in their duty towards the child (12 months)	
ITALY	Abandonment: lacking the moral and material care of their parents		
LATVIA		Treat the child especially badly or does not care of the child or does not ensure the supervision of the child and it may endanger the physical, mental or moral development of the child.	
LITHUANIA		Parental authority restricted for an unlimited period	
LUXEMBOURG	Manifest disinterest (12 months)	Lost their parental rights	
MALTA	Unjustifiably not having contact (18 months)	Neglect or persistent mistreatment	Unreasonably withholding consent If dispensing with consent is in the best interests of the child
NETHERLANDS	Have not, or hardly, lived together	Abuse of parental authority or grossly neglected duties to care for the child	
NORTHERN IRELAND	Abandoned or neglected the child	Persistently failed in duties towards the child, has persistently ill-treated, or seriously ill-treated the child	Withholding consent unreasonably

POLAND		Deprived of parental authority	If refusal is clearly contrary to the child's welfare
PORTUGAL	Not showing interest (3 months)	Deprived of parental authority	
ROMANIA			Abusively refusing to give consent, and adoption is in the child's best interests
SCOTLAND		Unable to satisfactorily discharge parental duties	
SLOVAKIA	Systematically did not manifest proper interest (6 months)	Deprivation of parental rights	
SLOVENIA	Whereabouts or residence unknown (12 months)	Parental rights have been take away	
SPAIN		Deprived of parental authority	
SWEDEN		Where a parent has no share in custody	

ANNEX IV: LEGISLATION IN EU MEMBER STATES

AUSTRIA

Civil Code

Art 181: Consent to adoption is needed, unless (2) the parents' whereabouts have been unknown for at least 6 months; or (3) if consent is refused without justification

BELGIUM

Civil Code

Art 348.11: The Court can dispense with consent to adoption if it appears that the parent has lost interest in the child or has compromised his or her health, safety or morals.

Law on Protection of Youth

Art 33: A loss of parental authority will only carry with it a loss of the right to consent to adoption if the judge expressly stipulates this

BULGARIA

Family Code

Art 93(1): Adoption without the parent's consent is permissible when the parent continuously fails to provide care for the child and does not provide financial support for it or when they raise and educate the child in a manner harmful to its development.

Art 93(2): Adoption without the parent's consent is also permissible when the child is resident in a specialised institution and the parent, for more than six months and without good reason, has not requested the termination or modification of this measure and the return of the child or its accommodation in a family of relatives or close friends, in accordance with the Law for the Protection of the Child.

Art 93(3): Adoption without the parent's consent under paragraph 2 is also allowed when the child is in receipt of a social service of residence type or when it is accommodated by a foster family and is registered in the Registry for full adoption.

CROATIA

Family Act 2003

Art 130: Parental consent to adoption is not needed where the parent has lost the right to parental care, is incapacitated, or is a minor not capable of understanding the nature of adoption.

Cyprus

Adoption Law 1995

Section 5(1) The Court may dispense with consent:

- (a) in the case of a parent or guardian of the infant, that he has abandoned, neglected or persistently ill-treated the infant;
- (b) in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the infant, that he has persistently neglected or refused so to contribute;
- (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld

CZECH REPUBLIC

Act No 94/1963 Sb on Family

Section 68(1): If the child's parents are legal representatives of the child, their consent is not necessary if:

- a) they have not manifested a proper interest in the child permanently for at least six months, in particular by not visiting the child, by not fulfilling their maintenance duty to the child regularly and voluntarily and by not trying to rectify their family and social condition within the limits of their possibilities so that they can personally care of the child; or
- b) if they manifested no interest in the child for at least two months after the child's birth even if no impediment prevented them from manifesting the interest.

DENMARK

Adoption (Consolidation) Act 2009

Section 7:

(1) The consent of the parents is to be obtained where the person to be adopted is under the age of 18 years and a minor.

(2) Where one of the parents does not have parental responsibility, cannot be found, or is by reason of insanity, mental deficiency or any similar condition incapable of managing his or her own affairs, only the consent of the other parent is required.

(3) Where the restrictions set out in subsection (2) above apply to both parents, consent is to be obtained from the legal guardian of the child.

Section 9:

(2) Where the consent required by virtue of section 7 of this Act cannot be obtained, the Regional Government Department may, nevertheless, grant an adoption decree in special circumstances where it is of decisive importance to the welfare of the child. Where the child is in the care of a child or youth welfare authority, the consent of the Social Appeals Board must be obtained.

Section 10:

At the request of the Social Appeals Board, the Regional Government Department may give permission that a child placed in the care of a children or youth welfare authority may later be freed for adoption, even though the consent required by virtue of section 7 of this Act cannot be obtained. Permission may only be granted subject to the provisions extended in section 9(2) of this Act.

ENGLAND AND WALES

Adoption and Children Act 2002

Section 53:

(1) The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that—

- (a) the parent or guardian cannot be found or is incapable of giving consent, or
- (b) the welfare of the child requires the consent to be dispensed with.

ESTONIA

Family Law Act 2009

Section 152(5): Parent's consent is not required if he or she is incapable of submitting an application for an extended period of time or if his or her whereabouts are unknown for an extended period of time or if the parent has been deprived of the right of custody over the child in full on the basis of § 135 of this Act.

FINLAND

Adoption Act 22/2012

Section 9

(1) The adoption of a child may not be granted unless his/her parents have consented thereto, with the exceptions provided in paragraphs (2) and (3) and section 36(2).

(2) For exceptional reasons, adoption may be granted even if the consent of the parents or one of them has not been obtained or if a previous consent has been withdrawn, if it is deemed that the adoption obviously and definitely is in the best interests of the child and that the refusal or withdrawal of consent by the parent(s) is not sufficiently justified, taking into account the best interests of the child and the interaction between the child and the parent(s), their mutual relationship and its nature.

FRANCE

Civil Code

Art 384-6: The Court may grant the adoption if it considers the refusal of consent by the parents to be abusive, only if are disinterested in the child and risk compromising his or her health or morality

Art 350: If the parents are manifestly disinterested during the preceding year, the tribunal can declare the child abandoned.

GERMANY

Civil Code

Section 1748

(1) The family court, on the application of the child, must substitute the consent of one parent where that parent has persistently grossly violated his duties to the child or has shown through his conduct that he is indifferent to the child, and where it would be disproportionately disadvantageous to the child if the adoption did not take place. The consent may also be substituted if the violation of duty, although not persistent, is particularly serious and it is probable that it will permanently not be possible to entrust the child to the care of the parent.

(2) The consent may not be substituted on account of indifference that is not at the same time a persistent gross breach of duty until the parent has been instructed by the youth welfare office on the possibility of its substitution and advised under section 51 (2) of Book Eight of the Social Security Code [Sozialgesetzbuch] and at least three months have passed since the instruction; the instruction should point out the limitation period. No instruction is necessary if the parent has changed his residence without leaving his new address and the residence cannot be determined by the youth welfare office within a period of three months despite appropriate research; in this case, the period commences on the first action of the youth welfare office directed towards instruction and advice or towards determining the residence. The periods expire at the earliest five months after the birth of the child.

(3) The consent of a parent may also be substituted where he is permanently incapable of caring for and bringing up the child as the result of a particularly serious psychological illness or a particularly serious mental or psychological handicap and where the child, if the adoption does not take place, could not grow up in a family and the child's development would as a result be seriously endangered.

(4) In the cases of section 1626a (2), the family court must substitute the consent of the father if the fact that the adoption does not take place would be disproportionately disadvantageous to the child.

GREECE

Civil Code

Art 1552

The consent of parents for adoption of their child replaced with specially reasoned decision of the court, in the following cases:

- a) if the parents are unknown;
- b) if both parents have been deprived of parental care or are under a custodial guardianship and removes their ability to consent to adoption of the child,
- c) if the parents are unknown, either before or after the provision of general authorization under Article 1554,
- d) if the child is protected by a recognized social organization has been removed from their parents the custody under the provisions of Articles 1532 and 1533, and they refuse to consent and abusive
- e) if the child is delivered with the consent of parents to care for family and upbringing in order adoption, and has been included in it for at least a year, and the parents subsequently abusively deny consent.

HUNGARY

Family Act 1952

Section 48A: An adoption can be ordered without the consent of the parent if:

- through a fault of his own, the parent has not contacted the child taken in temporary foster for over a year and the parent fails to alter his or her lifestyle or condition during that period and hence temporary raising in foster home cannot stop; or
- The parent changes place of residence and place of stay without leaving the new address behind and the efforts and measures to find out the new address fail to succeed within six months.

IRELAND

Adoption Act 2010

Section 54:

(2) ... the High Court by order may authorise the Authority to make an adoption order in relation to the child in favour of the applicants, and to dispense with the consent of any person whose consent is necessary to the making of the adoption order, if—

- (a) having due regard for the rights, whether under the Constitution or otherwise, of the persons concerned (including the natural and imprescriptible rights of the child), the High Court is satisfied that it would be in the best interests of the child to grant the authorisation, and

- (b) it is shown to the satisfaction of the High Court as follows:
- (i) that
 - (I) for a continuous period of not less than 12 months immediately preceding the time of the making of the application, the parents of the child to whom the declaration under section 53 (1) relates, for physical or moral reasons, have failed in their duty towards the child,
 - (II) it is likely that the failure will continue without interruption until the child attains the age of 18 years
 - (III) the failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child, and
 - (IV) by reason of the failure, the State, as guardian of the common good, should supply the place of the parents;
 - (ii) that the child –
 - (I) at the time of the making of the application, is in the custody of and has a home with the applicants, and
 - (II) for a continuous period of not less than 12 months immediately preceding that time, has been in the custody of and has had a home with the applicants; and
 - (III) that the adoption of the child by the applicants is an appropriate means by which to supply the place of the parents

ITALY

Law 184 of 4 May 1983

Article 8

Children in a state of abandonment because they lack the moral and material care their parents or relatives are bound to provide shall, as long as the lack of care is not due to temporary force majeure, be declared ex officio to be adoptable by the juvenile court of the district where they reside.

The state of abandonment shall also be deemed to exist - where the conditions referred to in the preceding paragraph obtain - when the children are living in a care institution or are placed in a foster family.

Force majeure shall not be deemed to exist when the parents or relatives referred to in the first paragraph refuse the support services provided by the local services and when this refusal is considered by the judge to be unjustified.

Article 15

If at the end of the enquiries and checks provided for in the preceding articles the state of abandonment referred to in Article 8 proves to exist, the juvenile court shall declare the child to be adoptable when:

- (1) the parents and relatives summoned pursuant to articles 12 and 13 did not appear, without any justified reason;
- (2) the hearing showed that their failure to provide moral and material care persisted and that they were not willing to remedy this situation;
- (3) the measures prescribed under Article 12 were not complied with, under the parents' responsibility

LATVIA

Civil Law

Section 169: It is necessary that all parties to the adoption give their consent to the adoption:

- (3) the parents of a minor adoptee if they have not had custody rights removed

A court may relieve the parties from the attestation of such consent if, according to the factual circumstances, it is shown that this is impossible due to some permanent impediment or also if the place of residence of the persons whose consent is required is unknown.

Section 200: Parents may have parental authority removed if:

- (1) the parent treats a child especially badly;
- (2) the parent does not care of the child or does not ensure the supervision of the child and it may endanger the physical, mental or moral development of the child.

LITHUANIA

Civil Code

Art 3.214: The consent of the parents of the child to be adopted shall not be required, if the identity of the parents is not known or if they are dead or if the parents' authority has been restricted for an unlimited period or if the parents are legally incapable or declared dead.

LUXEMBOURG

Civil Code

Art 351-2: Where parents have lost their parental rights, they do not need to give consent to adoption

Art 352: The court can declare a child abandoned if the parents have been manifestly uninterested in him or her for a period of one year.

MALTA

Civil Code

Art 117(1)(a)

The court may dispense with consent if:

...

(ii) the parent cannot be found or has abandoned, neglected or persistently ill-treated, or has persistently either neglected or refused to contribute to the maintenance of the person to be adopted or had demanded or attempted to obtain any payment or other reward for or in consideration of the grant of the consent required in connection with the adoption; or

(iii) either of the parents are unreasonably withholding consent

...

(v) the child to be adopted is not in the care and custody of either of the parents and the Adoption Board declares that there is no reasonable hope that the child may be reunited with his mother and, or father;

(vi) the parent or parents have unjustifiably, not had contact with the child to be adopted for at least eighteen months; or

(vii) it is in the best interests of the child to be adopted for such consent to be dispensed with.

NETHERLANDS

Civil Code

Art 1:228(2)

Objections raised by one of the child's parents as referred to in paragraph 1 under point (d) may be ignored:

- (a) if the child and its parents have not or hardly ever lived together as a family, or
- (b) if the parent has made abuse of his authority over the child or has grossly neglected his duties to care for and raise the child, or
- (c) if the parent has been irrevocably sentenced for committing a criminal offence against the child as described in Titles XIII to XV and XVIII to XX of the Second Book of the Penal Code.

NORTHERN IRELAND

Adoption (Northern Ireland) Order 1987

Section 16

(1) An adoption order shall not be made unless—

- (b) in the case of each parent or guardian of the child the court is satisfied that—
 - (ii) his agreement to the making of the adoption order should be dispensed with on a ground specified in paragraph (2).

(2) The grounds mentioned in paragraph (1)(b)(ii) are that the parent or guardian—

- (a) cannot be found or is incapable of giving agreement;
- (b) is withholding his agreement unreasonably;
- (c) has persistently failed without reasonable cause to discharge the parental duties in relation to the child;
- (d) has abandoned or neglected the child;
- (e) has persistently ill-treated the child;
- (f) has seriously ill-treated the child (subject to paragraph (4)).

POLAND

Family Code

Art 119(1): Consent is not required for adoption from parents who have been deprived of parental authority.

Art 119(2): Parental consent can be dispensed with where the refusal is contrary to child's welfare.

PORTUGAL

Civil Code

Art 1981: Consent for adoption is not required where the parents have been deprived of parental authority (where by act or omission, they have put the child's safety, health, development or education in danger)

ROMANIA

Law No 273/2004

Article 12

(1) The child's biological parents must give their consent for the adoption. In the case when the spouse of the adopter is also willing to adopt the child, the consent must be given by the spouse who is already an adoptive parent of the child.

(2) The parent or parents who have been deprived of parental rights or upon whom was enforced the penalty of prohibiting parental rights maintain their right to consent to the child's adoption. The consent of the legal guardian is compulsory.

(3) If one of the biological parents is deceased, unknown, declared deceased or missing in accordance with the law, under interdiction, as well as if the biological parent is incapable to express his or her will under any circumstances, the consent of the other parent is sufficient.

(4) The consent of the biological parents of the child is not necessary, if both of them are subject to any of the situations stipulated under paragraph (3), as well as in the case of the adoption stipulated under article 5, paragraph (3).

Article 13

In exceptional cases, the court may not take into account the refusal of the biological parents or, as the case may be, of the legal guardian to consent to the adoption of the child, if it is proven by any method of evidence that they are abusively refusing to give their consent for adoption and the court considers that the adoption is in the child's best interests, taking into account the child's opinion given as stipulated under Article 11, paragraph (1), point (b), and, in this regard, the court provides a specific motivation for the decision.

SCOTLAND

Adoption and Children Act (Scotland) 2007

(1) An adoption order may not be made unless one of the five conditions is met.

(2) The first condition is that, in the case of each parent or guardian of the child, the appropriate court is satisfied—

(b) that the parent's or guardian's consent to the making of the adoption order should be dispensed with on one of the grounds mentioned in subsection (3).

(3) Those grounds are—

(a) that the parent or guardian is dead,

(b) that the parent or guardian cannot be found or is incapable of giving consent,

(c) that subsection (4) or (5) applies,

(d) that, where neither of those subsections applies, the welfare of the child otherwise requires the consent to be dispensed with.

(4) This subsection applies if the parent or guardian—

(a) has parental responsibilities or parental rights in relation to the child other than those mentioned in sections 1(1)(c) and 2(1)(c) of the 1995 Act,

(b) is, in the opinion of the court, unable satisfactorily to—
 (i) discharge those responsibilities, or
 (ii) exercise those rights, and

(c) is likely to continue to be unable to do so.

(5) This subsection applies if—

(a) the parent or guardian has, by virtue of the making of a relevant order, no parental responsibilities or parental rights in relation to the child, and

(b) it is unlikely that such responsibilities will be imposed on, or such rights given to, the parent or guardian.

SLOVAKIA

Code of Civil Procedure

The consent of parents to adoption can be dispensed with if they systematically did not manifest proper interest in the child for 6 months, by not visiting the child, by not fulfilling their maintenance duties, by not trying to rectify their family and social situation within the limits of their possibilities so that they can personally care for the child

However, the parents of the child to be adopted shall not be parties to the proceedings when they are deprived of their parental rights or when they have no legal capacity and also when their consent is not needed for adoption in spite of the fact that they are representatives at law of the child to be adopted

SLOVENIA

Civil Procedure Act

Art 141 (1): Only children whose parents are unknown or whose residence has not been known for a year or who have consented to adoption before a competent body, may be adopted. The consent of a parent from whom parental rights have been taken away, or is permanently incapacitated from expressing their wish, is not required.

SPAIN

Civil Code

Art 177(2)(2): The parents of the prospective adoptee who is not emancipated, unless they should be deprived of parental authority by final judgment or they should incur in a legal cause for such deprivation. Such situation may only be appreciated in contradictory judicial proceedings, which may be processed as provided in article 1827 of the Civil Procedural Law.

SWEDEN

Children and Parents Code (1949:381)

Section 5a – Consent is not required from a person who is suffering from a serious mental disturbance, who has no share in custody, or is in an unknown place.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT

CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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