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### **Children's rights with disabilities and alternative care between universal and regional (Council of Europe) standards of protection**

**ABSTRACT:** The study deals with issues relating to alternative institutional care to which children, particularly children with disabilities, are subjected. In the case of these children, there is often a multiple 'sensitisation' situation - not only are they minors, but they are deprived of parental care and have intellectual or physical disabilities. The legal regulations for children in such situations will be presented. Soft-law guidelines representing demands for adoption and implementation at the national level will also be identified and discussed. A separate analysis will be made of the jurisprudence of the European Court of Human Rights on children in institutional care and how and to what extent this jurisprudence effectively influences the level of protection. In this aspect, particular attention will be paid to the issue of the vindication of violations of law violations by victims and the possible possibilities of making legal standing more flexible.

**KEYWORDS:** child, children's rights, disabilities, alternative care, human rights, institutional care

#### **1. Introduction**

The human rights protection system, including the protection of children's rights as a specific system, has two dimensions in the international sphere: a universal one, usually strongly linked to the United Nations (UN), and a regional one characterized by the applicability of regulations protecting children's rights in a selected geographical area. Both systems are designed to support the child's situation at the national level in a complementary way. In the event of a failure of the national system, they also provide for solutions that allow for the filing of notices or complaints aimed not only at

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obtaining appropriate compensation or redress but also at a broader impact on the entire child rights protection system in order to make it more effective. The need for effectiveness is determined primarily by the vulnerability of children, resulting from the fact that they are identified as members of a vulnerable group. The particular vulnerability of children is due to their immaturity and consequent unawareness of the rights violations to which they might become victims. These violations are particularly problematic for children placed in alternative care. The focus of this study is more specifically primarily on those children placed in alternative institutional care. Institutional care, in most cases carried out by the state, must meet the highest standards, for states are, after all, aware of their own legislation protecting the situation and rights of children and the human rights contractual obligations by which they are bound. States have the capacity to safeguard children's rights effectively, and should violations occur, they also have mechanisms to hold violators accountable at the national level. Moreover, states are also aware of the international child rights safeguards system in the universal and regional spheres.

Unfortunately, despite such extensive regulations, which are expected not only to prevent the violation of children's rights but, in the event it occurs, to react quickly to eliminate it, practice shows that the system works imperfectly in many cases. Consequently, it is necessary to analyze the standards related to the legal regulations, assess whether they are optimal, examine practice, and draw attention to those elements that should be improved and made more effective in the future. These improvements should reduce situations in which children, as subjects who often cannot claim their own rights, had these rights not only been guaranteed in legislation but realized.

### ***1.1. The legal foundations of a universal child protection system and their relevance to alternative custody***

Any consideration of children's rights must begin with the fundamental universal document, the Convention on the Rights of the Child (CRC).<sup>739</sup> This document is considered one of the most widely accepted international agreements. Its content addresses the child's situation in various contexts and draws attention to the need to meet the child's needs comprehensively.

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<sup>739</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3., Available at: <https://www.refworld.org/docid/3ae6b38f0.html> (Accessed: 31 January 2023).

Concerning the issue of foster care, it is first necessary to draw attention to Article 3 of the CRC, which contains one of the interpretative and guiding principles of the Convention<sup>740</sup>, namely, the principle of the protection of the best interests of the child. According to Article 3 of CRC, any action 'undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies' towards children must meet the standard of considering their best interests. Although it does not specify that actions are to be taken concerning children placed in foster care, this guideline is to be applied by all organizational entities, including those running foster care or deciding that a child will be placed in such care. A dedicated solution relating to foster care can be found in Article 20 of the CRC, which implies the need to take measures to provide children deprived of their family environment with alternative care. These measures should be conceived in such a way as to provide the child with an environment that is as close as possible to a family environment.<sup>741</sup> Furthermore, in the case of sick children, care should be provided at a level appropriate to their situation.<sup>742</sup> In particular, sick children, as well as children with disabilities, are particularly vulnerable to discrimination in access to education, health care and other social services.<sup>743</sup>

In addition to the Convention standards at the universal level, the UN document on guidelines on alternative care is particularly important.<sup>744</sup> These guidelines point to the need to preserve the family environment and view the family as the fundamental social group where opportunities for growth and development are most significant. The guidelines indicate that any decisions concerning children should be made with attention to the individual situation and taking into account the mechanisms for the best interests and rights of the child. There should also be no discrimination of any kind. Regarding alternative care standards, the need to place the child in an institution as close as possible to his or her current residence is emphasized. Attention is also drawn to the fact that the possible removal of a child from the natural family environment should be treated as a last resort. In particular, poverty and the financial conditions of a family should

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<sup>740</sup> Glenn, 1997, p. 23.

<sup>741</sup> UN Committee on the Rights of the Child (CRC), General comment No. 17.

<sup>742</sup> *Ibid*, General comment No. 7.

<sup>743</sup> Cantwell and Holzscheiter, 2008, p. 6.

<sup>744</sup> Resolution adopted by the General Assembly [on the report of the Third Committee (A/64/434)] 64/142 – Guidelines for the Alternative Care of Children, Available at: <https://digitallibrary.un.org/record/673583> (Accessed: 31 January 2023).

not be the only determinant of whether a child should be removed from that family. It is also considered essential to take direct measures to support the family in its possible social and legal difficulties, including ensuring its reintegration. Placing children in alternative institutional care requires far-reaching care, professionalism, sensitivity, and measures to ensure contact with the family.

This requires high standards in the performance of the staff involved in institutional care that should be implemented from the very beginning, which emphasizes the need to ensure that the transfer of a child into foster care is carried out with the utmost sensitivity and in a child-friendly manner. Those involved in this procedure should be adequately trained. Guardians of children in institutional care are also required to provide children with wholesome food following the children's dietary habits, norms, and religious beliefs and to secure any supplementation. It is also the responsibility of caregivers to ensure that children's health conditions are adequate, including ensuring that they have access to appropriate medical care and support should the need arise. Particular attention is required to respecting the child's rights for children with disabilities, HIV/AIDS, or any other special needs. The guideline also calls for the provision of fundamental rights to children in institutional care, such as the satisfaction of religious and spiritual needs and the right to privacy, safety, and hygiene. Importance should also be attached to adequate accommodation in institutions, and the housing provided in an institution should take into account factors such as the child's age, maturity, and degree of vulnerability. This last element is essential when considering infrastructural barriers that may present difficulties for children with mobility disabilities.

Care facilities should also ensure that children are protected from all forms of abuse and that children in alternative care are not stigmatized. The treatment of children in institutions shall not be cruel, inhuman, or degrading. Any form of discipline involving confinement, seclusion, or any form of physical or psychological violence shall be prohibited. The use of force or coercion may only be justified by an absolute necessity to protect the child's or others' physical or mental integrity in accordance with the law and must be reasonable and proportionate. Any calming or sedative medication may only be used based on therapeutic need and after appropriate diagnosis and selection of medication by a specialist. The need for children to have access to an effective and impartial mechanism through which they can raise complaints or concerns about their treatment or

placement conditions is also indicated. This aspect will be applied when children are at a level of development that enables them to identify the conditions and treatment for themselves.

Although this document is in the form of a guideline, given the extensive experience of the UN system in respecting children's rights and the knowledge base derived from periodic reviews or cooperation with non-governmental actors, its content should be considered particularly important.

### ***1.2. The legal basis of the regional system for the protection of children's rights and its relevance to alternative custody***

The regional system in Europe concerning children's rights is based on diverse sources. First, attention should be drawn to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), inspired by the Universal Declaration of Human Rights.<sup>745</sup> This document has an autonomous character in relation to those obligations under international law that directly guarantee the rights and freedoms provided for therein.<sup>746</sup> The Convention is not a document dedicated to children's rights, and it contains only a few provisions dedicated to children. However, it assumes that all the rights and freedoms it contains are rights and freedoms for everyone, including children. Of course, their perception and interpretation depend on the particular context of being a child and the specific needs of children. With that said, this interpretation has already been left to the bodies of the Council of Europe (CoE), originally the Commission on Human Rights and now the European Court of Human Rights (ECtHR). In the context of cases concerning children and their treatment related to institutional care or family relationships, Article 2 (right to life), Article 3 (freedom from torture and inhuman or degrading treatment), and Article 8 (right to respect for private and family life) of the ECHR have been cited most frequently in case law.

One of the first documents to deal with alternative custody, which originated at the Council of Europe regional level, is the resolution on the placement of children.<sup>747</sup> This resolution stipulated that, as far as possible,

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<sup>745</sup> Schabas, 2015, p. 1.

<sup>746</sup> Loucaides, 2007, p. 9.

<sup>747</sup> Resolution No. R (77) 33 on the placement of children. Available at: <https://rm.coe.int/res-77-33e-on-placement-of-children/1680a3b3f0> (Accessed 31 January 2023).

institutional care should be avoided in favor of leaving the child in a family environment while intensifying measures to support the family. Decisions regarding the placement of children in foster care should be made to guide the child's developing emotional needs and his or her physical well-being and welfare to the highest degree possible. Great importance is also attached to the professionalism of the staff in children's centers. The eventual care should take the form of foster care in the family environment, and placement in institutions should only be temporary.

The issue of alternative care for children was addressed for the second time by adopting a resolution in 2005.<sup>748</sup>

According to this resolution, the placement of children in institutions should be an exceptional case, but if it is to take place, it is necessary to ensure that children are able to exercise their full rights. The time spent in care should be as short as possible and should aim at reintegration with parents. Emphasis is also placed on the need to ensure non-discrimination, particularly regarding sex, race, color, social, ethnic or national origin, opinion expressed, language, property, religion, disability, birth, or any other status of the child and/or their parents. Individualizing the child's care plan is essential to ensuring that the child is allowed to express their opinion and pour in, depending on their stage of development. The resolution also stresses the need to take measures to prevent the excessive use of control and discipline unless this is determined by the need to protect the child himself or herself or other persons present with the child. The text of the resolution also points out the specific rights of children placed in foster care, which include: the right to placement for the sole purpose of meeting the needs of the child, the right to contact with the family, the right to contact with siblings, the right to identity, the right to respect for ethnic, religious, cultural, social, and linguistic background, the right to privacy, and the right to health care. In the context of health care, the need for it to be provided at a good quality level and in such a way that it is adapted to the needs of the child was emphasized. Other necessary rights included the right to respect for the child's dignity and physical integrity, the right to equal opportunities, the right to access to education, the right to be prepared for active and responsible citizenship, the right to participate in decisions concerning oneself, the right to information about one's rights, and the possibility to

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<sup>748</sup> Recommendation Rec(2005)5 of the Committee of Ministers to member states on of children living in residential institutions, 16 March 2005, Rec(2005)5, Available at: <https://www.refworld.org/docid/43f5c53d4.html> (Accessed: 31 January 2023).

react to violations of those rights. Ensuring the realization of these rights entails a high degree of professionalization of the staff running and working in children's centers and proper control and accreditation of these facilities. It is also necessary to ensure that any violations identified are punished. The recommendation also emphasizes the significant role that non-governmental organizations, including religious organizations, have to play in addition to public institutions.

The document adopted by the Committee of Ministers of the Council of Europe in 2011,<sup>749</sup> which dealt with child- and family-friendly social services, first included the basic principles that should be respected when providing social services.

These principles include (referring to the CRC), first, the principle of the best interests of the child, which should be implemented, among other things, by respecting the dignity of the child as well as treating the child with care, sensitivity, fairness, and respect and ensuring that the child is protected from discrimination based on gender, age, disability, economic or ethnic origin, race, color, birth, property, language, religion, political or another opinion, sexual orientation, or other status. Overcoming the stigmatization of certain groups of children should also help to realize this principle. The principle of the child's participation was identified as the second principle. The child should be listened to by social services staff and should be involved in the planning and adaptation of the measures that will be taken toward them. Of course, this should be done taking into account the child's age and individual characteristics. The right to participation must be correlated with the obligation to provide children with information on the available social services, their situation, and the decisions that have been taken with regard to them, and to be listened to concerning the assessment of these actions. The third principle to be taken into account is the principle of protection. This assumes that the child should be protected from neglect, abuse, violence and exploitation. Any services provided to the child, especially vulnerable children, should provide appropriate prevention, take individual needs into account, and ensure prevention of re-victimization.

The wording of the recommendation itself implies a strong emphasis on the situation of children with special needs. It points out the need to

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<sup>749</sup> Recommendation CM/Rec(2011)12 of the Committee of Ministers to member states on children's rights and social services friendly to children and families. Available at: [https://www.coe.int/t/dg3/children/keyLegalTexts/SocialServicesSept2012\\_en.pdf](https://www.coe.int/t/dg3/children/keyLegalTexts/SocialServicesSept2012_en.pdf) (Accessed: 31 January 2023).

provide a support system for children with mental health problems, as well as to take into account the needs of children with disabilities in such a way that they can live independently and participate fully in everyday life. It also emphasizes the importance of special social services allowing rapid intervention in crisis situations. Great importance is also attached in the body of the recommendation to the use of deinstitutionalization mechanisms, and these should be carried out in such a way as to increase the chances of family and community-based care, mainly dedicated to children under three and children with disabilities. The final part of the recommendation refers to the definition of standards to which social services should conform, mainly in terms of their organisation and wide availability. The quality of social services is also determined by the quality of the staff running them. Attention is drawn here to the need for training and continuous improvement of the competencies of persons providing these services to children, especially in respecting children's rights, including the rights arising from the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

According to the documents analyzed, a great deal of attention is paid to the empowerment of the child in foster care, and the existence of their rights and freedoms is extensively legislated. The documents' content shows an awareness of the uniqueness and risks of the alternative care environment. At the same time, there is an awareness of situations in which the use of alternative care is unavoidable.

### ***1.3. Selected ECHR case law on foster care***

Despite the existence of detailed solutions both at the level of legislation and at the level of guidelines and instructions addressed to States, the situation of children in institutional care remains a problematic issue, resulting in several violations. As can be seen from a selection of cases referred to the ECtHR, children with disabilities tend to be permanent residents of institutional care and sometimes suffer violations of their rights and freedoms while in such care.

One of the most well-known and at the same time appalling cases on institutional child custody is considered the case of *Nencheva and others v. Bulgaria*.<sup>750</sup> This case concerned children placed in institutional foster care in a children's home in Bulgaria for children with physical and mental disabilities. The facts of the case concerned the period 1996–97 when

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<sup>750</sup> *Nencheva and Others v. Bulgaria*, App. No. 48609/06, 13. June 2013.



Bulgaria was in the midst of an economic crisis. Consequently, the state authorities could not provide the children in the institution with food, warmth, and medical care meeting an adequate standard. The institution had a food shortage, so the children were fed only a small amount of putrid and non-diversified products. Due to the lack of fuel, the rooms in which they were housed were underheated, with temperatures of around 15 degrees Celsius. Hygienic conditions also left much to be desired. Due to the lack of disposable materials, it was necessary to wash current items, which took a long time to dry due to the low temperatures. In the convalescent home, children lying in bed were in difficult hygienic conditions. Despite numerous requests and appeals from those in charge of the facility, the state authorities did not provide such assistance.

As a consequence, 15 children died. In the Court's view, Article 2 of the ECHR must be regarded in certain circumstances as imposing a positive obligation on the State to protect the individual from others, and in certain specific circumstances, even from himself. This obligation cannot be excessive, nor does the existence of any alleged threat to life oblige the authorities to take specific measures to eliminate that threat. However, a positive obligation exists where it can be established that the authorities knew or ought to have known at the time that a real and imminent danger threatened the person's life. On the other hand, the authorities' liability will involve their failure to take measures within the scope of their powers that, from a reasonable point of view, would undoubtedly have reduced that risk. In examining this ECHR case under Article 2 ECHR, the Court found fault with the governmental authorities who were regularly informed of the situation and needs of the children's center.

Moreover, they were aware of the situation of crisis that prevailed in Bulgaria at the time. It was not a sudden, one-off, and unforeseen situation, but probably a state of affairs lasting for a more extended period and requiring decision-makers to take such decisions that would minimize the harmful effects of the crisis. The fact that all persons placed in institutional care were children and young adults (under 22 years of age) and had severe mental and physical disorders is also not irrelevant to the analyses made. Placing them in state institutions consequently subjected them to the exclusive care of the State, which, given their vulnerability, was obliged to take special care.

In deciding on the alleged violation of Article 2 ECHR, the Court found that the Bulgarian Government had not only failed to take measures

to prevent the risk of loss of life and the loss of life itself for children in institutional care but had also failed to fulfill its obligation to provide an adequate investigation into the circumstances of the deaths that had occurred. Meeting the standards of Article 2 ECHR requires that the Bulgarian authorities fulfill their obligation to conduct an *ex officio* investigation into the circumstances of the deaths. The circumstances should also include an examination of what involvement the state authorities had in the whole procedure, what actions to protect life they were obliged to take, and the identification and possible holding accountable of those whose acts or omissions might have influenced the whole situation.

As has been established, the proceedings were not initiated until two years after the events that led to these 15 deaths. The criminal proceedings took eight years, which clearly violates the standards of conduct concerning such weighty issues as the question of death. In this regard, as the Court emphasized, the Bulgarian Government has not provided any explanation to justify either the delay or the long course of the proceedings. The standard of the procedure itself in terms of the evidence collected was also unsatisfactory. Questions concerning the determination of the causes of the deaths and the factors that influenced these deaths were unclear. In particular, there was no clear answer as to whether and to what extent the deaths were due to natural causes and whether they occurred earlier than the assumed life expectancy of the children. Due to the length of the proceedings, it was also not possible to establish conclusively who could have influenced the deaths of the children and in what way. The government party's allegations concerning the events at the care center concerned only three persons. Moreover, these were only the people who managed the home and took measures, often desperate, to ensure a minimum existence for the residents. The entity responsible for the events that should be held liable was the public authorities, who failed to make the budgetary adjustments necessary to purchase sufficient food and fuel or to provide adequate and timely medical care.

The Court added that it was insufficient to recognize that the parties to the proceedings had a civil remedy to claim liability and obtain compensation in connection with the death of the children. For procedural reasons relating to the fact that the six-month time limit for bringing an action had been exceeded, the allegations raised under Articles 3 and 6 ECHR were not examined.

The ECHR clearly recognized the importance of being able to seek justice on behalf of children in the case of Center of Legal Resources on behalf of Valentin Câmpeanu v. Romania.<sup>751</sup> The Center mentioned above of Legal Resources (CRL) brought an action against Romania on behalf of the late Valentin Câmpeanu. He was HIV-positive from childhood and severely mentally disabled. Valentin Câmpeanu had been a resident of various institutional care facilities throughout his childhood and into adulthood. Although in the present case we are dealing with an adult, the reasons for his condition at the adult stage and his death must be sought from the early years of childhood. After all, Câmpeanu, who had been abandoned at birth, had spent the entire period in institutional care. He was therefore in the power of the state authorities, and it was these authorities that had a far-reaching duty not only to preserve his life but also to ensure the quality of that life and to ensure that he lived as long as possible in the comfort that was possible because of his disability and his illness. He was housed in a medical and social care center not adapted to deal with people with mental problems and eventually ended up in a psychiatric hospital. As determined by CRL, who noticed his problem during a visit to the hospital, he never received appropriate treatment, receiving antiretroviral medication only incidentally and suffering from malnutrition. CRL representatives found that Câmpeanu was housed alone in an isolated, unheated, and locked room with only a bed without any bedding, could not use the bathroom by himself, and was only partially clothed. Due to fears of infection, the staff at the psychiatric hospital where he was staying only administered glucose through a drip. An attempt by CRL representatives to transfer Câmpeanu was unsuccessful. The patient died in the evening of the same day. Unaware of his death, CRL continued with the transfer requests and organized an investigation into the violations of his rights as a human being concerning transfers to different facilities and the lack of appropriate diagnostics. After his death, CRL continued the proceedings by submitting a request for a criminal investigation concerning the death and circumstances of Mr. Câmpeanu's death. Initially, an autopsy was waived, indicating "it was not believed to be a suspicious death, taking into consideration the two serious conditions displayed by the patient" (namely intellectual disability and HIV infection).

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<sup>751</sup> *Center for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC] App. No. 47848/08, 17. July 2014. [GC].

However, due to CRL's intensified efforts, an exhumation was carried out. It was concluded that the cause of death was not sudden and was due to cardiopulmonary failure caused by pneumonia, a complication occurring during the progression of HIV infection. The national proceedings in which CRL actively participated did not clarify the circumstances of the case. The various instances tended to rely on Mr. Câmpeanu's incomplete medical records. They considered that there was no basis for claims that presumed the existence of negligence on the part of the care providers, in particular such negligence that could have led directly to Mr. Câmpeanu's death.

In examining this case, the ECHR first had to answer questions regarding the legitimacy of the CLR. The government side contested this legitimacy. Significantly, this challenge took place at a different level. In the Court's view, however, the situation regarding CRL's ability to step in on behalf of Mr. Câmpeanu is particular. According to the ECHR's well-established jurisprudence, actions may only be brought before the Court by or on behalf of living persons. Although in this case we are not dealing with an express power of attorney for the CRL, in the case of the most severe violations of the ECHR, applications can be made without express power of attorney. In its deliberations, the ECtHR emphasized that the Convention must be interpreted as guaranteeing practical and effective rights, rather than theoretical and illusory ones.<sup>752</sup> Moreover, the ECtHR pointed out that jurisprudential activity is not only aimed at resolving specific cases, but also at clarifying, safeguarding, and developing the principles established by the Convention to increase its scope of application. Although Câmpeanu was not an incapacitated person, nor did he have an appointed guardian, this was not due to his capacity, but rather was the result of negligence by the state authorities. He also had no relatives. Consequently, it must be considered that these exceptional circumstances justified the possibility for CRL to act on behalf of Mr. Câmpeanu through the ECtHR, even without an extraordinary power of attorney. A contrary conclusion would have led to a situation in which the State would have avoided responsibility, which must be considered contrary to the spirit of the Convention.

With regard to the consideration of the violation of Article 2 of the ECHR, it was stated that the State's obligations under it concern both the protection of the right to life and the provision of effective measures to establish the facts surrounding the death and possibly to bring those responsible for the death to justice. Mr. Câmpeanu had spent his entire life

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<sup>752</sup> McBride, 2021, pp. 35–36.

in public institutions. However, the transfers between facilities that he experienced were determined by their willingness to accommodate him rather than by his actual needs and the appropriate level of medical care. The result of such carelessness was, for example, that he was deprived of access to antiretroviral medication and was only given minimal treatment consisting of vitamins and sedatives. Consequently, at the investigation stage of the causes of death, it was impossible to ascertain the scale and timing of the negligence. Furthermore, there was neither accurate documentation of Mr. Câmpeanu's treatment, nor did the Government provide reliable documents on the circumstances of his death.

Furthermore, the Government was also unable to point out that the state authorities were not responsible for decision-making errors related to providing adequate medication and care. The latter aspect has a broader background and also refers to the systemic negligence toward residents in institutional care that took place in Romania at the time (food shortages, underheating, difficult living conditions) and the fact that, despite being aware of them, the public authorities did not take corrective action. Thus, Romania was considered to have breached its positive obligations under Article 2 ECHR.

From the perspective of the above case, the possibility of conducting proceedings before the ECtHR on behalf of the deceased Mr. Câmpeanu should be considered most relevant. The Court's decision to recognize the legitimacy and to take into account the evidence collected by the CRL in the case not only made it possible to establish the State's responsibility but also showed that procedural possibilities exist to protect vulnerable groups effectively. In the case indicated, we not only have the long-standing neglect of a child and later an adult, but also the lack of a practical possibility to assert one's rights due to the lack of awareness of their existence and the failure to appoint a guardian. The fact of the death of the person affected by these negligent acts should not only not stand in the way of establishing responsibility, it should indeed be supported procedurally at the level of the opening up of the ECtHR to the possibility of victims' entities acting on behalf of injured individuals.

Unfortunately, this positive trend of extending legal standing has not been sustained by the ECtHR. Even worse, it was not upheld in a similar case also concerning foster care and the negligence that took place in foster care. In 2016, a case was brought before the Court against Bulgaria. The complainant in the case was the Bulgarian Helsinki Committee (BHE),

specializing in the protection of human rights. The association became interested in the case of the care home in Mogilina after a program was broadcast on Bulgarian television about children abandoned by their parents and housed there (“Les enfants abandonnés de la Bulgarie”). The information contained in the program inspired the BHE to prepare and submit a letter to the Prosecutor General regarding the possibility that crimes related to the life and health of the children residing there had been committed in disabled children’s homes. The informed authorities initiated investigations, which ended with a finding of no violations and no need to continue the proceedings. As a consequence of this decision, the BHE took civil action claiming that the prosecution’s failure to take action constituted a case of age discrimination based on disability and health status. However, despite further national proceedings involving the BHE, no charges were brought against any individual.

Two cases of girls’ deaths in foster care became the canvass for the ECtHR investigation.<sup>753</sup> The first of these, Aneta Yordanova, was abandoned by her mother after birth. Due to her intellectual disability, she was placed in an institution for children with profound mental disabilities. While in the institution, she underwent surgery for an inguinal hernia. She also complained of vomiting and stomach pains. The doctor diagnosed gastritis and duodenitis and recommended hospitalization. As her condition worsened, an operation was carried out, clearing the gastric contents.<sup>754</sup>

Despite surgery, the condition did not improve. Aneta Yordanova died and, as the post-mortem showed, the cause of death was peritonitis due to perforation of the stomach, duodenum, pneumonia, and pleurisy. Despite the ongoing investigations, the prosecutor ultimately did not charge anyone. The second girl, Nikolina Kutsarova, also abandoned shortly after birth, placed with a foster family, and then placed in a home for mentally disabled children. While in foster care, she began to avoid eating. Despite being hospitalized, her condition did not improve and she consequently died, with several pathologies cited as the cause of death established after autopsy: dry coagulopathy, sepsis, anemia and thrombocytopenia, failure of several organs, cachexia, and, as a direct cause, cardiac arrest. The prosecution’s

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<sup>753</sup> *Bulgarian Helsinki Committee v. Bulgaria (dec.)*, App. No. 35653/12 and 66172/12, 28. June 2016. [Section V].

<sup>754</sup> According to medical records, the girl’s stomach contained: 25 shoe inserts, 8 rags, 6 socks, 3 sponges, 3 pieces of paper, and 3 pebbles, with a total weight of approximately four kilograms.

investigation, as in the case of the first girl, also failed to result in any charges.

In referring the complaint to the Court, the BHE alleged violations of Articles 2, 3, 8, 13, and 14 of the Convention concerning the two girls. At the same time, it identified itself as its representative. This representation was based on the fact of its activities as an association for the protection of human rights. It also stressed the recognition of the capacity of its activity at the national level by the Bulgarian Prosecutor's Office. The allegations formulated by the association concerned, in the case of Aneta Yordanova, the lack of adequate supervision of the girl, resulting in the absorption of numerous objects, as well as the lack of timely assistance and care adequate to her condition. These actions constituted discrimination based on her degree of disability, her status as an abandoned child, and the fact that she had been placed in foster care. An element of the violations also concerned the failure to conduct an effective investigation. In the case of the second girl, the allegations included a lack of adequate care and feeding and a failure to provide prompt and appropriate treatment, resulting in the girl's death. In this case, there was also a failure to conduct an effective investigation.

Concerning the admissibility of the proceedings initiated by the Bulgarian Helsinki Committee, the ECtHR focused primarily on the aspect of the association's standing. It pointed out that the association was not a direct victim of the alleged violations, nor was it an indirect victim, nor was there a sufficiently close connection between the association and indirect victims. Accordingly, the aspect on which the ECtHR chose to focus its deliberations was whether there were "exceptional circumstances" justifying the granting of standing to the BHE as an entity acting on behalf of the deceased girls. The admissibility of an organization to act on behalf of a deceased person had already been allowed by the ECtHR in the earlier *Valentin Câmpeanu* case. At that time, the Court allowed the possibility of standing by pointing to the vulnerability of the immediate victim preventing her from bringing an action during her lifetime, the relevance of the allegations brought before the Court, the lack of heirs or legal representatives capable of bringing an action before the Court, the contact of the applicant associated with the victim, and its participation in the national proceedings after death, as well as the recognition of the association's capacity to act by the national authorities. Referring to these recognized grounds and examining their application in the case against Bulgaria, the

ECtHR found the girls' lack of capacity to stand alone in Court during their lifetime due to their mental handicap, their status as abandoned children, and their high vulnerability. The Court also found that the victims had heirs, living mothers, and siblings. However, the ECtHR's recognition that their situation differed from that of Valentin Câmpeanu (whose mother had died) cannot be considered appropriate. Neither mother maintained nor sought to maintain contact with the deceased girls. The same applied to the siblings.

Consequently, the Court was correct (despite its initial reservations) in pointing out that these persons could hardly be regarded as capable of bringing an action. In analyzing the admissibility of the ECtHR, however, it noted that in the Romanian case, the association had taken an interest in the deceased Mr. Câmpeanu while he was still alive, had contact with him, and had initiated domestic proceedings immediately after his death. In the Bulgarian case, no such events took place, and, in the Court's view, this lack of immediacy is the basis for the difference in status of the two associations. However, the question must be asked whether this is indeed the correct approach. BHE indeed had no contact with the girls, but it raised the issue of abuse in institutional care homes as soon as it became aware of it, i.e., after the television program was broadcast. It then pursued active measures at the national level to clarify the circumstances of the deaths and bring those responsible to justice. The fact that action on behalf of specific individuals Aneta Yordanova and Nikolina Kutsarova was taken a long time after their deaths does not detract from the legitimacy of the action and the need to pursue it. Even more surprising is the ECtHR's argumentation indicating that the Bulgarian association had no standing in the domestic proceedings and did not enjoy a party's rights, which distinguished it from its status as an association in the Romanian case. Consequently, it was held that the lack of contact before the death, the lack of procedural status, and the late time of the intervention were grounds for refusing to recognize the association as having standing to appear before the Court. In rejecting the possibility of proceeding with the application, the Court stressed that it appreciated the activities of civil society in the field of the rights of people with extreme sensitivity and pointed out (somewhat paradoxically to the earlier argumentation) that the national authorities had taken into account the reports prepared by BHE.

The fact that the association in question was not in contact with the persons affected by the infringements must be regarded as unconvincing. In this case, being in contact should not affect legitimacy significantly since a



situation of far-reaching mental disability eliminates the freedom of the association in question to authorize it to act on behalf of someone. The lack of legitimacy leads to a situation of impossibility in conducting proceedings that thus makes it impossible to establish possible infringements and a lack of consequences for the guilty parties, including state authorities.

Concerning the action taken by the Court, it should be pointed out that it declared the application inadmissible based on only one formal, and not even fully substantiated, element. The other criteria from the *Câmpeanu* case, considered relevant, examined, and indicated as fulfilled, were also applicable in this case.

## **2. Conclusions**

The analysis presented herein of universal and regional legislation as well as the references to proceedings before the ECtHR indicate that the situation of children in institutional care still needs improvement. A number of guidelines and recommendations related to institutional custody emerge from the UN and CoE's analysis of documents from individual countries, reports, and the facts of cases pending before the ECtHR. This analysis warrants several conclusions.

First, the family environment, or one as close as possible to the family environment, should continue to be considered the leading and best environment for the child. As Article 16(3) of the Universal Declaration of Human Rights indicates, 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' In a similar manner, the regulations contained in Article 23(1) of the International Covenant on Civil and Political Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights were adopted. Also, the predecessor documents to the CRC, the 1924 and 1959 Declarations on the Rights of the Child, recognized the need to protect children without parents or whose parents could not care for them. In its preamble, the Convention itself provides that the child, "for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."

Second (albeit closely related to the first proposal), the need for the de-institutionalization of childcare should be stressed.<sup>755</sup> De-institutionalization processes should be implemented systematically and consistently across countries. There should be de-institutionalization policies and activities to promote and support family-like environments for children. Particular support should be provided to those de-institutionalization activities that involve children with disabilities. According to statistics, they often find themselves in institutional care, and a barrier to their transfer to family-like environments is the relatively low support that families caring for such children receive.

Third, it should be remembered that the importance of NGOs and their role in ensuring respect for children's rights was already recognized at the level of the CoE recommendations. Although there was no mention of legitimacy at the time, the fact that they should be involved in this protection was stated. This involvement should lead to adequate respect for children's rights and possible assistance in ensuring redress in case of violations. Such an outcome would be possible if the legitimacy of NGOs in the ECtHR was allowed. Such organizations should be able to initiate proceedings before the ECtHR regardless of their de facto recognition as representatives of victims at the national level. As Judge Pinto de Albuquerque rightly pointed out in his dissenting opinion, recognition or not as a representative at the national level is irrelevant, as "otherwise it would make liability for human rights violations conditional on the actual recognition of the complainant by the same institutions that may be responsible for the violation." Moreover, as Pinto de Albuquerque argues, standing should seek to ensure equality of rights in the enjoyment of the Convention. In cases where national authorities ignore the fate of alleged victims of human rights violations and where these persons are neither themselves nor through relatives in a position to bring complaints to the ECtHR themselves, the Court must interpret their rights of access to the European protection system as broadly as possible, as only such an approach guarantees the effective protection of their rights.

Fourth, we must not forget the new challenges that, unfortunately, are emerging for states in the context of child welfare. For example, the recent

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<sup>755</sup> Council of Europe Strategy for the Rights of the Child (2016–2021) Children's human rights. Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066cff8> (Accessed: 31 January 2023).

events related to the COVID-19 pandemic have resulted in the periodic closure of institutional care facilities in many cases. Not only has this resulted in restrictions on contact with the children there, but it could also be an opening for abuse due to the limited capacity to control and supervise such facilities. Also, the new challenges posed by the armed conflict in Ukraine may constitute an institutionalized danger due to the massive influx of children from Ukraine to neighboring countries and the need to provide these children with care, including institutional care, as these are in many cases children who have been in such care in Ukraine.

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