



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

FOURTH SECTION

CASE OF A.D. & O.D. v. THE UNITED KINGDOM

(Application no. 28680/06)

JUDGMENT

STRASBOURG

16 March 2010

FINAL

16/06/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of A.D. & O.D. v. the United Kingdom,
The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:
Lech Garlicki, *President*,
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Mihai Poalelungi,
Nebojša Vučinić, *judges*,
and Lawrence Early, *Section Registrar*,
Having deliberated in private on 23 February 2010,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 28680/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two British nationals, Ms A.D. and Mr O.D. (“the applicants”), on 12 July 2006. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Ms N. Mole of the Aire Centre, a lawyer practising in London. The United Kingdom Government (“the Government”) were represented by their Agent, Mr J. Grainger of the Foreign and Commonwealth Office.

3. The applicants complained that the decision to take the second applicant into local authority care violated their rights under Article 8 of the Convention. The first applicant also complained that the decision violated her rights under Article 3 of the Convention. Finally, both applicants complained of a violation of Article 13, alleging that they had no access to an effective domestic remedy.

4. On 9 July 2007 the President of the Chamber of the Fourth Section decided to communicate the complaints to the Government.

5. On 21 October 2008 the Court declared the application partly admissible in respect of the complaints under Articles 8 and 13 of the Convention.

THE FACTS

6. The first applicant, A.D., is a female British national who was born in 1966 and lives in Whitefield, Manchester. The second applicant, O.D., is the first applicant's son. He is a British national who was born in 1996 and currently resides with the first applicant.

A. The circumstances of the case

7. The facts of the case, as submitted by the parties, may be summarised as follows.

1. O.D.'s first months

8. On 8 August 1996 O.D. was delivered by caesarian section at 36 weeks because of his failure to grow in the womb. He weighed 1.9 kg. He was not diagnosed with any particular condition. He was initially fed via feeding tube.

9. The first applicant was concerned about O.D.'s small size and his failure to pick up weight. On 24 October 1996 she asked her general practitioner to refer him to a paediatrician. She was referred to Dr S., the paediatrician who had seen O.D. after his birth. Following a consultation in November 1996 the first applicant was told that the situation would be reviewed on 2 January 1997. As O.D.'s weight and length had fallen below the third centile chart, tests were carried out on 16 January 1997.

10. On 21 January 1997 the consultant radiologist informed Dr S. that X-rays revealed evidence of three, possibly four, healing fractures to the right ribs. The first applicant and her partner were informed the same day.

11. On 23 January 1997 O.D. was admitted to hospital as a patient and a full skeletal survey was carried out, which confirmed four fractures. The local authority were informed.

12. The first applicant took legal advice and also undertook some research, herself noting that O.D. had eight of the ten indicators for the condition of Osteogenesis Imperfecta (brittle bone disease), including the genetic factor of her own joint laxity or double-jointedness. She states that she raised this possibility with Dr S. who dismissed it without giving any reasons.

13. On 24 January 1997 a report by Dr S. concluded that the injuries were sustained “non-accidentally” in view of the nature of the fractures and the lack of any other explanation for them. He noted, however, that O.D.'s parents had appeared very caring and concerned for his welfare at their three meetings.

14. On 30 January 1997 the local authority held a case conference and placed O.D. on the “At Risk Register”. At the meeting Dr S. mentioned that

she had looked at O.D.'s bones to see if they appeared thin but considered that they were normal.

15. Ms M., the social worker assigned to the case, conducted six sessions with the family. When the first applicant raised the possibility of Osteogenesis Imperfecta with her, she was told that she was in denial over the injuries to her son. The first applicant and her partner were very distraught over O.D.'s feeding problems and injuries and by the accusations of child abuse.

16. The first applicant attended assessment meetings held at the Upland Centre, the purpose of which she was told was to assess the risk she and her partner posed to O.D. She and her partner fully co-operated and attended all meetings.

17. On 13 March 1997 O.D. was admitted to hospital following further weight loss and a nasogastric tube was inserted.

18. On 24 March 1997 the first applicant and her partner removed O.D. from the ward, against medical advice, as he had contracted a viral infection which caused vomiting and diarrhoea and was negating any advantages of feeding by tube. They took him to see a consultant paediatric gastroenterologist concerning his slow weight gain, but did not attend all appointments and cancelled a stomach biopsy as they felt he was well and gaining weight.

19. On 30 April 1997 the local authority received a report from Professor C., a professor of paediatric radiology, which confirmed the fractures to the ribs. She considered that the fractures had been inflicted on two separate occasions. She also concurred with Dr S. that "*the rib fractures have occurred from squeezing*" and that "*rib fractures in children are extraordinarily rare except in non-accidental injury...*". She found that O.D.'s bone texture was normal and there was nothing to indicate any underlying bone disease. She stated that there was no other medical test that would help to identify anything further about the rib fractures. Finally, she noted that the ultrasound of O.D.'s head revealed a bright area in the brain cortex. A small bleed could not be excluded, which caused her some concern as to shaking, but on balance she thought the results were normal.

2. Institution of care proceedings

20. On 1 May 1997 the local authority applied to the County Court for an interim care order. At the same time a guardian *ad litem* was appointed on behalf of O.D., who was of the opinion that the family should stay together.

21. On 6 May 1997, at the statutory review meeting, it was noted that Dr S. had undertaken a test due to concerns about bone disease and that the result was used by Professor C. The local authority was informed that a police investigation was not considered appropriate as there was nothing to suggest that the injuries flowed from a criminal assault. It was hoped that

the family would be placed in a protective unit where O.D. could be monitored by professionals. The first applicant and her partner were present at this meeting. The applicants disputed, however, that Dr S. had in fact carried out a test for Osteogenesis Imperfecta.

3. First interim care order

22. On 7 May 1997 the County Court granted an interim care order. It was proposed in court that the family relocate to the St John's Family Resource Centre in Bristol, some 150 miles away. The first applicant claimed that neither she nor her partner had been consulted or even warned about this possibility. They had to go directly to the Centre from the court room, leaving their own comfortable well-equipped home and their network of extended family and friends. The first applicant consented to the care order but submitted that she had no real choice, because if she had resisted the measure O.D. could have been placed in foster care straight away. She had been advised that if she did not oppose the assessment procedure, it would be less likely that they would be separated. While her solicitors had obtained an expert report by Dr P. suggesting that O.D. suffered from Osteogenesis Imperfecta, she had been advised not to rely on it in the proceedings because Dr P. had been discredited as a medical expert acceptable to the courts due to violations of professional ethics in the course of previous legal proceedings.

23. The first applicant stated that she was horrified by the conditions at the Centre, which was located in a crime-ridden, rough area of Bristol. The family had to live in one room with a small kitchenette and were not allowed to cook any meals after 7.00 p.m. The house was dirty and occupied by problem families (crime, drugs and alcohol). Initially they were only allowed to leave the Centre for two hours per day. The latter restriction was lifted on 4 June 1997 against the wishes of Ms M. and the local authority. During their stay, the first applicant and her partner had to claim benefits which they had not done previously. The family was not permitted to leave the Centre for two nights to attend the wedding of the first applicant's sister; they were only allowed to attend the actual ceremony and not the reception. According to the Government, however, the first applicant's evidence in the domestic care proceedings was at odds with this description: she stated on 15 July 1997 that the physical surroundings were better than they had feared and that the other residents were friendly and helpful. There had also been no restriction on the first applicant leaving the centre alone; the only requirement had been that if she left with O.D. they had to be accompanied by a member of staff. From 16 May she was allowed to take O.D. out unaccompanied for two hours a day, and after 4 June all restrictions were lifted. They also had overnight stays away from the hostel and a day long visit to Manchester.

24. The family remained at the Centre for twelve weeks. The first applicant was under the impression, as had been stated in court, that the assessment to be made was of the risk posed to O.D. by her and her partner. The keyworker at the Centre understood that a parenting assessment was to be carried out. When the letter of instruction was at last sent to the Centre, it asked, somewhat ambiguously, for their opinion on the standard of care provided to O.D. and the first applicant and her partner's ability to care for him.

25. The Centre's report compiled by Miss C.H. on 30 July 1997 stated that its aims were to assess the future risk posed to O.D. by his parents, to assess their handling and interaction with the child and to assess their parenting skills. The report noted that the couple presented as being very capable of caring for O.D. and that both appeared to be committed, with a willingness to accept the advice of professionals, although their level of anxiety had been high. Concerns remained, however, about O.D.'s feeding difficulties and limited weight gain, as he remained substantially below the third centile weight for a child of his age. In a further report on 2 August 1997, Miss C.H. confirmed that until there was clarity about the cause of the injuries the risk remained high.

26. While in Bristol O.D. had been seen by a consultant clinical geneticist who reported that Osteogenesis Imperfecta or some other collagen abnormality was no more than one possible explanation for O.D.'s medical history; in particular as it was rare to have this degree of growth retardation in the absence of multiple long fractures, other causes for the failure to thrive should be sought. He also commented that continuing emotional stress in the family should be seriously considered as a possible aggravating factor. He noted that further investigation might include a skin biopsy to assess collagen profiles but that it would be inappropriate to pursue these in Bristol. In any case, he indicated that the diagnostic value of the test had been previously shown to have a detection rate of only 87%.

27. On return to Manchester, after a twelve week stay in Bristol, the family had to live in a Family Assessment Centre for another week while the local authority applied to renew the interim care order.

28. The first applicant's solicitor instructed an expert radiologist, Dr L., to report on O.D.'s injuries, asking him specifically to comment on whether the injuries were more likely to have been caused by non-accidental means or a form of Osteogenesis Imperfecta. As an acknowledged expert in bone disease, Dr L. stated in the report that there was no evidence of abnormal bone morphology or density to suggest bone fragility. In the absence of abnormal bone fragility, he considered that non-accidental injury was the likely cause of the fractures. He was sceptical about taking a skin biopsy, considering the test to be equivocal. He also confirmed that the previous suggestion of a brain injury on the initial scan was unfounded as the scan merely showed reflective echoes.

4. Decision to apply for further measures

29. At a statutory review on 4 August 1997, the local authority concluded that O.D. could not safely be placed with his parents and proposed to place him with foster carers, with daily parental contact, while a psychological assessment of the first applicant and her partner was undertaken and a risk assessment was carried out by the National Society for the Prevention of Cruelty to Children (NSPCC). The question of placing O.D. with a relative had been discussed with the maternal grandparents. Ms M. and another social worker paid them a visit on 7 July 1997. The matter was not pursued as it was noted that the maternal grandparents considered that not enough consideration had been given to Osteogenesis Imperfecta and that decisions were being taken by persons who did not know the parents. In a statement of evidence submitted on 6 August, the applicant's partner listed family members who would either stay with the applicants or have the applicants stay with them; he did not specify that any relative was prepared to look after O.D. by themselves.

5. Second interim care order

30. The interim care proceedings began on 7 August 1997. At the hearing, Dr R., the consultant paediatrician who had overseen O.D.'s care at Bristol stated her opposition to the care plan; she considered that O.D. had a close relationship with his family and removal would cause emotional trauma equivalent to bereavement. The social worker supervisor also opposed the care plan, as O.D. had suffered no further injuries and she believed it to be highly likely to exacerbate his eating problems. While she gave evidence for the applicants, Dr R. had nonetheless stated in her report of 5 August 1997 that the rib fractures were unexplained and characteristic of non-accidental injury; that there was no definitive test for Osteogenesis Imperfecta; and that she felt it unlikely that O.D. had this condition, referring to the further opinion of an orthopaedic surgeon, Dr G, who had been unable to confirm a diagnosis of Osteogenesis Imperfecta.

31. The interim care order was granted. In a judgment handed down on 12 August 1997, the judge considered that the consultant paediatrician and supervisor seemed to deal with a much more permanent separation than was envisaged. He stated that it was unfortunate that proper communications had not existed permitting the risk assessment to be carried out at Bristol but that it still remained to be discovered how O.D. had sustained his injuries. With regard to the proposal to place O.D. outside the family, the judge noted that there had been no proper assessment of any other family member but considered that the local authority could not be blamed for this: "Clearly there had been discussions, considerable discussions and disagreement about the care plan. ... as things stand at the moment I am not satisfied that

any family member would accept the sort of risk that I think at present exists."

32. He went on to say: "So far as the capability of the parents is concerned, this will probably be of little comfort to them but nevertheless ... I have no doubt that they are very capable, that they are splendid parents in every possible way except with regard to these two matters, this most important fact that the injury has still not been sorted out and there is also the possible problems with feeding."

33. He concluded that he had to make an order to provide O.D. with the protection that he required.

34. O.D. was placed with local authority approved foster parents. The first applicant was allowed contact for a period of four hours a day for five days during the week.

35. The first applicant was concerned as to the care which O.D. was receiving in the foster home. New clothes which she had given him were not being used; she found a plastic pellet in his play pen; on one occasion he was crawling on the floor near to broken glass; and when the first applicant noticed a bruise on O.D.'s face, the foster mother showed no concern and it was the link worker who had to recommend that he saw a doctor. The Government stated that the foster parents, selected for expertise with feeding problems, reported to, and were visited by, the local authority regularly, who found their care to be satisfactory.

36. On 7 or 9 October 1997, O.D. was admitted to hospital due to feeding problems. The first applicant claimed that she was not informed and only found out on arrival for a contact session. She was not allowed to stay with him in hospital overnight. The Government stated that the first applicant had been aware in advance, due to a previous visit to a doctor, that O.D. might be admitted to hospital and that she was informed when this happened as soon as was possible. Her normal contact continued with him during his ten-day stay.

37. On 27 October the NSPCC informed the local authority that O.D. should be returned without delay to his parents.

38. On 31 October 1997 Dr Si., a consultant paediatrician instructed by the guardian *ad litem*, noted that the lack of further injury despite increased mobility was further evidence against Osteogenesis Imperfecta. He emphasised that the feeding and growth problem was not a child protection matter *per se* but that the impact of these problems on the parents needed to be taken into account.

39. On 12 November 1997, while still in foster care, O.D. fell and was taken to hospital. The radiologist diagnosed a possible fracture of the shinbone. The X-rays were analysed as showing the bones to be thin and osteopenic.

40. On 20 November 1997 the NSPCC submitted their risk assessment. They recommended that O.D. be returned quickly to his parents' care, with a

short period of prior increased contact. The applicants submitted that the report was issued two months later than estimated; the Government submitted that the judge had in fact indicated that only the initial report should be available at the end of September.

41. On 8 December 1997 the local authority, at a statutory review meeting, agreed that O.D. should return home the same day.

42. On 19 January 1998 O.D. was examined by Dr B., a senior clinical research associate and honorary consultant paediatrician at the University of Cambridge. He reported in his final report of 25 March 1998 that there had been insufficient radiological evidence to substantiate the diagnosis of Osteogenesis Imperfecta or other bone disease in January 1997 but that the taking of additional X-ray views of particular bones might have provided further clarifications. Tests now indicated that O.D. had type IV Osteogenesis Imperfecta, with a significant growth retardant component, a condition which had been active from the time of the tests. The force necessary to fracture his ribs might well have fallen within the range of normal handling. He recommended regular follow-up in a specialist paediatric clinic.

43. The X-rays and draft report of Dr B. were submitted to Professor C., who in her report of 18 February 1998 found the special bone density tests inconclusive, although she noted that she was not an expert. She agreed that the X-rays now showed abnormalities but did not find this conclusive of Osteogenesis Imperfecta. She stated that in her experience if children with Osteogenesis Imperfecta had sustained rib fractures such as these from normal handling then they went on to sustain fractures in other areas; she was therefore surprised that O.D. had not had further fractures other than the one sustained in foster care if he in fact had had Osteogenesis Imperfecta.

44. Dr B., Professor C, Dr L. and Dr Si. held a meeting on 29 June 1998 and issued a joint report, in which they concurred that there was no evidence at the time of the first fractures to indicate Osteogenesis Imperfecta or the desirability of any further investigations and that O.D. had suffered from birth from Osteogenesis Imperfecta Type IV. They also agreed that in the absence of an account of trauma in a baby, rib fractures such as those observed would be highly suggestive of non-accidental injury inflicted by a forceful squeezing. However, while the latter three doctors considered that the degree of force required to cause these fractures fell outwith the normal handling of a small baby although not within the category of abusive handling, Dr B. took the view that it might not be completely outside the normal range of handling (for example, catching a child who was slipping). The cause of the serious growth retardation was not known.

45. In light of that report, the local authority made an urgent application for an abridged procedure to withdraw care proceedings, which were scheduled for further hearing in December 1998.

46. The interim care order was discharged in July 1998.

6. *Subsequent complaint procedures and negligence procedures*

47. The first applicant submitted that the care proceedings had a devastating effect on her relationship with her partner and they have since separated. O.D., meanwhile, was suffering from sleeping and behavioural problems, was reluctant to leave the first applicant, would not play with other children and screamed and threw food at strangers.

48. In August 1998 the first applicant complained to the local authority which appointed an independent person, Mrs B., to investigate the complaint. After interviewing the key people involved, she found various defects in the handling of the case. She held that the local authority had failed to consider fostering O.D. with family members as required by statute, noted the confusion in communication with the Bristol Centre concerning the risk assessment and stated that once it had been decided to accept the NSPCC recommendation the rehabilitation should have taken days, not weeks; she also stated that there had been a steady deterioration in relations between the first applicant and the assigned social worker and that a more productive working relationship with the family might have been achieved by changing the caseworker as requested by the family. She did not uphold other specific complaints, finding, *inter alia*, that it had been necessary for the family to travel to the Bristol Centre on the same day as the hearing, that the local authority was justified in imposing restrictive travel arrangements on the family while at the Centre, that the stance of the judge and local authority when considering whether O.D. should be taken into care was understandable in light of the potential risks, that there was no reason to consider that the care received by O.D. from his foster carers was not entirely appropriate, that the parents were invited to review meetings and to give their views, and that the case involved the considered opinions of several eminent experts, who discounted bone disease and confirmed a diagnosis of non-accidental injury. She stated, *inter alia*, that with the weight of the medical evidence so firmly establishing non-accidental injury the local authority had no option but to apply for care proceedings. She made no recommendation for monetary compensation.

49. On 29 November 1999 the local authority's complaints officer wrote to the first applicant and recommended that she receive a full apology and that certain aspects of the local authority's systems be reviewed and revised.

50. On 7 December 1999, in light of the above negative findings, the Head of Children's Services sent the first applicant a letter of apology in respect of the criticised practices.

51. The first applicant instituted proceedings against the local authority on behalf of herself and O.D., claiming damages for negligence and personal injury.

52. On 9 September 2003 his Honour Judge Knopf held that the local authority owed no duty of care to a parent in the context of care proceedings based on allegations of abuse.

53. On 11 September 2003 the judge rejected the claims of O.D. on the ground that he had not been shown to have suffered any recognisable psychiatric damage, or alternatively, that any injury was transient and not compensatable by damages.

54. Both applicants were granted permission to appeal but the proceedings were stayed pending the outcome of *D. v. East Berkshire Community Health NHS Trust and others* [2005] AC 373 (see description of domestic proceedings in *R.K. and A.K. v. the United Kingdom*, 38000/05, judgment of 30 September 2008, §§ 23-26). These cases concluded in the House of Lords, which held that no duty was owed by medical or social work professionals to parents in the exercise of their duties, in the best interests of the children, when deciding whether there had been any abuse and what measures were necessary.

55. After the hearing of the applicants' appeals on 3 and 4 November 2005, the Court of Appeal on 17 January 2006 dismissed the first applicant's appeal as at no stage was she owed a duty of care by the local authority. The court also rejected O.D.'s appeal on the ground that there was no evidence that he had suffered harm other than transient distress. In the alternative, the court held that any harm suffered by O.D. did not amount to a recognised psychiatric disorder and was therefore not of the kind giving rise to an action for damages ("non-justiciable harm"). The Human Rights Act 1998 and the European Convention on Human Rights were irrelevant as the case concerned events prior to the Act's implementation.

56. Leave to appeal to the House of Lords was refused.

B. Domestic Law

57. Section 23 (6) of the Children Act 1989 provides as follows:

“Subject to any regulations made by the Secretary of State for the purposes of this subsection, any local authority looking after a child shall make arrangements to enable him to live with—

(a) a person falling within subsection (4); or

(b) a relative, friend or other person connected with him,

unless that would not be reasonably practicable or consistent with his welfare.”

58. A person falling within subsection 4 is a parent of the child; a person who is not a parent of the child but who has parental responsibility for him; or a person in whose favour a residence order was made.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

59. The applicants complained of a violation of their right to respect for their family and private life as provided in Article 8 of the Convention, which reads as follows:

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

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

60. The Government contested that argument.

A. The parties' observations

1. The Government

61. The Government accepted that removing O.D. from the first applicant's care *prima facie* interfered with her right to respect for her family life. The interference was justified, however, as it pursued the legitimate aim of protecting O.D., who had suffered a serious, unexplained injury. The measures taken were also in accordance with the law.

62. As to the necessity of the measures, in a situation where a small baby had suffered injuries which the parents could not explain, it was reasonable and responsible for the local authority to take the view that it could not leave the child in their care unsupervised. The first interim care order was endorsed by a judge and consented to by the first applicant, who had legal representation. The worrying medical circumstances justified the various restrictions on the family when in the Bristol Centre and the placement had to start immediately as the authority had parental responsibility from the moment that the interim care order had been granted.

63. Insofar as the applicants alleged that O.D. would not have had to be placed in foster care if the local authority had properly requested a risk assessment from the Bristol Centre, the Government accepted that the lack of this comprehensive assessment was one factor, amongst many, in the decision taken by the local authority to place him with foster parents; they accepted that the local authority had not specified in its instructions the type of assessment required nor enquired as to the progress of the risk assessment at the monthly reviews conducted while the family were at the

Centre. The fact that the authority might have erred, however, did not deprive the decision of a legitimate basis; the placement at the Centre had to be arranged quickly, the case had been complex and the instructions to the Centre had to cover many issues. Also the Centre's final report did not omit the issue of risk altogether as Ms C.H. understood that she was supposed to cover the future risk posed to O.D. by his parents and make an assessment on the point. Given all the concerns, it was difficult to conceive of a risk assessment report that would have resulted at that time in an immediate and unsupervised return to parental care. The Government submitted that by the end of the family's stay at the Centre, the local authority was not in a position to conclude that the second applicant would not be in danger were he to be returned home and, consequently, they could not responsibly have consented to his being returned to his parent's care. The matter was considered by a judge at an unusually full hearing and, following careful consideration, the judge endorsed the decision of the local authority.

64. Insofar as possible placement with a relative was concerned, the question of where to place O.D. had to be taken quickly given the risk factors (in reality, the local authority had less than a week to reach a decision on a care plan and find suitable carers); it was therefore simply not practicable to place O.D. with a family member. There were also concerns that such a placement would not have been in his best interests, as the relatives to whom the local authority had spoken did not accept that he was at risk from his parents and his growth and feeding problems necessitated proper feeding management by appropriate carers. The judge did not fault the local authority in this respect and the Government pointed out that section 23(6) of the Children Act 1989 did not require time and resources to be spent assessing a family placement when such a placement would obviously have been impracticable or unsuitable.

65. Furthermore, there was no harmful period of delay in either obtaining the NSPCC report or in returning O.D. to his parents within three weeks of receipt of the final report. This period was entirely proportionate. It was used to inform the relevant agencies and professionals of the latest information about the family, to consider that information and prepare for a statutory review meeting.

66. Moreover, it was clear that the medical professionals, even those relied on by the applicants, involved in the case had given due consideration to the possibility of Osteogenesis Imperfecta but had discounted it on the basis of the evidence. The medical experts agreed that there had been nothing in January 1997 to suggest a diagnosis of Osteogenesis Imperfecta or that further investigations would have been desirable. It had to be borne in mind that Osteogenesis Imperfecta was notoriously difficult to diagnose in infants (and is much rarer than non-accidental injury) and in this case there was the complication of growth and feeding problems. The first applicant had been involved in the proceedings throughout.

67. The Government considered that for the same reasons any interference with the second applicant's Article 8 rights was justified.

2. *The applicants*

68. While the applicants fully agreed with the Court's view expressed in *R.K. and A.K. v. the United Kingdom*, no. 38000/05, § 36, 30 September 2008, namely that mistaken judgments or assessments by professionals did not *per se* render childcare measures incompatible with Article 8 of the Convention, they submitted that the present case could be distinguished from *R.K. and A.K.* in a number of important respects.

69. In particular, the applicants submitted that in the present case the measures taken were not necessary and were disproportionate throughout, with fundamental and incomprehensible mistakes having been made. Although the bone damage, like the feeding problems, was unexplained, the authorities, without any additional evidence, jumped to the assumption that there had been injury inflicted, that the injury was non-accidental and that the parents should be suspected, even though the family presented none of the indicators of personal or social dysfunction which normally accompanied non-accidental injury. Moreover, unlike the applicant in *R.K. and A.K.*, the second applicant clearly presented eight of the ten known indicators of Osteogenesis Imperfecta and the first applicant displayed typical features of carriers of the defective gene, such as hyperflexibility. The applicants disputed that Dr S. had properly considered Osteogenesis Imperfecta and argued that she should have referred O.D. to a specialist at an early stage, while Professor C. could have conducted a DXA scan (bone densitometry machine) as Dr B. had later on.

70. The applicants pointed out that unlike the child in *R.K. and A.K.*, O.D. had serious health concerns from before birth which were unrelated to any child protection concerns. He therefore showed symptoms other than the unexplained fractures, such as an inability to gain weight. The Government's attempt to justify the interference with their right to respect for their family life by reference to these pre-existing medical conditions was inappropriate.

71. The first applicant and her partner co-operated at all times with the health care professionals. No concerns had been recorded by professionals involved with the family prior to the bone fractures, and in fact it was the first applicant who had initiated the relevant medical examinations. Nevertheless, the authorities opted for care proceedings, sending the family without proper notice to a Centre far from their home where they had to live for three months in substandard and distressing conditions in an area plagued by drug and gang activity. This failure of notice or prior discussion excluded the family from the decision-making process and no convincing explanation was given for the haste. Moreover, the stay at the Centre proved to be a profoundly disturbing move for all concerned. The first applicant's

partner had to give up his employment to participate in the assessment and conditions in the Centre were poor. If the first applicant did not make negative statements about the conditions at the time, it was so as not to influence negatively the report which the Centre was producing. Valuable time was lost in any event because for the first five weeks of the assessment the Centre was not given any instructions as to what was to be assessed. When instructions were eventually given, it was unclear whether the Centre was being asked to conduct a risk assessment or a parenting assessment. As a consequence the Centre was not asked to conduct a formal risk assessment and the local authority had to request for this to be done later by the NSPCC.

72. The applicants submitted that had the assessment been carried out as it should have been during the stay in the Centre, there was no reason to suppose that the findings would have been any different from the NSPCC's finding of no risk in October of the same year. There would therefore have been no question of removing the second applicant from his parents' care in August. The applicants stated that the local authority received only one written report from the Centre which was very favourable to the family: the only outstanding concern was the repeated assumption of a non-accidental injury having been suffered.

73. The applicants submitted that even if the possibility of an accurate diagnosis being reached from further tests was not certain, as their family had been assessed as a loving and caring unit which was at risk of being split up, it would have been reasonable and necessary to undertake the tests. They pointed out that O.D. had suffered no further injury in the care of the first applicant and her partner and the only concern was that the professionals had not yet discovered the medical causes of O.D.'s injuries.

74. In view of the favourable report from the Centre, the applicants argued that the postponed risk assessment could have been undertaken at the Family Assessment Centre in Sale, where the second applicant lived with his parents after leaving the Centre in Bristol. No reason was given explaining why it was considered necessary to separate the child and his parents for this assessment to take place.

75. The applicants submitted that unlike the applicant in *R.K. and A.K.*, O.D. was placed in foster care with strangers, without proper consideration being given to the extended family as potential carers as the law required; such a placement was not proportionate in this case, given the failure to properly explore alternatives. This was despite the fact that one of O.D.'s uncles was a registered child minder and his wife a registered foster carer. There had been no evidence that the family would have been unable to protect O.D., and a list had been provided by the applicants a day before the hearing.

76. The standard of the foster care had been problematic. The separation of mother and child had not been necessary or proportionate in the

circumstances. The applicants noted the delay in the submission of the NSPCC report, which even if only one month later than expected, still prolonged the separation. Although the final report was not produced until 20 November, on 27 October the NSPCC informed the local authority that O.D. should be returned without delay to his parents. O.D. was not returned to his parents until 12 December, which was six weeks after the NSPCC first recommended return. The further delay in rehabilitation and return was not necessary as found by the local authority investigator.

77. The final joint medical report did not address the fact that the second applicant had many of the indicators for Osteogenesis Imperfecta or the first applicant's own genetic features. In any event all the medical experts were agreed that O.D. had suffered Osteogenesis Imperfecta from birth. Thus the medical evidence relied on to support the view of non-accidental injury had been inadequate, confused and inconclusive throughout.

78. Furthermore, there had been unjustifiable delays in returning O.D. to his family and in removing him from the child protection register.

79. Finally, and in light of the above considerations, the applicants submitted that the interferences with their right to respect for their family and private life were much more serious than those which occurred in *R.K. and A.K* and a higher level of justification was therefore required in order for the measures to be considered proportionate. In the present case any such justification was noticeably absent.

B. The Court's assessment

80. It is not disputed that the removal of the second applicant from the first applicant's care constituted an interference with the applicants' right to respect for their family life within the meaning of the first paragraph of Article 8. It therefore remains to be determined whether the interference was justified under the second paragraph of Article 8 of the Convention: namely, whether it was in accordance with the law, whether it had a legitimate aim and whether it could be regarded as necessary in a democratic society.

81. Without question, the challenged measures conformed to the requirements of domestic law and pursued the legitimate aim of protecting the rights of others, namely those of the second applicant.

82. The Court reiterates that the question whether an interference was "necessary in a democratic society" requires consideration of whether, in the light of the case as a whole, the reasons adduced to justify the measures were "relevant and sufficient" and whether the decision-making process was fair and afforded due respect to the applicants' rights under Article 8 of the Convention.

83. In considering the reasons adduced to justify the measures, and in assessing the decision-making process, the Court will give due account to the fact that the national authorities had the benefit of direct contact with all

of the persons concerned. It is not the Court's task to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues. The Court reiterates that the authorities enjoy a wide margin of appreciation when assessing the necessity of taking a child into care. A stricter scrutiny is called for, however, in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access (see, for example, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, §§ 71 - 72, ECHR 2001-V (extracts)).

84. The Court further reiterates that mistaken judgments or assessments by professionals do not *per se* render childcare measures incompatible with the requirements of Article 8 of the Convention. The authorities, both medical and social, have duties to protect children and cannot be held liable every time genuine and reasonably held concerns about the safety of children *vis-à-vis* members of their family are proved, retrospectively, to have been misguided (*R.K. and A.K.*, cited above, § 36).

85. In the present case the applicants have alleged that the local authority made a number of fundamental errors which rendered the interference with their right to respect for their family life disproportionate and in violation of their rights under Article 8 of the Convention. In particular, they have submitted first, that the local authority overlooked warning signs, such as the fact that O.D. had eight of the ten indicators for Osteogenesis Imperfecta and the fact that the first applicant displayed typical features of the carriers of the defective gene; secondly, that in view of the “warning signs”, O.D. should have been referred to a specialist at an early stage; thirdly, that the local authority failed to obtain the requisite risk assessment during the family's stay at the Centre in Bristol; fourthly, that O.D. should not have been removed from his parents' care in August 1997; fifthly, that even if there had been no alternative to foster care in August 1997, the local authority should have further explored the possibility of placing O.D. with a relative; sixthly, that there was an unreasonable delay in returning O.D. to his parents' care following receipt of the NSPCC risk assessment.

86. It is not disputed that Osteogenesis Imperfecta is a very rare condition which is difficult to diagnose in small infants. In the present case, the Court observes that O.D. was not diagnosed with any medical condition at birth. In January 1997, when O.D. was five months old, he was examined by a Dr S., a paediatrician. The first applicant raised the possibility of Osteogenesis Imperfecta. As a consequence, Dr S. looked at O.D.'s bones but considered that they were normal. On 30 April 1997 Dr C., a professor of paediatric radiology, also examined O.D. but noted that his bone texture was normal and there was nothing to indicate Osteogenesis Imperfecta. While at the Centre in Bristol O.D. was seen by a consultant clinical geneticist, who reported that Osteogenesis Imperfecta or some other collagen abnormality was no more than one possible explanation for O.D.'s

medical history. He also commented that it would be rare to have O.D.'s degree of growth retardation in the absence of multiple long fractures. He noted that further tests could be conducted, such as a skin biopsy, but that the diagnostic value of the test had a detection rate of only 87%. On the family's return from Bristol, Dr L., a radiologist and acknowledged expert in bone disease instructed by O.D.'s parents, reported that there was no evidence of abnormal bone morphology or density to suggest bone fragility and, as a consequence, non-accidental injury was the likely cause of the fractures. He was sceptical about taking a skin biopsy as the test was equivocal. At the hearing in August 1997 Dr R., a consultant paediatrician, and Dr. G., an orthopaedic surgeon, both indicated that in their opinions it was unlikely that O.D. had Osteogenesis Imperfecta. Finally, as late at 31 October 1997, Dr Si., a consultant paediatrician instructed by the guardian *ad litem*, noted that the lack of further injury in spite of O.D.'s increased mobility was further evidence against Osteogenesis Imperfecta.

87. Although the medical experts were later to agree that O.D. had suffered Osteogenesis Imperfecta from birth, it does not follow that the medical evidence previously relied on was inadequate, confused or inconclusive. Clearly, a considerable number of medical experts were consulted by the parties in the course of the investigation into O.D.'s injuries, and in their opinion there was no evidence to suggest Osteogenesis Imperfecta or to indicate that further investigations were desirable. In view of this evidence, the Court does not consider that the social or medical authorities can be faulted for not reaching an earlier diagnosis of Osteogenesis Imperfecta or, in the absence of a diagnosis, acting on the basis that the injury could have been caused by O.D.'s parents. Moreover, in view of the medical evidence, the Court does not consider that the social or medical authorities can be faulted for not conducting further investigations, such as the skin biopsy referred to in the report of the clinical geneticist. In any case, even if a skin biopsy had been conducted, there was a good chance that the results would have been inconclusive as one expert indicated that the test was only 87% accurate and even the first applicant's expert was sceptical about its benefits.

88. The Court therefore considers that the reasons adduced to justify the decision to investigate O.D.'s injuries and to assess the risk posed to him by his parents were relevant and sufficient. The Court would note, however, that it has not been explained to its satisfaction why it was necessary to relocate the family far from their home for the purposes of the risk assessment with all the disruption that entailed. That being said, it will focus on what it perceives to be a number of fundamental errors made by the local authority in conducting those investigations and assessments, including at the Family Assessment Centre. First, the local authority clearly was to blame for the wrong assessment being conducted at the Family Assessment Centre. The Court observes that the applicants remained at the Centre for

twelve weeks, at considerable inconvenience to themselves, and during this time they co-operated fully with the assessment. Following their stay at the Centre, however, the local authority concluded that O.D. could not safely be placed with his parents until they had undergone a psychological assessment and a proper risk assessment had taken place. Consequently, O.D. was removed from his parents' care and spent the next four months with foster carers. It is therefore clear, and the Government have accepted, that the failure to conduct a risk assessment during the twelve-week stay in the Centre was a relevant factor in the decision to place O.D. in foster care in August 1997. It is significant that the Risk Assessment report, when finally produced, recommended the speedy return of O.D. to his parents. While the final report was not made public until 20 November 1997, the NSPCC had informed the local authority as early as 27 October 1997 that O.D. should be returned without delay to his parents. While it is impossible to say with certainty, the Court finds that there is a very real chance that had the proper assessment been conducted while the applicants were at the Centre, O.D. may never have been placed in foster care.

89. Secondly, with regard to the conduct of the risk assessment, the Court is not persuaded that less intrusive measures were not available, such as conducting the assessment while the whole family stayed at an assessment centre or placing O.D. with relatives. The Court appreciates that the local authority had to make a difficult decision under considerable time pressures. It recalls, however, that the local authority was required by law to give proper consideration to placing O.D. within the family, and could only exclude this option if it was not reasonably practicable or in the interests of O.D.'s welfare. While it is clear that the local authority had some understandable concerns about a family placement, the Court finds that it dismissed this option too quickly without giving it proper consideration.

90. Finally, the Court finds that the period of time which elapsed between the final assessment of the NSPCC on 20 November 1997 and the return of O.D. to his parents' care was not reasonable in the circumstances. In particular, the Court observes that local authority was informed of the NSPCC's conclusion that O.D. should quickly be returned to his parents on 27 October 1997, and yet O.D. was not returned to their care until 12 December 1997, more than six weeks later.

91. The Court is therefore satisfied that while there were relevant and sufficient reasons for the authorities to take protective measures in May 1997, the subsequent failings of the local authority both extended and exacerbated the interference with the applicants' right to respect for their family life and were not proportionate to the legitimate aim of protecting O.D. from harm.

92. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 8 in respect of the interference with the applicants' right to respect for their family life.

93. The first applicant also complained that the actions of the authorities damaged her reputation and her relationship with her partner, and constituted a grave interference with her moral and physical integrity. Having regard to its conclusions as to the lawfulness and the necessity of the measures taken by the local authority, the Court considers that these complaints raise no separate issue under Article 8.

94. There has accordingly been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

95. The applicants complained of a violation of Article 13 of the Convention read together with Article 8. Article 13 reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

96. The Government contested that argument.

The parties' observations

1. The Government's submissions

97. The Government considered that the applicants' complaints were not arguable, and hence outside the scope of Article 13, save for the complaints under Article 8 concerning the interference with family life. They submitted that the first applicant was able to avail herself of the local authority's complaints procedure. A thorough investigation had been conducted by an independent person, resulting in the first applicant receiving an apology. While she did not receive compensation, she did not ask that such a recommendation should be made. She had also had the opportunity to oppose any interim care orders, or to appeal. The Government, however, accepted that it was arguably obliged to ensure that an enforceable right to compensation was made available for such damage as could have been proved to have been suffered as a result of any violation of Article 8 and that this complaint should be declared admissible. As the applicants acknowledged, there was now an effective remedy provided under the Human Rights Act 1998.

98. As regarded the second applicant, to whom a duty of care was owed at the time, his claim failed because he could not show that he had suffered more than transient and non-justiciable damage, or indeed any damage at all. This did not, however, show that he was prevented from bringing a claim in negligence; a favourable result in those proceedings was not guaranteed, nor a right to damages. In short, there was a national procedure

capable of providing a remedy and that procedure was used, but, in the circumstances, no remedy was appropriate.

2. The applicants' submissions

99. The applicants submitted that they had no effective remedy for their above-mentioned complaints. The local authority complaints' mechanism and local government ombudsman had already been found by the Court not to be effective remedies in these circumstances (*T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, ECHR 2001-V (extracts)). They saw no reason why the courts should not have recognised a duty of care as existing before the Human Rights Act 1998 came into force and submitted that their approach violated the applicants' Convention rights. They also pointed out that, even following the Human Rights Act, its provisions could not help parents who had to rely on the law of negligence as opposed to section 7 to vindicate their Convention rights. As regards the second applicant, it was not necessary to show damage in order to be a victim; therefore, in order for Article 8 to have been violated, it was not necessary to show the very specific kind of clinically diagnosed psychiatric damage required in English law. He had been entitled to a determination that the local authority had breached his right to respect for family life and also the possibility of obtaining an enforceable award for compensation, yet because he could not demonstrate a recognised psychiatric disorder, he was unable even to obtain a determination that his rights had been violated. This deprived him of access to an effective remedy.

B. The Court's assessment

100. The Court reiterates that the purpose of Article 13 is to require the provision of a remedy at national level allowing the competent domestic authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. Such a remedy, however, is only required in respect of grievances which can be regarded as arguable in terms of the Convention (see *Halford v. the United Kingdom*, 25 June 1997, § 64, *Reports of Judgments and Decisions* 1997-III; *Camenzind v. Switzerland*, 16 December 1997, § 53, *Reports of Judgments and Decisions* 1997-VIII).

101. There is no doubt that the applicants' complaints about the interference with their right to respect for their family life were arguable. Moreover, in the case of *R.K. and A.K.*, the Court held that the applicants should have had available to them a means of claiming that the local authority's handling of the procedures was responsible for any damage which they suffered and obtaining compensation for that damage. As such

redress was not available at the relevant time, the Court held that there had been a violation of Article 13 of the Convention (see § 45).

102. As the first applicant is in an analogous position to the applicants in *R.K. and A.K.*, the Court considers that there has also been a violation of her rights under Article 13 of the Convention.

103. The second applicant, however, is in a different position. A duty of care did exist between the local authority and the second applicant, and he was entitled to bring, and, indeed, did bring, a claim in negligence. The Court considers that the right to bring a claim in negligence, and to appeal against an unfavourable decision, would normally constitute an effective domestic remedy, even if it does not always produce the outcome that the applicant hopes for. In the present case the second applicant's claim was not successful because there was no evidence to suggest that he suffered from a recognised psychiatric disorder which had been caused by the period of separation from his parents and he could not, therefore, show that he had suffered justiciable damage. By definition, the domestic courts are not in a position to assess non-justiciable damage and the Court considers that it is reasonable for claims to be rejected on that ground.

104. Moreover, the finding that any damage sustained by the second applicant was non-justiciable is a finding of fact by the domestic courts. The Court reiterates that it is not normally within its province to substitute its own assessment of the facts for that of the domestic courts because, as a general rule, it is for the domestic courts to assess the evidence before them (see, *inter alia*, *Edwards v. the United Kingdom*, 16 December 1992, Series A no. 247-B, p. 12, § 34 and *Vidal v. Belgium*, 22 April 1992, Series A no. 235-B, pp. 32-33, §§ 33-34).

105. The Court therefore finds that there has been no violation of the second applicant's rights under Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

107. In respect of non-pecuniary damage, the applicants each claimed GBP 10,000 (EUR 11,260.10) in relation to the complaint under Article 8, and GBP 10,000 in relation to the complaint under Article 13 read together with Article 8.

108. The Government submitted that this sum was excessive.

109. The Court recalls the judgment in *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, ECHR 2001-V (extracts), in which the Grand Chamber found a violation of Articles 8 and 13 and awarded each applicant GBP 10,000 in respect of a separation which lasted a year. The Court further recalls its recent judgment in *R.K. and A.K. v. the United Kingdom*, in which it found a violation of Article 13 read together with Article 8 and the applicants were jointly awarded EUR 10,000 in respect of a separation which lasted for seven months.

110. The Court finds that these cases are appropriate comparators. It therefore jointly awards the applicants EUR 15,000 in respect of the complaint under Article 8 of the Convention. It makes no separate award under Article 13 of the Convention.

B. Costs and expenses

111. The applicants each claimed GBP 10,000.00 (EUR 11,456.60) for the costs and expenses incurred before the Court.

112. The Government submitted that this was clearly excessive. In particular, they submitted that a separate award should not be made to each applicant as their interests in this case were very similar.

113. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicants the sum of EUR 10,000 for the proceedings before the Court.

C. Default interest

114. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that there has been a violation of Article 13 of the Convention read together with Article 8 of the Convention in relation to the first applicant;

3. *Holds* that there has been no violation of Article 13 of the Convention in relation to the second applicant;
4. *Holds*
 - (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:
 - (i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 16 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President