From: Robert Clarke
Date: 10 January 2019
Re: **Case note on *Wunderlich v. Germany* (no. 18925/15)**

(a) Facts

1. Between 2008 and 2011, the German Wunderlich family lived abroad where they homeschooled their children. They returned to live in Germany in 2011. On 6 September 2012, the regional family court withdrew Dirk and Petra Wunderlich's (the Applicants) right to determine their children's place of residence, their right to take decisions on school matters and their right to apply to authorities on behalf of their children, and transferred these rights to the government youth office. The court based its decision on the parents' desire to homeschool their children.

2. On 29 August 2013, 33 police officers and 7 youth welfare officers surrounded the family home and threatened to use a battering ram to open the door. They carried the four children out of the house crying and placed them in foster homes. The children were subject to educational assessments in which they performed well.

3. The children were returned three weeks later after the Applicants stated they would send them to school. The youth office retained some parental rights – including the right to determine place of residence – until 15 August 2014.

4. On 9 October 2014, the Federal Constitutional Court refused to hear the Applicants' case.

5. ADF International filed an application to the European Court of Human Rights ("ECtHR" and "the Court") on 16 April 2015, arguing that Germany's actions violated Article 8 of the Convention ("Everyone has the right to respect for his private and family life, his home"), and Article 2 of Protocol 1 to the Convention ("…the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.")

6. The Court communicated the case to the German government on 30 August 2016 and handed down its judgment on 10 January 2019.

(b) Decision

7. In a unanimous decision, the Court found the complaint admissible and ruled that there was no violation of Article 8. Despite heavy reliance in written argument on Article 2 of Protocol 1 to the Convention – both from the applicant and all third-party intervenors – the Court at no stage in its substantive discussion refers to this article.

8. In preliminary comments, the Court indicated that it would not revisit its previous jurisprudence in which it had ruled that the blanket-ban on homeschooling in

Germany is compatible with the Convention.[1] It later reiterated that it has previously found compulsory schooling to be "aimed at ensuring the integration of children into society with a view to avoiding the emergence of parallel societies."[2] The Court noted that this was "in line with the Court's own case-law on the importance of pluralism for democracy."[3]

9. The Court began its consideration of the arguments by accepting the government's concession that its actions amounted to an interference with Article 8 rights and considered that the interference was in accordance with the law and pursued the legitimate aim of "protecting the health, rights and freedoms of the applicants' children."[4]

10. In considering whether the interference was "necessary", the Court reasoned that the "best interests of the child….may override those of the parent."[5] When assessing the reasons advanced by the authorities, the Court indicated that those authorities "enjoy a wide margin of appreciation."[6]

11. The Court repeated the reasoning of the national courts that children will not be able to "learn social skills, such as tolerance or assertiveness, and have contact with persons other than their family" if they do not attend school.[7] On this basis, the Court concluded that,

> the enforcement of compulsory school attendance, to prevent social isolation of the applicants' children and ensure their integration into society, was a relevant reason for justifying the partial withdrawal of parental authority. It further finds that the domestic authorities reasonably assumed – based on the information available to them – that children were endangered by the applicants by not sending them to school and keeping them in a 'symbiotic' family system.[8]

12. The Court recognized that the knowledge assessment demonstrated that the education the children were receiving was satisfactory but notes that "this information was not available to the youth office and the courts when they decided upon…the taking of the children into care."[9] In an apparent tacit admission of the disproportionate approach adopted, the Judges indicated that the authorities

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[1] *Wunderlich v. Germany*, no 18925/15, 10 January 2019, § 42.
[2] Ibid., § 50.
[3] Ibid.
[4] Ibid., § 43-45.
[5] Ibid., § 46.
[6] Ibid., § 47.
[7] Ibid., § 49.
[8] Ibid., § 51.
[9] Ibid., § 52.

"cannot be held liable every time genuine and reasonably-held concerns about the safety of children…are proved, retrospectively, to have been misguided."[10]

13. Finally, given that the children were returned "after the learning assessment had been conducted and the applicants had agreed to send their children to school", the Court concluded that the "removal of the children did not last any longer than necessary in the children's best interests."[11]

14. Remarkably, given the factual context, the Court also found that the intervention was "not implemented in a way which was particularly harsh or exceptional."[12]

15. Finally, the Court adjudicated on the fact that even after the physical return of the children, the Youth Office retained certain parental rights for almost one year more. The Court found that this was necessary to facilitate a long-term development assessment and that there was no "identifiable actual prejudice."[13]

(c) Analysis

16. There are four fundamental issues with this judgment, which, in large part, simply adopts the reasoning of the German authorities without subjecting it to any real scrutiny.

(i) The framing of the judgment as parent versus child

17. The whole judgment is framed in a troubling way. When the Court turns to the pivotal question of the "necessity" of the dramatic intervention, the Court indicates that

> Article 8 requires that a fair balance must be struck between the interests of the child and those of the parent and, in striking such a balance, particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent.[14]

18. The Court was established to resolve proceedings between an individual (or, in this case, a family) and the State. With this approach, the Court positions itself as the 'better' arbiter of what is best for children. Yet this is not the only part of the judgment in which the Court frames this case as being about resolving a dispute between parents and their children.

19. In another part of the judgment, the Court "reiterates that the fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological

[10] Ibid.
[11] Ibid., § 55.
[12] Ibid.
[13] Ibid., § 56.
[14] Ibid., § 46.

parents"[15] Despite the admission that the existence of a "more beneficial environment" is not enough, on its own, to justify breaking up a family, the clear implication is that this may be a factor, and the Court presumably sees itself as the arbiter of precisely which environment is the most beneficial for each child.

(ii) The assumptions made about home education

20. The principal reason the Court appears content to accept Germany's argument that its actions were necessary, is the argument that children inevitably receive a defective or limited education if they are taught in the home environment. This prejudice is clear when the court indicates in a number of places that compulsory school attendance is necessary for children to learn "social skills such as tolerance, assertiveness and the ability to assert their own convictions against majority-held views",[16] and in order to promote pluralism.[17]

21. Yet this judgment promotes a particular concept of society that is anything but pluralistic and tolerant, and sends the clear message to this family that an attempt to live out their 'convictions' as against 'majority-held views' will be met with the full force of the State.

22. The Court clearly accepts the argument made by the German authorities that the simple act of homeschooling has the practical effect of *endangering* children, finding that:

> the domestic authorities reasonably assumed – based on the information available to them – that children were *endangered by the applicants by not sending them to school* and keeping them in a "symbiotic" family system.[18]

(iii) The assumptions made about 'parallel societies'

23. Germany is the only country in Europe to maintain a blanket ban on home education. Rather than question this extreme position, the Court accepted the German justification for the ban without any scrutiny. It re-affirmed that "the German system of imposing compulsory school attendance while excluding home education" was aimed at "ensuring the integration of children into society with a view to avoiding the emergence of parallel societies."[19]

24. The idea that home education, conducted by loving parents seeking the best upbringing for their children, creates a "parallel society" within Germany, is without evidence and contrary to the experience of many other nations. Rather than probe

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[15] Ibid., § 48.
[16] Ibid., §12. See also § 49.
[17] Ibid., § 50.
[18] Ibid., § 51. Emphasis added.
[19] Ibid., § 50.

this position, the Court accepted it outright and even held that such a position was "in line with the Court's own case-law".[20]

(iv) Failure to grapple with the dramatic intervention

25. Given that the Court would not take the opportunity to revisit previous decisions in cases like *Konrad and Others v. Germany*,[21] in which a ban on home education was upheld, it would have been reasonable to expect the Court to focus on the particular facts of this case. However, despite the centrality of this incident to the whole case, the dramatic dawn police raid on the family home is almost completely absent from the judgment.

26. The only mention is two sentences in the section detailing the facts:

> On 29 August 2013 the applicants' children were removed from the parental home and placed in a children's home. The children had to be carried out of the house individually with the help of police officers after they had refused to comply with the court bailiff's requests to come out voluntarily.[22]

27. On this basis, the Court concluded that the intervention was not "particularly harsh or exceptional."[23] That is remarkably short shrift given the significant invasion of the family home.

(d) Conclusion

28. While extremely disappointing, and a significant step back for parental rights in Europe, this ruling is not necessarily the end of the journey for the Wunderlich family. There remains the opportunity to seek referral to the Grand Chamber of the European Court of Human Rights. With that in mind, it is worth recalling the dramatic reversal of the Chamber judgment in *Lautsi v. Italy*,[24] which saw a 2009 Second Section unanimous decision against Italy turn into a 15-2 Grand Chamber decision in favour of Italy in 2011.

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[20] Ibid.
[21] *Konrad and Others v. Germany* (dec.), no 35504/03, 11 September 2006.
[22] *Wunderlich v. Germany*, no 18925/15, 10 January 2019, § 19.
[23] Ibid, § 55.
[24] *Lautsi v. Italy* [GC], no. 30814/06, 18 March 2011; See also Chamber Judgment of 3 November 2009.