I. THE PARTIES

A. The Applicants

1a. Surname: Himmelstrand **2a. First Name:** Jonas

Sex: Male

3a. Nationality: Swedish **4a. Occupation:** consultant

5a. Date and Place of Birth: 25 March 1953, Uppsala, Sweden

1b. Surname: Himmelstrand **2b. First Name:** Tamara

Sex: Female

3b. Nationality: Swedish **4b. Occupation:** music teacher

5b. Date and Place of Birth: 12 February 1964, Lausanne, Switzerland

1c. Surname: Himmelstrand **2c. First Name:** [redacted]

Sex: Female

3c. Nationality: Swedish **4c. Occupation:** N/A

5c. Date and Place of Birth: 29 October 1998, Uppsala, Sweden

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B. The High Contracting Party

13. Sweden

II. STATEMENT OF THE FACTS

The Third Applicant, [redacted] Himmelstrand, was born on 29 October 1998 in Uppsala, Sweden. She is the second child of the First and Second Applicants, Jonas and Tamara Himmelstrand. She has an older brother born 1994 and a younger brother born 2004.

At an early age, she became slow in learning to talk. In September 2001, almost at the age of three, she started going to a day care center for a few hours a day. After a few months of being in the day care center her speech difficulties started increasing. At the age of four, she was diagnosed with Atypical Autism (Autism Spectrum Disorder).

[redacted] parents started an intensive program at home with the help of an assistant and [redacted] talking skills were improving substantially. The day care center management considered [redacted] improvement to be one of the greatest successes of a home program. [redacted] talked and communicated beautifully at her age level and in August 2003 she started pre-school. The pre-school, a Steiner pre-school, was carefully selected with a group of only eight children and a teacher.

However, even this set-up proved to be unworkable. [redacted] often had stomach aches and headaches coming home from pre-school. Studies about [redacted] syndrome reveal that even a group of only eight children could be too stressful. By reaching her school age in 2004 her parents decided that the only viable alternative for her education is home schooling. Her parents had experience with home schooling her older brother and the local authorities were very appreciative of their accomplishments. Thus the headmaster of the local school gave consent to home education for [redacted]

Her first year of home schooling was mostly about recovering from the stress of the previous pre-school and day care years. After nearly a year she made many important steps in learning. She learned to read and write, count elementary math and discovered her passion for art drawing.

The parents had regular meetings with the headmaster of the local school who was responsible for her, and her academic and social progress was very good, especially considering her diagnosis.

In May 2008, the parents were called to a meeting at the local school. A new special educator had come to the school, Ms. Anette Thiderström. The parents were informed that the headmaster made a mistake and lacked authority to give permission for home schooling. The parents had to apply to get permission for home schooling by sending an application to the local political Board of Children and Youth (*Barn- och ungdomsnämnden*) of the Uppsala Municipality. Given the good reputation that Himmelstrands had as home schooling parents, they were told that it would just be a formality. The application was sent in August 2008 for the school year 2008-2009.

The relevant law in Sweden is the Swedish School Act, specifically Chapter 10, § 4, which at the material time stated:

> *"A school-aged child shall be allowed to fulfill its school obligation in other ways than stated in this law, if it appears to be a fully satisfactory alternative to the education otherwise available to the child according to the law. Possibilities [for the authorities] to have an insight into the activities shall be provided.*
>
> *Permission can be given for up to one year at a time. During this time it shall be examined how the operation runs. Permission shall immediately be withdrawn if necessary insight into the operation is not granted, or if for other reasons it can be assumed that necessary circumstances for permission no longer exist."*

In their application, [redacted] parents referred to a great amount of research done on home education, their acknowledged competency as parents and educators, [redacted] special condition and the acknowledged success of her development in home education.

Demonstrating the lack of forseeability of the procedure to home educate, the Board of Children and Youth turned down the application at its meeting on 18 June 2008, basically saying that [redacted] parents had not proven that they can offer a fully satisfactory alternative.

[redacted] parents immediately lodged an appeal to the local Administrative Court (*Länsrätten* at the material time, and now *Förvaltningsrätten*) and continued home educating [redacted]

While the appeal was pending, the municipality made a forced test of [redacted] on 30 September 2008. The parents specifically asked the authorities that they refrain from normal school tests which [redacted] was not used to, but to no avail. The

representatives of the municipality made no effort to connect with [redacted] They came into the house, gave tests to [redacted] and then walked out. [redacted] with her diagnosis, was so stressed that she reversed plus and minus in her math test and thus the result of the math testing was not very good. To this day [redacted] seems to not have fully recovered from this unfortunate experience regarding the math test.

On 2 February 2009, the local Administrative Court held an oral hearing where [redacted] parents presented expert and witness testimony. They represented themselves *pro se*. The court ruled in their favor (Case 1460-08, Länsrätten i Uppsala län, Sweden, Judgment of 2 March 2009). The court found that as the schooling alternatives for [redacted] were few, taking into consideration her special sensitivity, the appeal was granted and [redacted] was given permission to be home educated for the school year 2008-2009. The court also took into consideration that [redacted] had possibilities to meet other children in her dance lessons, that the parents were willing to cooperate with the school, and that only a few months remained of the school term.

The municipality appealed to a higher Administrative Court (*Kammarrätten*). There was no oral hearing and the appellate procedure was in written form only. The appellate court ruled in favor of the municipality and overturned the decision of *Länsrätten*. The court reasoned that [redacted] diagnosis made it even more important that she went to school. [redacted] parents appealed to the Supreme Administrative Court which decided not to hear the appeal.

The parents filed a new application for the new school year 2009-2010. The application was denied and the parents lodged an appeal to the administrative courts. Meanwhile the municipality of Uppsala appointed a new special education teacher, Ms. Åsa Bonin, whose task was to establish [redacted] level of learning. Ms. Bonin was very sensitive and an extremely skilled special education teacher. Her opinion was that the municipality had been insensitive to the needs of the child in this situation. She found in working with [redacted] that her level of knowledge was absolutely adequate to her diagnosis. She appeared as a witness during the court proceedings and gave very persuasive testimony in favor of the parents' home education results.

During the court procedure, [redacted] parents introduced expert testimony by Dr. Gordon Neufeld, one of Canada's most recognized child psychologists and an internationally acclaimed expert and author of the book "Hold on to your Kids." Dr. Neufeld has 40 years of clinical experience with a wide variety of children: middleclass, working class, home school educated, school educated, special needs and delinquents. Dr. Neufeld had visited Sweden several times and met the Himmelstrand family on two occasions. His testimony was recorded through a video conference from Vancouver (transcript of the entire testimony is attached in **Appendix a**). The basic message in the testimony is that [redacted] is doing extremely well in her

development considering her sensitivity and that this is a clear proof of the competency of [redacted] parents to home educate. He also testified that children with these challenges seldom do well in school. Typically they do much better in a home setting if the parents are committed and prepared for home education.

Although confronted with overwhelming witness and expert testimony in favor of [redacted] home schooling, both the *Länsrätten* and *Kammarrätten* ruled against the family. The subsequent motion for a leave of appeal to the Supreme Administrative Court was not granted.

At the end of the school year 2009-2010, [redacted] parents were fined 6000 Swedish crowns (SEK) for the rest of the term.

During the next school year, 2010-2011, a new application for home schooling by [redacted] parents was rejected by the local authorities on 7 September 2010 (No. BUN-2010-0244.21). The Municipality of Uppsala reasoned that "[it] is hardly possible for 'normal parents' to maintain adequate teaching in the higher forms." As far as the evidence produced by the [redacted] parent on her social activities, the municipality noted in very general terms that "[these] activities cannot however, taking into account her age and special needs, be assumed to be sufficiently broad and multifaceted to give her the possibility of the *intended* social training and development" (emphasis added). Thus, the Municipality of Uppsala concluded that "[the] teaching that the parents wish to provide cannot be considered as an adequate alternative to the education otherwise available to them." The reasoning of the municipality gave no guidance whatsoever on the conditions that home schooling parents need to meet in order to have their application granted – it is thus wholly arbitrary.

Their appeal to the *Förvaltningsrätten* (formerly the *Länsrätten*) was denied on 1 February 2011 (Case 6745-10). The main argument of the first instance administrative court was that "it is not shown that Jonas and Tamara Himmelstrand have sufficient subject competence in all the subjects in Year Six." As far as social training was concerned, the court found a child "nearly always can be assumed to need the experience that schooling provides." This assertion is not only in contradiction with the Swedish law at the material time, which allowed exceptions for home schooling, but also with other cases dealt by the *Förvaltningsrätten*. Deciding on an appeal from the municipal board, the court in the case of Cina Walléns and Magnus Henriksson (Case 7645-11) set aside the municipal board's decision and granted approval for home schooling under much less demanding circumstances than those found in the Himmelstrand case. The court reasoned that the parents "devote considerable attention to the care of their child … [the] family has previously had a working relationship with a municipal school" and concluded that it "cannot see how the child through being home educated in the current year would risk being cut off from the

opportunities for any future advance studies." The cited verdict only confirms that the Himmelstrand application was dealt with in extremely arbitrary fashion, similar cases being considered on their merits with a very different outcome.

The second instance administrative court (*Kammarrätten*) decided finally on 15 February 2012, long after the school year had finished. The appeal was rejected with *per se* reasoning: parents can never offer a fully satisfactory alternative to school; school is always better, and the older the child, the better the school becomes. Although the Himmelstrand spouses offered a distance learning alternative at a special needs school (Clonlara School) and enclosed a study plan for [redacted] the second instance administrative court found the study plan unpersuasive and lacking "details." The court thus concluded that "[it] cannot therefore be deemed proven in the case that Clonlara School would provide the necessary subject competence for the subjects reported in the study plan." As far as [redacted] social training was concerned the appellate court considered her social learning as not "sufficiently broad and multifaceted taking into account her age and disabilities." The court left the Himmelstrand spouses with no clear guidance as to what would constitute a "sufficiently broad and multifaceted" social training. Without concrete reasoning, however, this assertion is unfounded and is merely an arbitrary finding. In its findings, the appellate court noted that the European Convention on Human Rights has found that "application[s] for home education lies within the context of the room for interpretation which exists under Article 2 of the first supplementary protocol to the ECHR."

[redacted] parents appealed to the Supreme Administrative court which refused to grant a leave to appeal on 1 October 2012.

For the school year 2011-2012, Jonas and Tamara Himmelstrand submitted two applications for home schooling – for [redacted] and a second one for their youngest son Mikael. Both applications were denied.

On 29 November 2011, the Uppsala Municipality had decided on the specific amount they wanted the Himmelstrand family to pay for the 2010-2011 school year: 90 000 SEK for each of the two parents, or a total of 180 000 SEK for the whole school year 2010-2011 for homeschooling [redacted]

Faced with the enforcement of such crushing fines against their family, Jonas and Tamara Himmelstrand were left with no alternative but to flee the country. On 9 February 2012 the family moved to the Aland Islands in Finland where a number of Swedish homeschoolers reside in effective exile.

In December 2012 the fine of 180 000 SEK was decreased to 100 000 SEK by the lower administrative court (*Länsrätten*). The family appealed this fine to the higher

administrative court (*Kammarrätten*). Presently, the family is under constant threat from the Swedish Enforcement Agency to pay the fine or have their property confiscated.

In conclusion, [redacted] autism spectrum diagnosis permits her to excel in education if a non-stimulating environment accompanied by strong positive relationships with caregivers is provided. This is virtually impossible to provide in a typical school environment and much more possible in the home environment. Testimony demonstrated that [redacted] is flourishing in her homeschooling and general development even though her clinical psychologist testified that this was unusual even with such sensitive children as [redacted][1] In addition to school subjects, she plays theater and sings solo in a church theater group and attends modern dance class twice a week. Overall, [redacted] education which has been provided primarily by her parents, in spite of the arbitrary opposition from authorities, has served her well and should continue.

III. STATEMENT OF ALLEGED VIOLATIONS OF THE CONVENTION AND PROTOCOLS AND OF RELEVANT ARGUMENTS

Introduction

By denying the application of the First and Second Applicants, Jonas and Tamara Himmelstrand, to lawfully home educate the Third Applicant, [redacted] Himmelstrand, the High Contracting party has violated the procedural and substantive rights under Protocol 1, Article 2 and Article 8 of the European Convention of Human Rights ("the Convention"). It did so by denying a fair hearing on the merits and by refusing their application on the naked presumption that "school is always better than home school." Swedish education law contains an explicit home education exception and overwhelming witness and expert testimony demonstrated that in this particular case home education was the very best option for [redacted] in accordance with her individual educational and psychological needs.

It is further submitted that the High Contracting party has violated Protocol 1, Article 2 and Article 8 of the Convention in respect of the Third Applicant, [redacted] Himmelstrand, by acting against her best interests psychologically and in the fulfilment of her educational needs.

As Swedish law already explicitly recognized the right of parents to home educate, the applicants are not seeking the recognition of a "new right to home education." Rather, the applicants seek review of Sweden's failure to grant due process prior to

[1] Dr. Gordon Neufeld has 40 years of clinical experience in this area and has published on this topic scholarly work which has been published into 8 languages.

denying [redacted] the right to receive and her parents to provide a home education suited to her particular special needs.

An education experience that the applicants are seeking clearly provides a "fully satisfactory alternative," something previous domestic courts had agreed with. However, Sweden failed to extend domestic legal rights to [redacted] Himmelstrand, who otherwise fits all of the criteria for the home education exemption allowable under the law. Instead of providing the required due process, Swedish authorities imposed substantial fines in an obvious and undemocratic attempt to coerce [redacted] and her family to attend school in spite of her medical condition that indicated school was harmful to her. Had Jonas and Tamara Himmelstrand succumbed to the pressure and placed [redacted] in school, the harm to her psychological and social development could have been irreparable.

If ever there was a child eligible to receive the legally available home education exemption under Swedish law, it is [redacted] Himmelstrand. The fact that other children have received the exemption under far less compelling circumstances is evidence that egregious procedural deficiencies exist in the application of the Swedish school law.

Admissibility

Several facts in the instant application separate it from previous home education applications filed with this court and the present case clearly meets the admissibility requirements under Article 34 of the Convention.

First and foremost, home education was, and remains, a legally available option to the applicants. [redacted] met the requirements to be home educated and the family proceeded under proper procedural grounds to apply for the home education exemption under the Swedish School Act. Accordingly, the case is easily distinguishable from *Konrad and Others v. Germany*,[2] in which the Court dismissed the claim of home educators in Germany; home education is explicitly provided for by law in Sweden and is still not a recognized right in Germany.

Secondly, [redacted] suffered from a medical condition, evidenced by medical testimony, that would be greatly exacerbated by school attendance (whereas tremendous progress was already being made in her home schooling environment). Nevertheless, she was arbitrarily refused the right to be home educated without justification.

Thirdly, as the exemption sought in the instant case was legally available and sought because of medical/psychological reasons connected to [redacted] learning disability

[2] ECHR, *Konrad and Others v. Germany*, application no. 35504/03, decision of 11.09.2006.

rather than ideological reasons, this Court's previous discussions with respect to the creation of "parallel societies" are inapplicable.

Finally, to the extent the court views the Chamber decision in *Konrad,* which case does not conform to the spirit of the more recent Grand Chamber decision in *Folgero and Others v. Norway*.[3] In *Folgero* it was held that exemptions had to be allowed for students *from* religious education where parent's religious beliefs were offended. The natural progression of this holding is to allow for exemption from education which parent's believe infringes their Convention rights and particularly if it is harmful to the educational development of their children.

Protocol 1, Article 2 ECHR

This Court has held that Protocol 1, Article 2 is the *lex specialis* in the area of education.[4] The provision states:

> *"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."*

Protocol 1, Article 2 explicitly specifies that the State shall respect the right of parents to ensure education and teaching in conformity with their own philosophical convictions. The scope of this clause is broad and encompasses all methods of knowledge transmission and every type of educational structure including, moreover, those outside the school system.[5] The rights of parents to educate their children according to their own philosophical beliefs and in the child's best interest must be safeguarded in order to provide the possibility of pluralism in education, this being essential for the preservation of a democratic society.

Protocol 1, Article 2 enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire education programme of a child.[6] That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than to simply "acknowledge" or "take into account".[7]

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[3] Application No. 15472/02, Judgment of 29 June 2007. Affirmed most recently in *Case of Hasan and Eylem Zengin v. Turkey*, Application No. 1448/04, Judgment of 9 October 2007.
[4] ECHR, *Folgero and Others v. Norway*, App. No. 15472/02, judgment of 29 June 2007., § 54.
[5] P.-M Dupuy and L. Boisson de Charzounes, "Article 2", in L.E. Pettiti, E. Decaux and P.H. Imbert (eds.), *La Convention europeenne des Droites de l'Homme*, Economica, 2nd ed., 1999, p. 999.
[6] *Kjeldsen, Busk Madsen and Pederson v. Denmark*, Judgment of 7 December 1976, Application No. 5095/71, 5920/72, 5926/72, § 52. See also: *Case of Folgero and Others v. Norway*, App. No. 15472/02, judgment of 29 June 2007., § 84(c).
[7] *Case of Folgero and Others v. Norway, op. cit.*

As this Court has held, *"It is in the discharge of a natural duty towards their children – parents being primarily responsible for the 'education and teaching' of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education."*[8] Secondly and equally pertinently, this Court held that: "*Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."*[9]

The term philosophical convictions must be interpreted in light of the Convention as a whole, thus being worthy of respect in a democratic society and which are not incompatible with human dignity.[10] Philosophical beliefs must include pedagogical beliefs defined as the parents' beliefs as to the best way of educating their children. In the instant matter, expert psychological testimony has supported the validity of these beliefs and the associated hazards of placing [redacted] into a public school. Furthermore, [redacted] own history of thriving in a home schooling environment and seriously regressing in a state schooling environment (even with as few as eight children present) indicates to the importance of her being in a home education environment.

In the seminal case of *Campbell and Cosans v. the United Kingdom* the Court held that philosophical beliefs are akin to the term "belief" as defined and protected under Article 9 of the Convention and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.[11] The Court went on to hold that the parents' objection to their children receiving corporal punishment amounted to 'philosophical convictions' under the Convention.[12] It follows, therefore, that pedagogical beliefs, such as those of the Himmelstrands, which have been shown to be thorough, effective, precisely thought out and executed, must fall within the meaning of Protocol 1, Article 2's protections.

Domestically, the Himmelstrands presented evidence that they have a conviction that goes deep into human development philosophy including dealing with special needs and "social training." This philosophy is every bit as strong and compelling as a

[8] ECHR, *Folgero and Others v. Norway*, App. No. 15472/02, judgment of 29 June 2007., § 84(e).
[9] ECHR, *Folgero and Others v. Norway*, App. No. 15472/02, judgment of 29 June 2007., § 84(f).
[10] ECHR, 25 February 1982, *Campbell and Cosans v. the United Kingdom*, Series A, No. 48, § 36: CDE, 1986, p. 230.
[11] *Id.*
[12] In *Arrowsmith v United Kingdom* [1978] 3 EHRR 218 § 69 pacifism was considered a 'philosophy' and in *H v United Kingdom* (Application 18187/91) it was uncontested that veganism was capable of concerning a "belief" within the meaning of Article 9 of the Convention.

religious view, and this is made absolutely clear by the level of effort the family has shown in working to have their daughter home educated.

In making its decision to deny the Applicants the exemption available in Swedish law to home educate, the Uppsala Municipality drew a false parallel between the first sentence of Protocol 1, Article 2, which states that no person should be denied an education, and the act of home education. However, as demonstrated in the preceding court decisions, the Himmelstrand's dedication to educating their daughter and her educational progress demonstrates that [redacted] was receiving a good education.

The Municipality of Uppsala also inexplicably confuses home education with private school education. The special educational needs of [redacted] require an environment only available through home education. Furthermore, scientific research has shown home education to be a viable and excellent alternative to both private education and public school education. The contention of the municipality in the domestic proceedings that the Himmelstrands seek to stop all schooling for [redacted] lacks any factual basis and ignores the breakthroughs the family has achieved in educating their daughter at home. To this extent, the family had provided the relevant authorities all planning documents as to [redacted] education as well as summaries of her progress through prior home education she had undertaken.

In the instant case, therefore, the family was exercising its legal right to home educate under Swedish law and there is ample evidence to demonstrate that it was exercising its right successfully.

Violation of Protocol 1, Article 2 ECHR

According to the Swedish School Act (Chapter 10, § 4),[13] a child may fulfil her compulsory school attendance by means other than those stated in the Act if the alternative is considered acceptable in comparison to the education that was otherwise available to the child. Home education, under Chapter 10, § 4 is one of the acceptable means of alternative education included in this paragraph and may be granted without any special external circumstance. This finding is reinforced by Sweden's judiciary in the case of RÅ 1990 ref 111 which upheld the right to home educate where no exceptional circumstances existed. In the cited case, the Swedish Supreme Administrative Court held that "individual instruction can in individual cases, mainly at the primary school level, be considered as an acceptable substitute for Comprehensive Compulsory School, even though some special external circumstances do not exist."

[13] In effect until June 30, 2011 (which was the applicable law at the time that the events of this case occurred).

In 2010 the Swedish Riksdag amended the Swedish school law to permit home education only under "exceptional circumstances." This language has operated to severely restrict home education in Sweden. The rejection of the Himmelstrand's request to home education has violated the family's rights and created a situation in which parents can no longer reasonably foresee how their acts in exercising these protected rights will be received by Swedish authorities.

In the present case, the exercise of these protected rights has led to unwarranted and unjustifiably heavy fines. Whereas the Swedish School Act provided precisely the type of educational accommodations that [redacted] needed to thrive in her young life, the Swedish authorities nonetheless punished her and her parents for acting in [redacted] best interest. Moreover, there is a startling lack of proportionality between the family's reasonable request and the fine of 240 000 SEK.

The Swedish authorities have drawn a false parallel between guaranteeing that a child is educated and disallowing alternative means of education, such as home schooling. This false parallel proceeds solely from the unlawful and unfettered discretion of the local authorities and makes impossible actualization of rights under the statutory law of Sweden.

Sweden, to meet its international obligations, must allow the possibility for parents to fully exercise their parental rights and may do so while also safeguarding a minimum standard of education. These two principles are not mutually exclusive as has been proven by countless other nations which allow for the possibility of home education. For example, home education is a form of education recognized in the educational systems of the vast majority of western democracies. In the United States of America there are 2 million homeschooled children, approximately 3-4 % of the school age population. In the United Kingdom there are nearly 100,000 homeschooled children. In Russia there are nearly 80,000 home schooled children. In France there are nearly 35,000 homeschooled children. Homeschooling is a growing movement internationally in other cultures as well.

By enacting a *per se* rule against home education, Swedish courts have sought to prevent the possibility of an entire form of education that is otherwise recognized by most Western countries. This is inimical to the values of a democratic society and is not only unnecessary but also it is wholly anathema to a democratic society.

Central to this Court's analysis of this question should be the fact that an exemption to home educate, even if under somewhat limited circumstances, was available to [redacted] who otherwise met all criteria to be home educated under the Swedish School Act.

While this Court has indicated it does not see a separate right to home education under the Convention, it nonetheless does have supervisory authority over the issue of home education in the instant matter precisely because it is already a substantive right under the Swedish School Act which was denied in a way that is prohibited by the Convention. Under the totality of the circumstances listed above, it should be clear that by denying this right to the applicants, Swedish authorities violated their Protocol 1, Article 2 rights.

Article 8 ECHR

Underlying this whole case and controversy are the special needs of [redacted] who was wrongly denied the home schooling exemption that was available to children in her circumstances under Swedish law. Article 8 of the Convention states:

> *"1. Everyone has the right to respect 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."*

The right of parents to have their children educated in conformity with their religious and philosophical convictions enshrined in Protocol 1, Article 2, is a specific aspect of State's obligation to respect family life. Thus, the guarantees developed in the context of Article 8 should, *mutatis mutandis,* apply for parental rights in educating their children.

This Court has gone as far as stating that Article 8 of the Convention may encompass a right to judicial review even in a case in which the substantive right in question had yet to be established.[14] The Court has also held that while the creation of certain rights is left to the discretion of the Member States themselves, the Court does gain supervisory authority under Article 8 of the Convention once that Member State does provide the right in its domestic law.[15] Therefore, the court may exercise supervisory authority over the unlawful denial of a right that the State has made available; such is the case with [redacted] Himmelstrand.

Violation of Article 8 ECHR

[14] ECHR, *Case of Koch v. Germany*, application no. 497/09, judgment of 19 July 2012, § 53.
[15] *See e.g.*: ECHR, *Case of Tysiac v. Poland*, application no. 5410/03, judgment of 20 March 2007, §§ 105, 116.

The Court has previously found States to be under a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity.[16] In addition, these obligations may involve the adoption of measures, including the provision of an effective and accessible means of protecting the right to respect for private life,[17] including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation of specific measures to ensure the best interests of the child. Whereas the right to home educate was available to Swedish families under certain circumstances, this right was unlawfully withheld from [redacted] Himmelstrand to her psychological detriment, thus interfering with her rights under Article 8 of the Convention.

For Sweden to lawfully interfere with Convention rights, the interference must meet three criteria: (a) the interference must be prescribed by law; (b) the interference must have a legitimate aim; and (c) the interference must be necessary in a democratic society. Applying the three prong test to the rights guaranteed under Article 8, it is clear that the interference with Convention rights is not justifiable in the circumstances.

(a) Prescribed by Law

According to the Court's settled case law, prescribed by law means that the law in question must be accessible and foreseeable in its effects. It cannot be vague. Further, the "quality" of the law must clearly and precisely define the conditions and forms of any limitations on basic Convention safeguards and must be free from any arbitrary application.[18]

The European Court of Human Rights ("the Court") in *Metropolitan Church of Bessarabia* held that domestic law, to meet the clarity requirement, must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention:

> *"In matters affecting fundamental rights it would be contrary to the rule of law—one of the basic principles of a democratic society enshrined in the*

[16] *Glass v. the United Kingdom*, no. 61827/00, §§ 74-83, ECHR 2004-II; *Sentges v. the Netherlands* (dec.) no. 27677/02, 8 July 2003; *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-...; *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002; *Odièvre v. France* [GC], no. 42326/98, § 42, ECHR 2003-III.

[17] *Airey v. Ireland*, 9 October 1979, § 33, Series A no. 32; *McGinley and Egan v. the United Kingdom*, 9 June 1998, § 101, *Reports of Judgments and Decisions* 1998-III; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 162, ECHR 2005-X.

[18] *See*: ECHR, 26 April 1979, *Sunday Times v. the United Kingdom*, Series A, No. 30 § 49 *et* seq; ECHR, 24 March 1998, *Olsson v. Sweden*, Series A, No. 130 § 61f; *Kruslin v. France*, *op. cit.*, § 36. Also *cf.* ECHR, 22 November 1995, *SW v. the United Kingdom*, Series A, No. 335-B, § 36, on how the development of criminal law by the courts should be reasonably foreseen.

> *Convention—for a legal discretion granted to the executive to be expressed in terms of an unfettered power; consequently the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise."*[19]

The legislation in question must be easy to access, as well as clear and precise in order that the public may govern their actions accordingly. It is thus only when these four elements of precision, access, clarity and forseeability are met that the law will be deemed to meet the criteria of prescription by law.[20]

In the instant matter, the lack of forseeability in the school law is apparent where clashes occur between the natural exercise of parental rights in determining the mode of education for one's children and the State's aim in guaranteeing that children receive an adequate education. In reality this is a false dichotomy as home education has been proven through objective scientific and sociological evidence to be a valuable and effective form of education.[21]

This Court has held on numerous occasions that the mere existence of a legal foundation is not enough to meet the principle of legality: it is also necessary to consider the matter of the quality of the law.[22] Moreover, the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective."[23] In the instant matter, serious procedural deficiencies with the home education exemption in the Swedish School Act allowed local authorities to exercise unfettered discretion in denying the application of the Himmelstrands.

The Swedish School Act therefore breaches Convention requirements because it is too vague and does not sufficiently accommodate these important parental rights in cases exactly like that of the Himmelstrands. [redacted] best interests call for the precise kind of education her parents are providing, yet this was denied by the State authorities.

(B) Legitimate Aim

Secondly, the interference in question must pursue a legitimate aim. Restrictions on rights guaranteed by the Convention must be narrowly tailored and must be adopted in the interests of public and social life, as well as the rights of other people within

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[19] ECHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, Reports 2001-XII, § 109: JDI 2002, p. 313.
[20] ECHR, 26 April 1991, *Ezelin v. France*, series A, No. 152, § 56.
[21] Ample studies evidencing the success of home education can be found at: http://www.hslda.org/research; http://www.nheri.org/NHERI-Research.html.
[22] *See e.g.*: *La Rosa and Alba v. Italy (No. 1)*, No. 58119/00, judgment of 11 October 2005, § 77.
[23] *See Öcalan v. Turkey* [GC], no. 46221/99, § 135, ECHR 2005-IV).

society.[24] While the goal of guaranteeing a minimum level of education is legitimate, the means of doing so by depriving a citizen of the right recognized in the law without due process is not legitimate. Furthermore, as highlighted above, home education was already lawful under Swedish domestic law and therefore the question of whether a legitimate aim was being pursued in denying this right to [redacted] to home school must be looked at under the specific circumstances of her case.

While States may have a legitimate aim in laying down minimum standards for education and schools which it oversees, the proscription of an entire form of non-public education that has otherwise been recognized among civilized nations and for which a substantial body of evidence indicates that it is effective, is not a legitimate aim. Furthermore, the establishment of a *de facto per se* rule disallowing a form of education reflects animus towards rights protected in the Convention. The interest of the State may be that a child is educated, but the Convention must establish some lines of protection beyond which the State may not go; permitting children to be educated *de facto only* in State run or State approved schools is not permissible especially when the State has already acknowledged the right of home education.

Therefore, the restrictions placed on the Himmelstrand family in refusing their request to home educate their daughter do not pursue a legitimate aim. Moreover, the restrictions actually serve the opposite role by injuring [redacted] educational and psychological development.

(c) Necessary in a Democratic Society

The final criterion that must be met for government interference with Convention protections to be justified is that the interference in question is "necessary in a democratic society." This Court has stated that the typical features of a democratic society are pluralism, tolerance and broadmindedness[25] and the word "necessary" does not have the flexibility of such expressions as "useful" or "desirable."[26]

For such an interference to be necessary in a democratic society it must meet a pressing social need while at the same time remaining proportionate to the legitimate aim pursued.[27] Moreover, the state has a duty to remain impartial and neutral, since what is at stake is the preservation of pluralism and the proper functioning of democracy, even when the State or judiciary may find some of those views irksome.[28]

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[24] *See*: F. Sudre, *Droit International et Europeen des droits de l'homme*, PUF, Droit fundamental, 1999, p. 108.
[25] ECHR, 30 September 1976, *Handyside v. the United Kingdom*, Series A, No. 24, § 49 *et seq*.
[26] ECHR, *Case of Svyato-Mykhaylivska Parafiya v. Ukraine*, application no. 77703/01, judgment of 14 June 2007, § 116.
[27] *Sunday Times v. the United Kingdom*, *op. cit.*, § 63 *et seq*.
[28] ECHR, 30 January 1998, *United Communist Party of Turkey and Others v. Turkey*, Reports 1998-I, p. 25, § 57.

This Court has frequently stated that, "[i]nherent in the whole Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[29] In its balancing of the rights of the individual and the interests of the State, the Court refrains from substituting its opinion on the merits of an individual case over the judgments of a national court. Nonetheless, its role is, when a case is taken as a whole, to decide whether the authorities had "relevant and sufficient reasons" for taking the contentious measures.[30]

Factors involved in determining proportionality include the interests to be protected from interference, the severity of the interference and the pressing social need which the State is aiming to fulfil. In regards the interests to be protected, this Court has noted that "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life."[31]

By denying the Himmelstrand family a right that was available in Swedish law, and by punishing them in such a disproportionate manner, the Swedish authorities have stifled a legitimate and informed minority view. The refusal to accommodate [redacted] educational disability serves no objective or reasonable justification and the fines levied against the Himmelstrand family are as high in light of the alleged offense as to defy reasonableness. In this way Sweden stifles pluralism and abuses this family's Convention rights. Applicants seek this Court's assistance to recognize these serious violations of the Himmelstrand's Convention rights both as parents and in [redacted] case as a child.

Comparative Jurisprudence

In addition to obligations arising under the Convention, a denial of home education in the instant matter is also in violation of Sweden's other international human rights obligations, which permit parents to choose the kind of education their children receive. Such international obligations have been explicitly or implicitly codified in, *inter alia*, Articles 5 and 18(1) of the United Nations Convention on the Rights of the Child, Articles 18(4) and 4 (2) of the International Covenant on Civil and Political Rights, Article 5(1)(b) of the Convention Against Discrimination in Education, Article 13 of the International Covenant on Economic, Social and Cultural Rights and Article 26(3) of the non-binding but persuasive Universal Declaration of Human Rights. Such international obligations are worth considering as they provide this

[29] *Soering v. the United Kingdom*, 14038/88 [1989] ECHR 14 (7 July 1989).
[30] *Olsson v. Sweden*, *op. cit.*
[31] ECHR, *Elsholz v. Germany*, judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, § 43.

Court with a wider legal framework for the correct application and interpretation of the Convention rights in the instant matter.[32]

The view expressed in the foundational human rights instrument, the Universal Declaration of Human Rights ("UNDHR") allocates parents and not the State as the guardians of the interests of their children. As such parents have a "prior right," that is, a right grounded in nature and pre-existing the State, to choose the kind of education that corresponds to their moral beliefs.[33] Article 16(3) states that, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." It is important to acknowledge that the UNDHR was formulated in order to protect against the horrific human rights abuses perpetrated by Germany and its allied antagonists during World War II. In particular the nationalization of all schools in Germany in 1938 and the use of the newly nationalized education system to expressly indoctrinate children in accordance with National Socialism. This directly contributed to the formulation of Article 26(3). This history provides important context for this Court to interpret the importance of this right and demonstrating the grave consequences possible if governments are permitted to take over such foundational institutions in society like education to the exclusion of parental interests.

Secondly, Sweden has signed the United Nations Convention on the Rights of the Child ("UNCRC") which clearly states that among the most important rights of the child, besides the right to life, are precisely the right to parental love and the right to education. The UNCRC also explicitly states that parents, being the ones who love their children most, are those most called upon to decide on the education of their children:[34]

> *"States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."*

The UNCRC contains no presumption, contrary to Sweden's implication (which Sweden itself contradicted in its case law and statutory law providing for the home education exemption), that home education is not "education" or that education in a

[32] *See e.g.* ECHR *Bayatyan v. Armenia* (Application no. 23459/03) 7 July 2011, [G.C.] §§ 50-70.
[33] Article 26(3) states, "Parents have a prior right to choose the kind of education that shall be given to their children."
[34] United Nations, *Convention on the Rights of the Child*, U.N.T.S. vol. 1577, p. 3, Articles 5, 18§ 1.

public school is or should be held up as the standard by which an education should be determined and there is ample evidence to the contrary.[35]

Thirdly, Sweden has signed and ratified the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Article 13 of the ICESCR, which Sweden has not placed reservations against, dictates:

> *"The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions."*[36]

This guarantee requires that the State respect the right of parents to educate their children according to their own religious or philosophical beliefs, which, as noted above, must include pedagogical beliefs. The right to education and respect for parental authority over their children assumes a level of freedom for parents to choose schools not established by the State and rejects the attempt by the State, exercised in the past by totalitarian regimes, from imposing a monopoly in education. Similarly, the non-derogable provision in Article 18(4) of the International Covenant on Civil and Political Rights states, "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

Lastly, the United Nations Special Rapporteur on the right to education, Vernor Muňoz, highlighted the importance of home education in 2007 in his report on Germany.[37] The report stated:

> *"Even though the Special Rapporteur is a strong advocate of public, free and compulsory education, it should be noted that education may not be reduced to mere school attendance and that educational processes should be strengthened to ensure that they always and primarily serve the best interests of the child. Distance learning methods and home schooling represent valid options which could be developed in certain circumstances, bearing in mind that parents have the right to choose the appropriate type of education for their children, as stipulated in article 13 of the International Covenant on*

[35] See the studies evidencing the success of home education can be found at: http://www.hslda.org/research; http://www.nheri.org/NHERI-Research.html.
[36] United Nations, *International Covenant on Economic, Social and Cultural Rights*, *at* Art. 13.
[37] UN General Assembly, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council", Report of the Special Rapporteur on the right to education, Vernor Muňoz, Addendum, Mission to Germany, A/HRC/4/29/Add. 3.

Economic, Social and Cultural Rights. The promotion and development of a system of public, government-funded education should not entail the suppression of forms of education that do not require attendance at a school."[38]

In his recommendations the Special Rapportuer asked for "necessary measures [to] be adopted to ensure that the home schooling system is properly supervised by the State, thereby upholding the right of parents to employ this form of education when necessary and appropriate, bearing in mind the best interests of the child."[39]

Therefore, when considering the wider international human rights obligations placed on Sweden in the field of home education, it is clear that Sweden has acted against these international standards in the instant case.

Conclusion

The applicants herein submit their application to this esteemed court under Protocol 1, Article 2 of the Convention and Article 8. The case begs the question as to how loving parents in the applicants' situation can serve the best interests of their child without fear of unconscionable fines. It further raises serious questions about how the best interests of children like [redacted] can be served if such drastic punishments are being levied against her family despite the clear evidence that her needs were best served in a home schooling environment and despite the available exemption to home educate under Swedish law at the time.

IV. STATEMENT RELATIVE TO ARTICLE 35 § 1 OF THE CONVENTION

16. Final decision (date, court or authority and nature of decision)

1 October 2012 – Högsta Förvaltnings-Domstollen (Supreme Administrative Court); decision not to grant leave to appeal.

17. Other decisions (listed in chronological order)

a. 7 September 2010; Uppsala Kommun, Kontoret för Barn, Ungdom och Arbetsmarknad (Uppsala Municipality, Board of Children and Youth); denial of the application for home education,
b. 1 February 2011; Förvaltingsrätten I Uppsala (Administrative Court in Uppsala); rejection of appeal,

[38] *Id.*, § 62.
[39] *Id.*, § 93(g).

c. 29 November 2011; Uppsala Kommun, Kontoret för Barn, Ungdom och Arbetsmarknad (Uppsala Municipality, Board of Children and Youth); decision on fine,
d. 15 February 2012; Kammarrätten I Stockholm (Higher Administrative Court in Stockholm); rejection of appeal,
e. 10 December 2012; Förvaltingsrätten I Uppsala (Administrative Court in Uppsala); decision on fine decreasing it to 100 000 SEK.

18. Is there or was there any other appeal or other remedy available to you which you have not used?

All domestic remedies were exhausted. No other remedy or possibility of appeal is available to the Applicants.

V. STATEMENT OF THE OBJECT OF THE APPLICATION

19. Applicants seek just satisfaction, pecuniary and non-pecuniary damages, and costs as relates to the denial of their application for home schooling and the subsequent fines levied against the First and Second Applicants.
It is submitted that by denying the application of the First and Second Applicants, Jonas and Tamara Himmelstrand, to lawfully home educate the Third Applicant, [redacted] Himmelstrand—by denying a fair hearing on the merits and by refusing their application on the presumption that "school is always better than home school" – the High Contracting party has violated the procedural and substantive rights under Protocol 1, Article 2 and Article 8 of the Convention.

VI. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

20. No other submissions have been made to any other international tribunal or procedure.

VII. LIST OF DOCUMENTS

21.
a. Transcript of Dr. Gordon Neufeld's testimony.
b. 7 September 2010; Uppsala Kommun, Kontoret för Barn, Ungdom och Arbetsmarknad (Uppsala Municipality, Board of Children and Youth); denial of the application for home education,
c. 1 February 2011; Förvaltingsrätten I Uppsala (Administrative Court in Uppsala); rejection of appeal,

d. 29 November 2011; Uppsala Kommun, Kontoret för Barn, Ungdom och Arbetsmarknad (Uppsala Municipality, Board of Children and Youth); decision on fine,
e. 15 February 2012; Kammarrätten I Stockholm (Higher Administrative Court in Stockholm); rejection of appeal,
f. 1 October 2012 – Högsta Förvaltnings-Domstollen (Supreme Administrative Court); decision not to grant leave to appeal.
g. 10 December 2012; Förvaltingsrätten I Uppsala (Administrative Court in Uppsala); decision on fine decreasing it to 100 000 SEK.
h. 21 December 1990, Högsta Förvaltnings-Domstollen (Supreme Administrative Court); precedential decision on home education; cited as RÅ 1990 ref 111 (English translation).

VIII. DECLARATION AND SIGNATURE

We hereby declare that to the best of our knowledge and belief, the information we have given in the present application form is correct.

Place: Vienna, Austria
Date: 25 March 2013

Dr. Roger Kiska
Attorney at Law

Dr. Daniel Lipšic
Attorney at Law

Dr. Michael P. Donnelly
Attorney at Law

Dr. Michael P. Farris
Attorney at Law

Attachment: Authority