SUPREME COURT OF NORWAY

On 6 July 2020, the Supreme Court's Appeals Selection Committee composed of Justices Matningsdal, Kallerud and Høgetveit Berg issued in

HR-2020-1418-U, (case no. 20-090769SIV-HRET), civil case, appeal against decision:

A	(Counsel Knut Gunnar Brindem)
v.	
X municipality	(Counsel Erik Kristian Gundersen)
B	(Counsel Per Ove Marthinsen)

the following

O R D E R :

(1) The case concerns an appeal against the Court of Appeal's decision not to grant leave to appeal in a case under the Child Welfare Act regarding revocation of a care order and contact rights, see section 4-21 of the Child Welfare Act.

(2) A (the father) and B (the mother) are the parents of C, born 00.00.2008 and D, born 00.00.2011.

(3) The children were placed in emergency care after a serious violent incidence in their home on 20 June 2015. The mother hit the father in the head with a rock causing him serious head trauma. She was then remanded in custody. After the mother was released, the children were returned to their home in September 2015, before they were placed in emergency care once again in November 2015. A care order was issued by the County Board on 9 March 2016. The mother has subsequently been convicted of attempted homicide and sentenced to mandatory mental health care, as she was considered psychotic at the time of the act.

(4) The care order was brought before the District Court. In the District Court, the issue was whether the children were to be reunited with their mother, since she had the daily care at this time. The District Court upheld the County Board's decision by a final judgment 20 January 2017. Contact between the children and mother was set at three hours seven times per year, and between the children and the father, contact was set at two hours five times per year.

(5) From the emergency placement in November 2015, the children lived in an interim foster home until they, in February 2017, were relocated to their current foster home in the same area. The foster father was C's contact teacher, while the foster mother was working in D's kindergarten when they took on the mission.

(6) Late October 2018, the father announced that he would bring a case before the County Board and apply for a revocation the care order. At that time, it had not been clarified which of the mother and the father had the care under the Children Act, as mediation between the parents had been unsuccessful. In December 2018, the mother and the father entered into an agreement that the father was to have daily care for the children.

(7) After the father had submitted an application for family reunification, the County Social Welfare Board in Y, made the following decision on 13 May 2019:

> "1. Application for a revocation of the care order for C, born 00.00.2008, and D, born 00.00.2011, is dismissed.
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> 2. A is entitled to contact with C and D three hours four times per year. The child welfare services may supervise during the contact sessions.
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> 3. B is entitled to contact with C and D three hours four times per year. The child welfare services may supervise during the contact sessions."

(8) The father brought an action in Øvre Romerike District Court. On 14 February 2020, the District Court ruled as follows:

> "The decision by the County Social Welfare Board in Y of 13 May 2019 is upheld."

(9) The father appealed to Eidsivating Court of Appeal, which ruled as follows on 13 May 2020:

> "Leave to appeal is not granted."

(10) *A* has appealed to the Supreme Court against the Court of Appeal's procedure.

(11) The condition in section 36-10 subsection 3 (c) of the Dispute Act for being granted leave to appeal in Court of Appeal is met. The District Court barely mentions the father's caring skills in its reasoning. The Court of Appeal also found this unclear. The Court of Appeal references statements from the expert, but fails to comment on several contentions made in the appeal, including whether the father's plans to work less upon a return of the children and to accept assistance measures. Moreover, the District Court has incorrectly found as a fact that the children have lived in Z in five years. The correct is in excess of four years, three of which have been in the relevant foster home. This is important, as the same fact is used to rule out future reunification with reference to the attachment criterion.

(12) The case also concerns issues of significance beyond the present case, which means that also the condition in section 36-10 subsection 3 (a) of the Dispute Act is met. In brief terms, it is mentioned that the father already in 2018 applied for increased contact, as he was feeling ready to get his children home. The child welfare services should then have intensified the contact to improve and protect the bonds between the father and the children. It is a violation of the ECHR that the child welfare services have done nothing to facilitate reunification between the father and the children. The uncertainty prevailing between them is instead used to justify that the children have now become so attached to the foster home that the father also in the future will have no possibility of obtaining reunification, see the District Court's reference to section 4-21 subsection 1 second sentence of the Child Welfare Act.

(13) A asks that Eidsivating Court of Appeal's decision of 13 May 2020 be set aside.

(14) *B* has submitted a response in support of the contention and reasoning provided in the father's appeal.

(15) *X municipality* has submitted a response.

(16) The appealed decision meets the requirements in HR-2017-776-A. The grounds for appeal have been reproduced, and the reasoning why no circumstances as those mentioned in section 36-10 subsection 3 (c) are present, is satisfactory.

(17) The appeal also does not have significance beyond the present the case. The Court of Appeal's reasoning and the District Court's judgment concern an entirely individual matter. The District Court's reasoning for the contact granted, with reference to the expert assessment, implies that increased contact will expose the children to undue hardship. Furthermore, the attachment criterion in section 4-21 subsection 1 second sentence of the Child Welfare Act is correctly considered met. As pointed out by the Court of Appeal, it therefore has no significance for the District Court's result that the goal of reunification did not form a basis for the assessment.

(18) Apart from this, reference is made to the contentions in the response to the Court of Appeal, particularly on the children's strong reactions to the appeal proceedings and the father's wish for reunification.

(19) *X municipality* asks that the appeal be dismissed.

(20) *The Supreme Court's Appeals Selection Committee* notes that the Committee's competence is limited to reviewing the Court of Appeal's procedure. This includes determining whether the statutory conditions for a hearing in the Court of Appeal are met. The Committee is fully competent to review this issue.

(21) If any of the conditions of an appeal hearing are met, the question whether leave to appeal should be granted for the entire or parts of the case is up to the Court of Appeal's discretion. The Supreme Court's competence is thus limited to reviewing whether the discretion and any reasoning provided are adequate, see for instance HR-2017-776-A paragraphs 27 and 57. As a step in reviewing the Court of Appeal's decision, the Appeals Selection Committee must consider whether the District Court's procedure, including its decision-making basis and reasoning, may amount to a violation of the right to family life in Article 102 of the Constitution or Article 8 of the European Convention on Human Rights (ECHR) if the District Court's judgment remains the final and binding ruling in the case, see HR-2020-661-S paragraphs 61.

(22) The substantive conditions for revocation of a care order are regulated in section 4-21 subsection 1 first and second sentence of the Child Welfare Act:

> "The County Social Welfare Board shall revoke a care order where it is highly probable that the parents will be able to provide the child with proper care. The decision shall nonetheless not be revoked if the child has become so attached to persons and the environment where he or she is living that, on the basis of an overall assessment, removing the child may lead to serious problems for him or her."

(23) The Appeals Selection Committee has no comments to the District Court's initial reference to this provision.

(24) About the general legal starting point in cases involving revocation of a care order, the Supreme Court's Appeals Selection Committee states the following in HR-2020-994-U paragraphs 21–23:

> "(21) It appears from the Supreme Court's grand chamber rulings of 27 March 2020 that, in the light of more recent case-law from the European Court of Human Rights, ECtHR, there is a need for certain adjustments in Norwegian child welfare practice. The Committee mentions in particular HR-2020-661-S paragraph 112:
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> > 'Some judgments by the Court have demonstrated that the decision-making process, the balancing exercise or the reasoning has not always been adequate. In particular, the Court has found violations with regard to the authorities' duty to work towards reunification of the child and the parents.'
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> (22) The duty to work towards reunification has to do with the starting point that it must be assumed to be best for the child to live with its biological parents – the biological principle. This is emphasised by the ECtHR in many cases, including in the Grand Chamber judgment of 10 September 2019, *Strand Lobben and Others v. Norway*, see also HR-2020-662-S paragraph 51. Paragraph 86 in HR-2020-661-S emphasises the importance of family ties – both for the parents and for the child – being clearly visible in the reasons given by the child welfare services, the county boards and the courts. Then it is set out:
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> > 'In the individual case, it must be clearly stated that these considerations have been assessed, and which weight they have been given when balanced against factors related to the child.'
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> (23) The grand chamber cases mentioned above concerned adoption and a care order, respectively, and the determination of contact rights. However, the general views of reunification are also prominent in cases raising issues about revocation of a care order – reunification – under section 4-21 of the Child Welfare Act."

(25) With this legal starting point, the Appeals Selection Committee will first consider the requirements set out in HR-2020-661-S paragraph 112, reproduced above. In the Committee's view, one must assume that the District Court's decision-making basis was adequate, as an expert had been appointed with a detailed mandate. In addition, a number of witnesses were called.

(26) The question is thus whether the District Court's balancing of interests and reasoning meet the requirements laid down in case-law. The individual assessment is introduced by a description of the children's needs:

> "In the court's view, there is no doubt that both D and C have special needs that require care beyond the ordinary. The children have been subjected to separation in connection with two emergency placements and the subsequent relocation to the present foster home. The children have also, in one way or another, been involved in and forced to deal with the consequences of their mother's attempt to kill their father. It is difficult to say how much they have comprehended, but this is an event in the children's lives that will not go away. In the time leading up to this, it must be assumed that they have been exposed to

stress through their parents' conflicts. They have lived close to parents who, in their own way, have had mental disorders. This is harmful for children. C has also prior to the attempted homicide had difficulties, which has required treatment. He has tolerated changes poorly over time, but comes to terms with them eventually. Before the Court, he comes across as shy of conflict and as a child who needs particular backing to be able to stand up for his own opinions."

(27) The father's caring skills are described as follows:

"It is admirable that the father has recovered so well after being subjected to a very serious attack by the mother. It is good that he is back at work. It is undoubtedly demanding to keep calm in front of a secondary school class in a challenging school environment. However, being a good enough teacher is not the same as it being highly probable that he is able to provide adequate care. The Court assumes that he may provide satisfactory material care, but finds that he lacks understanding of the challenges he has in his role as a parent. The Court notes that he does not show sufficient sensitivity in his meeting with the children. He lacks understanding of how his own background forms him as a parent. He also does not seem to understand how the children's combined experiences imply that they have special needs.

About the social caring skills, she states:

> 'Based on an overall assessment of available documentation and own investigations into the case, I believe, based on my professional knowledge, that the father's social caring skills towards both children are somewhat impaired. The documentation points in the direction of the father having difficulties with social relationships, which in turn can make it difficult for him to create good limits and relationships that may promote the children's social development.'

The Court also cannot see that there are assistance measures that can be implemented to improve the father's caring skills towards the children. Neither courses nor guidance in the home may remedy the shortcomings in the father's caring skills. Family reunification will clearly not be in the children's best interest."

(28) The District Court then turns to discussing the children's attachment:

"It is the court's view that C and D have now developed such an attachment to the foster home that a relocation could lead to serious problems for them. They have lived in Z for five years and had close contact with the foster parents, first through school and kindergarten, and since the relocation, also in the home. The children's special needs are fulfilled in the foster home where they receive good and close follow-up. They have bonded with the foster parents, the other children in the home and with the extended family. The children are well-adjusted, appear to be thriving and participate in activities in the local environment. The Court nonetheless disagrees with the private parties' contention that the children appear robust. The contact sessions seem to function better, which is nice. However, strong reactions have been observed after contact sessions where the parents have brought up topics related to the case. Insecurity is also observed in less structured situations where the two seek and watch out for each other. Such situations require sensitive adults who are able to look after them. The difference is not made through habituation or 'warming up' through frequent contact or longer duration, but through the caregiver's ability to see the children's needs and fulfil them where they are. Both children have strongly expressed that they wish to continue living in the foster home. Their knowledge of the implications of new proceedings and the risk of relocation have set them back when learning that the case had been appealed.

> In recent ECtHR case-law, it is emphasised that a care order is intended as a temporary measure, and that reunification is the goal. Nonetheless, in *Strand Lobben v. Norway* the following is expressed in paragraph 208:
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> > 'Another guiding principle is that a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measure implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child (…) However, where a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited.'
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> The conditions for reuniting D and C with their father, A, are not met."

(29) These quotes constitute a complete reproduction of the District Court's reasoning for not revoking the care order. Admittedly, the District Court has not emphasised aspects that are not legally relevant. The fundamental flaw in the District Court's reasoning – in the light of recent ECtHR and Supreme Court case-law – is that it consistently discusses revocation of the care order at a general and superior level without giving any clear individual examples.

(30) In addition, key issues are left out. As set out in the quote above from HR-2020-994-U, the goal of reunification is central in cases involving a care order. Of relevance in this respect is the quote above from paragraph 86 in HR-2020-661-S on the significance of family ties – both for the parents and for the child – in the reasons given by the child welfare services, the county boards and the courts, and that it must be clear from the individual cases that these considerations have been assessed, and the weight they have been given in the balancing against circumstances concerning the child. It does not appear from the District Court's reasoning that such assessments have been carried out.

(31) The District Court also fails to address the significance of A already in 2018 – the year after the children were placed in the present foster home – expressing towards the child welfare services that he wanted the care order revoked, and that he therefore sought more extensive contact with the children.

(32) It would also have been natural to discuss whether three years of living with the foster parents is sufficient to meet the criteria set out in paragraph 208 of *Strand Lobben*, reproduced by the District Court.

(33) In the appeal to the Court of Appeal, it is clearly stated that A emphasised that he was willing to work less if he could have the children returned to him, and that his employer accepted this. The District Court does not discuss the significance of this at all in its reasoning.

(34) As for the assessment of the scope of the contact, it appears from the District Court's judgment that the County Board trusted that "we are most likely dealing with a long-term placement". As the District Court does not express a different view in its reasoning, one must assume that the District Court agreed. This starting point is problematic with respect to recent Supreme Court and ECtHR case-law, and particularly since the parents had had the son in their care until he was seven and a half, and since the father's loss of the care was caused by extraordinary circumstances. Reference is made to the Supreme Court grand chamber ruling HR-2020-662-S, where Justice Falkanger states the following in paragraph 128:

> "Contact must be facilitated in order to strengthen and develop family ties, see *K.O. and V.M.* paragraph 69. When it is stated in the Supreme Court judgment Rt-2012-1832 paragraph 34 that the access must 'safeguard the interest of creating and maintaining the child's knowledge and understanding of its biological origin', it must be specified that such a limitation of the purpose of the contact may only be made in the cases where the aim of reunification is abandoned. Such an abandonment – with the effect that the contact is strongly limited or completely removed – requires exceptional and strong reasons …"

(35) It is true that the District Court mentions that the contact visits have been burdensome to the children – which is relevant for the determination of contact rights. However, when the Court simultaneously quotes from the County Board's decision, stating that it likely concerned a long-term placement, it leaves the impression that the District Court has failed to take the goal of reunification into account when determining the scope of contact. This is a considerable flaw in the District Court's ruling.

(36) Against this background, the Appeals Selection Committee concludes that there are serious flaws in the District Court's reasoning and balancing of interests with regard to the issue of revocation of the care order and the scope of the contact, see section 36-10 subsection 3 (c) of the Dispute Act.

(37) The Court of Appeal's ruling includes some supplementary quotes from the expert declaration on the father's caring skills and on the significance of possible assistance measures. However, the Appeals Selection Committee cannot see that the Court of Appeal's decision, in the light of the criteria set out in the Supreme Court's grand chamber rulings, has sufficiently remedied the flaws in the District Court's judgment. In this respect, it should be noted that the Court of Appeal, despite it being held in the appeal, has also failed to address the significance of A being prepared to, and having obtained consent to, work less if the care order was invoked.

(38) Against this background, the Appeals Selection Committee finds that it may amount to a violation of the right to family life under Article 102 of the Constitution or Article 8 of the ECHR if the District Court's judgment remains as the final ruling in the case. Consequently, the Court of Appeal's decision must be set aside.

(39) The ruling is unanimous.

C O N C L U S I O N

The Court of Appeal's decision is set aside.

Knut H. Kallerud	Magnus Matningsdal	Borgar Høgetveit Berg
(sign.)	(sign.)	(sign.)