SUPREME COURT OF NORWAY

**J U D G M E N T**

given on 9 October 2020 by the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Wilhelm Matheson
Justice Aage Thor Falkanger
Justice Arne Ringnes
Justice Borgar Høgetveit Berg

**HR-2020-1929-A, (case no. 19-167532SIV-HRET)**
Appeal against Eidsivating Court of Appeal's judgment 30 September 2019

| | |
|---|---|
| A | |
| B | (Counsel Ingrid Mellum Gundersen) |
| v. | |
| X municipality | (Counsel Lars Marius Heggberget) |

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(1) Justice **Høgetveit Berg:**

**Background to the case**

(2) The case concerns deprivation of parental responsibility and adoption, against the will of the parents, of a boy who was taken into the care of the child welfare services immediately after he was born.

(3) C was born in --- 2012 and is nearly eight years old. A and B are his biological parents.

(4) A also had a child in August 2011. This child does not have the same father as C. The mother lived with her parents after her first childbirth. Shortly afterwards, during a routine check and subsequent inquiries, it was discovered that the child was injured and in bad health. The child had not gained weight, and its head had grown and changed shape. The child was hospitalised with bruises, broken ribs, bleeding in the back of the eye and internal head bleedings. The child welfare services issued an emergency care order when the child was four weeks old and took the child into care by the Social County Welfare Board's decision late January 2012. In October 2012, the Public Prosecution Authority brought charges against the mother and her parents for failing to seek medical attention for a gravely ill child.

(5) Based on the previous history with the mother's eldest child, the child welfare services issued an emergency care order for C when he was born. He was placed in the care of D and E and has lived there since.

(6) By the decision of the County Social Welfare Board Y of 5 April 2013, X municipality took over the care of C. Contact rights between the boy and his biological parents were set at two hours four times a year under supervision. The care order was based on a strong likelihood that the child would otherwise be subjected to serious shortcomings in the daily care, see section 4-12 subsection 1 (a) first option of the Child Welfare Act, *and* that the parents would not be able to fulfil the boy's social and emotional needs, see section 4-12 subsection 1 (a) second option. The child welfare services had engaged psychologist specialist Monica Sarfi to give an expert assessment of the mother's caring skills. Sarfi also gave an oral statement to the County Board.

(7) Gjøvik District Court upheld the County Board's care order by judgment of 7 October 2013. In accordance with section 36-4 of the Dispute Act, the Court was composed of one professional judge, one specialist in clinical psychology, and one ordinary lay judge. Psychologist specialist Sarfi testified as an expert.

(8) In March 2014, the mother and her parents were convicted in Borgarting Court of Appeal of violation of section 242 subsections 1 and 2 of the Penal Code 1902 for failing to seek medical attention for the mother's first child shortly after birth in 2011, when the mother was living with her parents. The mother was given a partially suspended sentenced to eight months of imprisonment, partially suspended. Both grandparents were sentenced to five months of imprisonment, also partially suspended. The Court of Appeal found as a fact that the child had been injured by shaking, by either the mother or one of her parents. However, it was not possible to establish which of the three had injured the child, or whether any of the other two knew about the shaking.

(9) In August 2017, X municipality made an application to the County Board for deprivation of parental responsibility and forced adoption. The biological parents applied for a revocation of the care order. The child welfare services appointed psychologist specialist Monica Sarfi as an expert.

(10) The County Social Welfare Board Y made a decision on 9 February 2018, rejecting the biological parents' application. The County Board decided on adoption and deprivation of parental responsibility. The biological parents were allowed contact visits of two hours, twice a year.

(11) On 9 March 2018, the biological parents brought an action in Gjøvik District Court demanding a review of the County Board's decision. According to section 36-4 of the Dispute Act, the District Court was composed of one professional judge, one psychologist and one ordinary lay judge. The District Court appointed psychologist specialist Gunnar Førland Standal as an expert. By the District Court's judgment of 22 October 2018, the County Board's decision was set aside as concerned adoption, deprivation of parental responsibility and contact visits. The decision that there was no basis for a revocation of the care order was upheld. Both the mother and the father were allowed to visit C for two hours, four times a year.

(12) The District Court found that in the event of a reunification, C would have an extraordinary need for care for a long time, and that there was a high risk that the parents would not be able to provide C with adequate care. The District Court also found it clear that C had become so attached to his foster parents and his existing environment that a move would cause serious problems for him. However, the District Court concluded that there were no particularly strong reasons indicating that adoption would be clearly better for C than continuing as a foster child.

(13) X municipality appealed against the judgment to the Eidsivating Court of Appeal.

(14) During the period between the District Court's judgment and the proceedings in the Court of Appeal, C's foster mother died in May 2019 after a short illness.

(15) During this period, the biological parents split and the mother moved home to her parents.

(16) Eidsivating Court of Appeal was composed of three professional judges, one psychologist specialist and an ordinary lay judge, see section 36-10 subsection 4 of the Dispute Act. Three expert witnesses testified in the case. On 30 September 2019, the Court of Appeal ruled as follows:

> "1. A and B are deprived of parental responsibility for C, born 00.00.2012, see section 4-20 subsection 1 of the Child Welfare Act.
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> 2. Consent is given for E, born 00.00.1978, to adopt C, see section 4-20 subsections 2 and 3 of the Child Welfare Act.
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> 3. A and B are allowed contact visits with C twice a year, each time for two hours, see section 4-20 (a) of the Child Welfare Act."

(17) The Court of Appeal, in contrast to the District Court, found that there were particularly strong reasons why adoption would be clearly better for C than continuing as a foster child. Point 3 of the judgment's conclusion contains a clerical error as it should refer to section 4-20 a, and not to section 4-20 (a), of the Child Welfare Act.

(18) The biological parents have appealed against the judgment to the Supreme Court. The appeal challenges the application of the law, the findings of fact and the procedure. On 12 December 2019, the Supreme Court's Appeals Selection Committee granted leave to appeal with regard to the application of the law and the findings of fact.

(19) Psychologist specialist Vigdis Sorteberg has been appointed an expert in the Supreme Court. She also gave an oral testimony in the Supreme Court. In addition, statements have been submitted by psychologist specialist Gunnar Førland Standal and psychologist specialist Monica Sarfi. C has been given the opportunity to express his opinion on the matter. Some other new evidence has also been presented, but without implying any significant changes from the case in the Court of Appeal.

**The parties' contentions**

(20) The appellants – *A and B* – contend:

(21) The conditions for deprivation of parental responsibility and adoption are not met. The conditions in section 4-20 subsection 3 (a), (c) and (d) of the Child Welfare Act are met, but the condition in (b) – the best interests of the child – is not. Adoption will also be in violation of Article 8 of the ECHR on the right to family life, as the measure is not necessary in a democratic society.

(22) The goal of family reunification was abandoned too early. The authorities have not fulfilled their positive duty to work towards reunification. The parents have not received any help from the child welfare services to obtain reunification. The authorities have also not taken any steps to strengthen the ties between the child and the parents. Adoption can therefore not be justified by the lack of family ties.

(23) The boy's ties to his biological family must be maintained unless the parents are particularly unfit. The biological parents are not particularly unfit caregivers, and contact is not harmful to the boy. An adoption will sever the biological ties.

(24) C does not have special care needs. He is robust, well functioning and has not become a vulnerable child as a result of the death of his foster mother. Possible vulnerability is hypothetical and linked to the future. C receives the necessary support from his foster father and extended family to cope with the loss of his foster mother. The risk of the parents applying for revocation of the care order is low; they have come to terms with C living in the foster home.

(25) The cooperation between the parents and the foster parents has been good. The boy has had contact with his biological parents since birth, and also with his maternal grandparents.

However, following adoption, contact visits can no longer be enforced, which entails a risk that the foster father may terminate all contact with the parents and grandparents.

(26) If adoption takes place now, C will lose his right to participate in deciding his own future. Adoption should not take place until C understands the difference between adoption and foster care. He has nothing to lose from waiting. He has a strong and secure attachment to his foster father and extended family.

(27) A and B ask the Supreme Court to rule as follows:

> "The District Court's judgment is upheld."

(28) The respondent – *X municipality* – contends:

(29) The conditions for adoption are met. There are particularly strong reasons for adoption. C must under no circumstances be reunified with his parents, and the remaining choice is between permanent foster care and adoption by the foster father. The best thing for C is to be adopted by his foster father. This outweighs the biological parents' right to family life.

(30) Unequivocal research shows that adoption is the best solution for a child's development when the child has been placed in foster before establishing a bond with the biological parents. This factor must be given considerable weight and form the basis for the concrete and individual assessment required in each case. Nothing in the case at hand suggests any other solution.

(31) The child's attachment to the foster home must also have considerable weight. On the one hand, C has a strong and secure psychological attachment to his foster father, the extended family, the farm he lives on and the local community. The memory of his foster mother lives on through his foster father. C's attachment to his biological parents is, on the other hand, minimal. He has very little to lose from adoption.

(32) Emphasis must also be placed on the needs of the child. C has special needs for stability and safety. Being a foster child makes C, at the outset, more vulnerable than other children, and the death of his foster mother has made him particularly vulnerable. It might be harmful if C were to become confused about where he belongs. Repeated visits by the supervisor and the child welfare services and questions about how he is doing in the foster home make him feel insecure. If he is adopted, C will no longer be a foster child with the uncertainty that entails. Adoption will allow C and his foster father to live as other families, without the constant supervision by the child welfare services. Parental responsibility should remain with the person who in fact cares for the child.

(33) Weight must be given to the child's own thoughts. C has expressed himself in such a way that it must be clear that he wishes to be adopted by his foster father.

(34) A common negative outcome of adoption is that biological ties are severed. That is not the case here. C has contact with his parents and grandparents, and knows that they are his biological family. Continuing contact visits after adoption means that the ties will not be severed. There is no risk that the foster father will refuse contact. On the contrary, adoption may improve the content of the contact visits with the biological parents.

(35) X municipality asks the Supreme Court to rule as follows:

> "The appeal is dismissed."

## My opinion

### *The issue*

(36) The case concerns adoption against the parents' will. The question is whether C, who will soon turn eight years old, should remain in foster care in the only home he has ever known, or whether the foster father should be allowed to adopt him – with a right for the parents to visit as determined by the Court of Appeal.

(37) The case also concerns deprivation of parental responsibility under section 4-20 subsection 1 of the Child Welfare Act. However, this is only relevant with a view to a decision on adoption. It is therefore sufficient to consider the adoption issue.

(38) A revocation of the care order is not at issue, as it was earlier in the process.

### *The Supreme Court's jurisdiction*

(39) According to section 36-5 subsection 3 of the Dispute Act, the court shall review all aspects of the case, based on the situation at the time of the judgment.

(40) I note that the case is duly clarified, and that the factual basis has been updated to the last detail. Three expert statements have been submitted. The expert in the Supreme Court has also given oral testimony at the hearing. The parties largely agree on the factual circumstances. The primary issue in dispute is the individual application of the law.

### *The law*

(41) Adoption against the parents' will is regulated in section 4-20 subsections 1-3 of the Child Welfare Act:

> "If the County Social Welfare Board has made a care order for a child, the County Social Welfare Board may also decide that the parents shall be deprived of all parental responsibility. If, as a result of the parents being deprived of parental responsibility, the child is left without a guardian, the County Social Welfare Board shall as soon as possible take steps to have a new guardian appointed for the child.
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> When an order has been made depriving the parents of parental responsibility, the County Social Welfare Board may give its consent for a child to be adopted by persons other than the parents.

> Consent may be given if
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> (a) it must be regarded as probable that the parents will be permanently unable to provide the child with proper care or 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, and
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> (b) adoption would be in the child's best interests, and
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> (c) the adoption applicants have been the child's foster parents and have shown themselves fit to bring up the child as their own, and
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> (d) the conditions for granting an adoption under the Adoption Act are satisfied."

(42) The conditions for various measures under the Child Welfare Act are more closely clarified and specified in case-law, most recently in three Supreme Court grand chamber rulings: HR-2020-661-S, HR-2020-662-S and HR-2020-663-S. In these rulings as well as in previous judgments, the case-law of the European Court of Human Rights – ECtHR – has carried great weight, see for example HR-2020-661-S paragraph 88.

(43) As concerns our case, I reference in particular HR-2020-661-S paragraphs 89 and 90. Here, it is clear that the condition of the best interests of the child must be supplemented by a requirement that adoption can only take place if there are particularly weighty reasons. The factors relating to the child that suggest adoption must be so strong that the consideration of maintaining the biological ties between the child and its parents must yield. The grand chamber ruling also states that the general substantive conditions for consenting to adoption in Norwegian case-law correspond to those in Convention case-law, see paragraph 109.

(44) I also mention that after the grand chamber cases, no cases on forced adoption have been heard in the Supreme Court before the case at hand. Also, no new judgments have been handed down by the ECtHR in child welfare cases against Norway after the said grand chamber cases were decided.

***Section 4-20 subsection 3 (c) and (d) of the Child Welfare Act***

(45) The parties do not dispute that the conditions in section 4-20 subsection 3 (c) and (d) of the Child Welfare Act are met. I agree. All written evidence clearly supports that the foster father is fit to care for the boy and raise him as his own child. I further reference the oral testimony by the expert in the Supreme Court and the fact that the biological parents agree that the foster father is fit.

***Section 4-20 subsection 3 (a) of the Child Welfare Act***

(46) The main question is whether adoption will be in the best interests of the child, see section 4-20 subsection 3 (b) of the Child Welfare Act. What is best for the child is nonetheless closely linked to the basic conditions for adoption in section 4-20 subsection 3 (a). I will therefore first consider these conditions.

(47) Section 4-20 subsection 3 (a) of the Child Welfare Act sets out two alternative basic conditions for adoption. The first is that the child has become so attached to the persons and the environment where he or she is living that removing the child may lead to serious problems for him or her. I will first discuss this alternative.

(48) C has lived with his foster parents his whole life – for almost eight years. He is strongly attached to his foster father, the foster home and the environment there, the foster grandparents and the extended foster family. He consistently refers to his foster father as "father" and his deceased foster mother as "mummy". He has expressed several times that the farm they live on is "a bit mine" and the like, which demonstrates his attachment to his foster family and the local environment. C was particularly attached to the foster mother, and the memory of her lives on through the foster father. On the other hand, C has no emotional attachment to his biological parents. The biological parents, in turn, agree that their son has become so attached to the people and the environment where he is living that removing him may lead to serious problems. Thus, the parents also acknowledge that reunification is no longer a goal. The municipality agrees on this, and so do I.

(49) The second alternative basic condition in section 4-20 subsection 3 (a) of the Child Welfare Act is that it must be highly likely that the parents will be permanently unable to provide the child with proper care. The central issue is the parents' ability to provide care. For the sake of clarity, we are dealing with the ability to provide care *to C*, and not the general caring ability. The municipality and the parents disagree as to whether this condition is met.

(50) I trust that there is currently no risk that the parents may subject C to violence.

(51) The biological parents have had great challenges in managing their own adult lives without help, despite extensive assistance measures. This is particularly the case for the mother. I also note that the parents moved apart in the spring of last year.

(52) In her oral testimony in the Supreme Court, the expert stated that the mother is not used to taking responsibility and in many ways is still dependent on her parents. Her assessment is that the mother finds it difficult to deal with problems and is unable to reach beyond herself. The expert further stated that the mother underestimates risk. It is unlikely that that she would master the demanding situation that would undoubtedly occur if she were to care for an eight-year-old boy. Finally, the expert was uncertain whether the mother had sufficient skills to give the child the stimuli necessary in his upbringing.

(53) The father has not cooperated very well with the expert in the Supreme Court, which has given her an insufficient basis for assessing him. Nonetheless, I perceived the expert as expressing that the father does not appear to have the caring skills required to take over the care for an eight-year-old boy. The father was passive when the expert observed the parents' contact visits with the child, and otherwise more preoccupied with finding a job.

(54) During contact visits with C, the parents have not demonstrated adequate caring skills. The interaction with C during contact has been, and is, lacking. The parents have not been able to come close to C despite a relatively extensive contact regime for almost eight years. During visits, the parents may appear passive, despite the foster father's staying in the background, with the effect that C tends to take on an active and leading role. Attempts by the child

welfare services to improve the parents' caring skills and competence in contact situations have not been successful.

(55) In addition, I mention that the expert before the County Board, psychologist specialist Monica Sarfi, believed that the parents would not be able to provide the child with proper care. She had reached the same conclusion in connection with both the care order in 2013 and the assessment the preceding year with regard to the mother and her first child. The same opinion was held by the expert in the District Court and the Court of Appeal, psychologist Gunnar Førland Standal.

(56) The expert in the Supreme Court does not rule out that the parents' functioning may have improved. If that is the case, one may expect an increased level of functionality in the future. At the same time, it is premature to conclude that these are permanent changes. It is not necessary for me to consider whether the parents currently have the necessary skills to take care of a newborn child. Under any circumstances, I do not think that they, at present, will be able to take care of an eight-year-old boy whom they hardly know. The parents lack childcare experience, and cannot grow into the parental role together with the child like someone who has cared for the child from birth.

(57) Against this background, I can only conclude that it is *clearly* probable that the parents will not be permanently able to provide proper care to C.

***Can historical mistakes by the governing authorities change the assessment under section 4-20 subsection 3 (a) of the Child Welfare Act?***

(58) With regard to the basic conditions for adoption in section 4-20 subsection 3 (a) of the Child Welfare Act, the parents have asserted that the authorities have previously made errors that must be significant for the adoption assessment today.

(59) As mentioned, the Supreme Court is to consider whether the conditions for adoption are met today, see section 36-5 subsection 3 of the Dispute Act. If errors have been made by the authorities in the past, this may still be relevant to the current situation, see HR-2020-661-S paragraphs 135-139 and 153. However, the Supreme Court does not need to consider possible errors that are not relevant to the current situation, see HR-2020-662-S paragraph 60.

(60) The parents contend that the authorities, particularly the child welfare services, have previously failed to fulfil their duty to work towards reunification – and that adoption can thus not be justified by the lack of family ties. It is therefore necessary to consider the factual grounds for the current situation.

(61) In connection with the care order in 2013, the District Court found as a fact that the mother had marginal caring skills. She had no training in coping with adult life and lacked the skills to fend for herself. The father could not compensate for this. He too was immature, incapable of understanding the need for help and was in frequent contact with the police. The District Court further pointed out the need for considerable guidance on how to interact with the child. The shortcomings were so serious that the processes of change and maturation would take a long time. Extensive measures were therefore required. The majority in the District Court also

emphasised the risk of violence, pointing out that violence could easily have cost the older half-sibling's life. In the criminal case that followed, the Court of Appeal did not find it proven that the mother had exercised violence, but that she had at least failed to seek necessary medical attention after the violence towards the child. Overall, in my view there were solid grounds for the care order.

(62) The District Court's legal starting point for the issue of contact rights following the care order was more problematic. In its judgment from 2013, the District Court trusted that the care order would entail long-term placement and that the access therefore had to be limited, but did not make a thorough assessment of the goal of reunification. The District Court wrote that the contact visits were "primarily to ensure that he learns about his biological origin". This was the wrong legal starting point, see HR-2020-663-S paragraphs 137 and 138:

> "(137) The aim of reunification has been emphasised in a number of rulings from both the Supreme Court and the European Court of Human Rights, and it implies that contact rights must be set to maintain this objective. It lays down requirements for the frequency and quality of the contact sessions; see HR-2020-661-S paragraphs 143 to 145. In the cases where reunification with the parents is still the goal, the extent of access must thus be determined to ensure that the bonds between the parents and their child may be strengthened and developed, see HR-2020-662-S paragraph 128 and HR-2020-661-S paragraphs 131 to 134."
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> (138) In Rt-2012-1832 paragraph 34, it is set out that the contact must "safeguard the consideration of creating and maintaining the child's knowledge to and understanding of its biological origin". However, such a limitation of the purpose of the contact may only take place if the goal of family reunification is abandoned, see HR-2020-662-S paragraph 128 and the Court's judgment 19 November 2019 K.O. and V.M. v Norway paragraph 69. This is not the issue here. I will revert to which conditions apply in those cases when considering the father's case."

(63) Even if the District Court applied the wrong legal starting point in 2013, the question is whether this had an impact on the determination of contact rights from October 2013 and onwards. Contact rights were set at two hours, four times a year under supervision. The District Court emphasised the risk of violence. Furthermore, the District Court emphasised that both parents had limited ability to understand the boy's needs and signals during the contact sessions up to the time of the judgment, so that counselling and guidance were necessary before increased access could be considered. I interpret this to mean that the contact sessions up until then had not functioned well, especially due to the parents' passiveness and lack of competence in contact situations. I add that the District Court had a solid basis for its assessment. From the care order until the District Court's judgment, less than a year later, the boy had a total of 19 contact sessions with his biological parents and 13 sessions with his grandparents. Although the District Court's legal starting point was incorrect, I believe that there was an adequate factual basis for the limited access from October 2013 and onwards. Nor did the parents apply for increased access.

(64) There is also the fact that access was increased immediately after the District Court's judgment. Apart from what the District Court had determined, the parents were allowed to see C to deliver Christmas presents and in connection with 17 May [Norway's national day]. This has taken place every year, except this year due to the Corona pandemic. The supervision had

already been discontinued in December 2013. From 2014, the grandparents on both sides were allowed three contact sessions per year. And from March 2016, contact sessions have been held outside the foster home, which according to the parents have worked better. In addition, there has been contact by SMS from the foster parents, also with photos. In 2017, the foster parents also initiated contact with half-siblings.

(65) The parents have stressed the child welfare services' continuing duty to work towards reunification. Here, I start by mentioning that this duty also rests with the State, not just with the child welfare services. One must therefore consider all assistance measures available to the parents and the child.

(66) A main element in the lack of caring skills was that the parents needed to evolve and become more mature and independent. The parents were 21 years old when C was born, and both had received extensive help from NAV long before that. The mother was followed up by NAV since the age of 18, mainly through work-related counselling sessions. The contact was particularly close from 2015, often at least once a week. In addition, five specific measures and two years of work practice were carried out. The father has been in contact with NAV from the age of 17, through many different work-related activities and practices. The State has thus arranged for the parents to find work, become more mature and independent and thereby improve their caring skills.

(67) Immediately after C's emergency placement in November 2012, the parents received an offer from the child welfare services for support and possible referral to psychiatric care. They refused this.

(68) In December 2014, the parents did not attend the agreed meeting with the child welfare services and did not respond to a message asking about their absence.

(69) In March 2016, after the child welfare services handed the case to a new caseworker, the parents were offered guidance before and during contact visits. They did not show up for the first four agreed guidance sessions, and failed to report their absence for the last three of these. The child welfare services then cancelled the remaining counselling sessions. The mother contacted the child welfare services in October 2016 and agreed on new guidance sessions. Challenges with NAV were stated as the reason why the parents had not attended. The child welfare services expressed surprise why the parents had not contacted them to reschedule. After further non-attendance without notice, the child welfare services stated, in November 2016, that if more sessions were cancelled, it would be pointless to maintain the offer of visitation guidance. The guidance was then terminated.

(70) Against this background, I cannot see that the State has failed to fulfil its duty to work towards reunification. Over a long period of time, the parents have received assistance from NAV to cope with adult life. In addition, they have been offered, but mostly ignored or declined, concrete assistance from the child welfare services with a view to increasing their caring skills and competence in contact situations.

(71) Overall, I therefore cannot see that there are previous errors by the authorities that must be significant for the adoption assessment today.

***Section 4-20 subsection 3 (b) of the Child Welfare Act 3 (b) – the content of the assessment of the best interests of the child***

(72) Adoption against the parents' will can only take place if it would be in the child's best interest, see section 4-20 subsection 3 (b) of the Child Welfare Act, see also section 4-1. The primary consideration of the child's interests also follows directly from Article 104 subsection 2 of the Constitution and Article 3 of the Convention on the Rights of the Child. Article 102 of the Constitution states that everyone has the right to respect for their privacy and family life. Deprivation of parental authority and adoption are undoubtedly interferences with the family life of children and parents. Article 8 of the ECHR therefore also applies.

(73) For the balancing of the competing interests that emerge when assessing what is best for the child in adoption matters, I refer to the grand chamber ruling HR-2020-661-S, paragraphs 81 and 82:

> "(81) The more overall balancing of the various considerations relating to adoption, which is the main question in the case at hand, is formulated as follows in the Supreme Court judgment Rt-2015-110 paragraph 46 and repeated in several subsequent judgments:
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> > 'A forced adoption has a strong impact on the biological parents. The emotional pain of your child being adopted is usually profound. The family ties severed by forced adoption are protected under Article 8 of the Convention and Article 102 of the Constitution. Adoption is also a radical measure for children, which under Article 21 of the Convention on the Rights of the Child may only be decided if this is in the best interests of the child. On the other hand, the interests of the parents must yield where crucial factors relating to the child indicate adoption, see Article 104 subsection 2 of the Constitution and Article 3 (1) of the Convention on the Rights of the Child. …". ...'
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> (82) Thus, the starting point are the family ties – often referred to as the biological principle – both for the parents and for the child. Included here is also the child's interest in having a family life with his or her biological parents, and one must bear in mind that adoption is therefore also a radical measure towards the child. However, the child may have interests that come in conflict with those of the parents, and their interests must then yield to crucial factors relating to the child."

(74) There is no doubt that the first two conditions in Article 8 of the ECHR are met – the requirement of a legal basis and a legitimate purpose. The dispute at hand concerns the third condition – whether the measure is necessary in a democratic society. Here, there is a requirement of proportionality between the protected interests of the individual and the legitimate aim pursued, see HR-2020-661-S paragraphs 75 to 78. Convention case-law is summarised in paragraphs 95 and 99:

> "(95) As set out in the two quoted paragraphs in *Strand Lobben*, particular importance should be attached to the best interests of the child, which according to paragraph 204 are of paramount importance. According to paragraph 207, the best interests of the child generally dictate, on the one hand, that the child's ties with its family must be maintained, unless the parents have proved particularly

> unfit. Family ties may only be severed in very exceptional circumstances. On the other hand, the parents cannot request measures that may harm the child's health and development. These two main factors are part of the consideration of the best interests of the child. In addition, the Contracting States are obliged to put in place procedural guarantees that in a practical and efficient manner protect the child's interests.
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> …
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> (99) Here, the Court emphasises that the removal of parental responsibilities and adoption are subject to strict requirements, since these measures entail that the family ties are definitively severed. They should only be applied in exceptional circumstances and be motivated by an overriding requirement pertaining to the child's best interests. These formulations, too, have been used by the Court in a large number of cases."

(75) The reference in paragraph 95 to *Strand Lobben* is to the ECtHR's Grand Chamber judgment in the case of *Strand Lobben and Others v. Norway* of 10 September 2019.

(76) The substantive conditions for adoption in Norwegian case correspond to those in Convention case-law, see HR-2020-661-S paragraph 109. The general assessment principle for adoption is expressed as follows by the Supreme Court in HR-2020-661-S paragraph 110:

> "The reasons for consenting to adoption rather than continued foster care must be so weighty that they justify a complete severance of the family ties."

(77) With reference to *Strand Lobben*, paragraphs 205 and 208, a grand chamber of the Supreme Court has decided that a care order must be considered a temporary measure, and that national authorities have a positive duty to work towards reunification as soon as possible, while this must be balanced against the best interests of the child, see HR-2020-661-S paragraph 128. The Supreme Court then stated in paragraphs 129 and 130:

> "(129) On the other hand, after a certain point, family reunification is no longer an option. It cannot take place if the parents have proven particularly unfit or the measure will harm the child's health and development, see Strand Lobben paragraph 207 on these two scenarios. According to paragraph 208, family reunification may also be precluded when a considerable period of time has passed since the care order, and 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. Decisive weight cannot always be attached to the fact that a parent has recovered his or her capacity to assume care, see *Pedersen and Others v. Norway* paragraph 65 with further references.
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> (130) The fact that the circumstances may preclude reunification, is also expressed in Strand Lobben paragraph 209, where the Court sums up the following with regard to adoption:
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> > 'It is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family (see *R. and H. v. the United Kingdom*, no. 35348/06, section 88, 31 May 2011).'"

(78) The effect of the authorities' failure to fulfil their positive duty to work towards reunification is dealt with in HR-2020-661-S paragraphs 135 to 139. I quote from paragraph 137:

> "(137) … Adoption cannot be ruled out if the parents prove to be particularly unfit, and this is likely to continue. Moreover, the principle may only apply to situations where contact is not *harmful* to the child, see the wording in Strand Lobben paragraph 207 that a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development. If contact is considered harmful, the authorities' choice not to facilitate it will not be considered an error. Nonetheless, it requires that the authorities have done their utmost to arrange contact without posing a risk of harm to the child. And, at some point, the child's need of *stability* – status quo – may override the interests of the parents, see *Strand Lobben* paragraph 208."

(79) Here, the Supreme Court points out three basic circumstances that – individually or collectively – may imply that adoption is in the best interests of the child, when balanced against the interests of the parents. The three circumstances are whether it is likely that the parents will remain particularly unfit, whether contact will be harmful for the child and the child's need for stability.

(80) Children have the right to be heard in questions that concern them, and due weight must be attached to their views in accordance with age and development, see Article 104 subsection 1 second sentence of the Constitution. This is expressed in more detail in section 1-6 of the Child Welfare Act, stating that children who are capable of forming their own opinions have the right to participate in all matters concerning themselves. The child must receive sufficient and suitable information and has the right to express his or her views freely. Due weight must be given to the child's opinions in line with child's age and maturity. The points of view must be emphasised in accordance with age and maturity. Also, according to section 6-3 subsection 1 of the Child Welfare Act, a child who has reached the age of seven, and younger children capable of forming their own opinions, must receive information and be given the chance to be heard before a decision is made in a case concerning him or her. The weight given to the child's opinion depends on age and maturity.

(81) Before I turn to my individual assessment of what is best for C, I reiterate that the Supreme Court in several cases has stated that due weight must be placed on a research- and experience-based perception of what is generally best for the child, but that a concrete and individual assessment must be made in each case, see Supreme Court Rulings Rt-2007-561 paragraph 50, HR-2018-1720-A paragraph 65, HR-2019-1272-A paragraph 100 and HR-2020-661-S paragraph 191. Extensive knowledge based on research from several countries shows that adoption is the best solution for children who have been placed in foster care before they have established bonds with their biological parents, and when reunification is not an option. I reference for instance Professor Marit Skivenes' expert testimony in the Court of Appeal and psychologist specialist Vigdis Sorteberg's expert report to the Supreme Court. This may serve as a starting point, but I emphasise that C's situation must be assessed individually.

(82) I also mention that the child has a right to child welfare measures. Section 1-5 of the Child Welfare Act, in force from July 2018, stipulates that children are entitled to necessary measures according to law when the conditions for the measure are met. In other words, children have a legal right to necessary measures.

***The individual assessment of the best interests of the child***

(83) Hence, there must be such weighty reasons for adoption rather than continued placement in foster care that they justify severing C's legal family ties. In this assessment, one must bear in mind that it lies at the core of the system of adoption that, in consideration for the child's best interests, there are no real prospects for reunification.

(84) I start by reiterating that the care order in 2013 was thoroughly justified, and that the State has not subsequently failed to work towards reunification, with implications for the adoption issue.

(85) As mentioned, the Supreme Court has a broad and up-to-date decision-making basis. In my view, there are solid grounds for concluding that reunification is not an option. Firstly, it is clearly probable that the parents will be permanently unable to provide proper care to C. Secondly, C has become so strongly attached to the people and the environment where he is living, that it could cause him serious problems if he is moved. Due to C's strong attachment to the foster home and vulnerability after his foster mother's death, and because he barely knows his biological parents, C would, if removed from the foster home, have an extraordinary need for care that his biological parents would not be able to fulfil. Consequently, there are no realistic prospects for a return – on which the biological parents also agree.

(86) It is therefore a fundamental and undisputed premise in the case at hand that C will live in the foster home in any event. He has spent his entire almost eight-year life in this foster home – a large part of the time he will legally be a child. It is not disputed that he receives excellent care and is safe and well there. C still has a strong need for stability regarding this situation going forward.

(87) According to sections 8 and 9 of the Foster Home Regulations, the relevant municipality must supervise the child's situation in the foster home. The supervisor must talk to the child, who must be given the opportunity to express his or her opinion about the foster home without the foster parents being present. Supervision must take place at least four times a year, which is also the case for C. Talking about how is doing in the foster home gives him anxiety. He becomes frustrated and angry and refuses to talk about it. The expert in the Supreme Court has stated that C perceives such questions as a devaluation of his foster father – and stirs the fundamental question of where he belongs. When C reacts in this way, the questions may disrupt C's sense of identity and make him insecure. This is strengthened by the death of his foster mother. This point was also made by the expert in the Court of Appeal. Adoption will give C peace and security with regard to where he belongs. Due weight must therefore be given to the consideration of stability.

(88) C previously also had visits from supervisors from the child welfare services four times a year. Since 2015, this has been reduced to twice a year, which is the minimum under section 7 subsection 3 of the Foster Home Regulations. Visits by both the supervisor and the child welfare services take a good amount of time, effort and attention. C shows signs of fatigue. The child welfare services do not see any need for follow-up, as the foster home functions exceptionally well.

(89) The expert in the Supreme Court emphasised that the foster father's prerequisites for providing good care and ensuring stability around C will be strengthened if he is given the legal authority of a parent. This will be particularly significant in C's teenage years, but also now.

(90) C has little connection with his biological parents, and no real relationship. He has never lived with them. Although he knows that they are his parents, and he has had regular contact with them, they are like distant relatives to him. During the contact visits, the parents are often passive while the foster father stays, as instructed, in the background. The experts in both the Court of Appeal and the Supreme Court have described that during contact visits C therefore takes on an active and leading role, which can be demanding for him. The contact between C and his parents still has an intrinsic value and makes it easier to establish better contact when he gets older.

(91) The expert in the Supreme Court pointed out that a legally stronger and more secure bond between C and the foster father may also strengthen the relationship with the biological parents. The foster father has agreed to access twice a year, which is admittedly less than today. However, based on the expert's testimony in the Supreme Court in particular, I trust that the foster father will facilitate further contact, as he does today. I take the statement from the expert to mean that the foster father wishes for C to have better contact with his biological parents provided this takes place on different terms than today. In addition, the expert has stated that the foster parents, especially the foster mother when she was alive, were unusually concerned about C having contact with his biological parents. The foster mother also took the initiative to contact C's half-siblings. Contact visits and supervision take a lot of time and attention. If the supervision is terminated as a result of adoption, this will free up time.

(92) As mentioned, the contact visits have not been of sufficiently quality, either for the boy or for the biological parents. The foster father has presupposed that he should stay in the background, which has made it difficult for him to contribute to a good relationship. He has expressed that it will be easier to create a relaxed atmosphere if he may invite the biological parents as regular guests – without the formality of the contact visits. I understand the expert to mean that such an arrangement may increase the quality of the contact between the boy and his biological parents.

(93) Overall, I trust that adoption in this case will facilitate better contact between the child and his biological parents, and that adoption at least will not damage the contact to any severe extent.

(94) C has not been asked directly whether he wishes to live with his foster father as a foster child or as an adopted son. The boy is secure and strongly attached to his foster father – and sees him as his own father. He has expressed a wish to have the same surname as his foster family, and stated that the farm they live on is a bit his. It is entirely unrealistic that C should think

that someone other than his foster father should make the legal decisions involving him, if he had the choice. I therefore trust that C wishes, or at least will wish when he understands the question, to be adopted when the alternative is to be a foster child until he comes of age.

(95) The parents have asserted that it is too early to take the irreversible step of consenting to adoption, and that one should wait until C understands the difference between being adopted and being a foster child. I disagree. Reunification is not an option, and there are no unresolved issues that will be clarified over time. C goes to school and will gradually gain knowledge from there about foster children's position in general, from the media or from fellow pupils, which may create uncertainty about his situation. According to Professor Marit Skivenes, who testified in the Court of Appeal, it is particularly important that adoption be carried out before the teenage years. If C, who will soon be eight years old, is to benefit fully from the adoption, it should be carried out now, see HR-2019-1272-A paragraph 109.

(96) These considerations, which from C's point of view favour adoption, must be balanced against the parents' interest in preserving their legal ties with C, and C's interest in having contact with his biological parents. The biological ties are important, but in this case they do not outweigh the advantages of adoption:

(97) After an adoption, the biological parents will no longer be able to make decisions concerning the boy. As long as reunification is unrealistic and the parents believe the boy is doing well with his foster father, and – above all – the fact that a more normal family life has not been established – the deprivation of legal authority is less burdensome.

(98) Adoption will nonetheless place an emotional toll on the biological parents by formalising the factual situation. Adoption is the final formal step that rule out any prospect of reunification. I have no doubt that the parents in this case will find it difficult. At the same time, they acknowledge the factual situation and that C will never move into the home of any of them.

(99) The biological roots are not removed after an adoption. In the case at hand, there is also no reason why the foster father should not follow up C's contact with his biological parents in a good way. As mentioned, the biological parents may on the contrary experience better interaction with C after an adoption. The same will largely apply to the grandparents.

(100) Like the three experts who have assessed the case, psychologists Sarfi, Standal and Sorteberg, I have no doubt that there are particularly weighty reasons why it is clearly best for C to be adopted now instead of continuing as a foster child. I am therefore confident that there are "exceptional circumstances" showing that adoption is "motivated by an overriding requirement pertaining to the child's best interests". All conditions for adoption are met.

(101) In the judgment by the Court of Appeal, contact rights were set at two hours twice a year, see section 4-20 a subsection 1. Contact visits will safeguard C's right to and need for knowledge of his biological origin. At the same time, the parents will have knowledge about C's development during his upbringing. Such contact is in line with the wishes of the biological parents. The foster father has consented to contact visits. The extent of access is not a topic for the Supreme Court, but I reiterate that in this case, the prospects of increased contact with both biological parents and grandparents after an adoption are good, and with a more

meaningful content when C is confident about where he belongs. The foster family has all along been concerned about C acquiring knowledge of his biological family

***Conclusion***

(102) Against this background, I have concluded that the conditions for adoption are met and that the decision is valid. The appeal must therefore be dismissed. I vote for this

J U D G M E N T :

The appeal is dismissed.

(103) Justice **Ringnes:** I agree with Justice Høgetveit Berg in all material respects and with his conclusion.

(104) Justice **Matheson:** Likewise.

(105) Justice **Falkanger:** Likewise.

(106) Chief Justice **Øie:** Likewise.

(107) Following the voting, the Supreme Court gave this

J U D G M E N T :

The appeal is dismissed.