THE SUPREME COURT OF NORWAY

On 23 October 2017 the Supreme Court gave judgment in

HR-2017-2015-A, (case no. 2017/614), civil case, appeal against judgment,

I.	
A	(Counsel Torhild Holth)
v.	
The municipality of Oslo	(City Advocate in Oslo repr. by Tomasz Edsberg)
II.	
B	(Counsel Øystein Storrvik)
v.	
The municipality of Oslo	(City Advocate in Oslo repr. by Tomasz Edsberg)

V O T I N G :

(1) Justice **Berglund:** The case concerns parents' visitation rights after the removal of their child, see the Child Welfare Act section 4-19. It also questions the significance of a very weak bond between the parents and the child.

(2) A, born 00.00.1993, and B, born 00.00.1990, are cohabitants and parents to C, born 00.00.2014.

(3) During a routine check at the child health clinic on 3 July 2014, when C was six weeks old, the health service nurse had a suspicion that the boy had been subjected to serious physical abuse. On the same day, he was examined at Akershus University Hospital, and diagnosed with at least nineteen rib fractures. The mother and the child were immediately received at X child welfare centre. Due to obligations at work, the father did not wish to join them.

(4) One week later, the parents were arrested by the police, and an interim emergency order was made to have the boy taken into care. A petition for arrest was issued for both parents on suspicion of violation of the Penal Code 1902 section 219 subsection 1 relating to physical abuse against family members. Neither the district court nor the court of appeal found reasonable cause to suspect the mother of the abuse, whereas the father was remanded in custody. He remained in custody for 17 days.

(5) After their release, the mother was first, and next the father, granted contact rights (access) to the boy for one hour every other week, under supervision.

(6) The County Board for Child Welfare and Social Affairs in Oslo and Akershus, made the following decision on 16 October 2014:

> **"1. The municipality of Oslo, Y child welfare service, is to take C, born 00.00.2014, into care.**
>
> **2. C is to be placed in a foster home.**
>
> **3. C and his parents A and B, are entitled access each other for one hour once a year.**
>
> **4. The child welfare service shall have the opportunity to supervise the visitations."**

(7) A, and later also B, instituted proceedings in Oslo District Court requesting a legal review of the County Board's decision regarding contact rights. Both parents accepted the decision to take the boy into care.

(8) On 25 February 2015, Oslo District Court gave judgment with the following conclusion:

> **"A and B are not to access C, born 00.00.2014."**

(9) The district court held that contact between C and his parents would entail a risk of retraumatisation of the boy and that it would not be in his best interest to be exposed to such danger. Also, it was emphasised that the parents did not have the necessary understanding of the boy's situation and that they did not take responsibility for what had happened.

(10) A appealed to Borgarting Court of Appeal, whereas B asserted her rights as a parent to be involved in the ongoing case. The court granted leave to appeal pursuant to the Dispute Act section 36-10 subsection 3 d.

(11) During the case preparations in the court of appeal, specialist in psychology Eva Steinbekk was appointed as an expert witness to evaluate whether the parents were suited to have contact with the boy. She submitted a written statement to the court of appeal on 21 April 2016.

(12) On 16 October 2016, Oslo District Court gave judgment in the criminal case against the parents. The father was convicted of having caused a number of rib fractures by squeezing the boy's chest hard on at least two occasions, see the Penal Code 1902 section 219 subsection 2, and for not having ensured that C received necessary medical treatment, see the Penal Code section 242 subsection 1, cf. subsection 2. The mother was acquitted of violation of the Penal Code section 219, but convicted of violation of section 242. The

acquittal is final. The parents have appealed the convictions to the court of appeal, and the proceedings are scheduled to November 2017.

(13) On 23 January 2017, Borgarting Court of Appeal dismissed the parents' appeal in the child welfare case. The court of appeal considered it an open question whether access would result in retraumatisation of C, but emphasised the actual uncertainty in this regard. It was also considered that visitation could entail that he learned about his history earlier than desirable, and that he did not have any bond to this parents apart from the biological relationship. In the court of appeal's view, the boy had no need for visitation. The appeal court also emphasised the risk that the parents might use the visitation right in a subsequent claim for custody.

(14) Both A and B have appealed the court of appeal's judgment to the Supreme Court. A's appeal concerns the application of the law, whereas B's appeal concerns the assessment of evidence and the application of the law.

(15) Specialist in psychology Eva Steinbakk has, as an expert witness, submitted a short supplementary statement to the Supreme Court. Apart from that, the case remains the same as in the court of appeal.

(16) The appellant no. 1 – *A* – has contended the following:

(17) The court of appeal applied the correct legal rule when arguing that there must be special and strong reasons for denying contact between the parents and their son. No other conditions apply when the bond between the parents and the child is weak. However, the strict conditions for denying access are not met. It is in the child's interest to know its biological origin also when the ties are weak. Although the case is serious, the child has not suffered permanent injuries. Nor is there anything to suggest that access may result in retraumatisation. Neither the basis for the removal nor the duration of foster care is decisive for whether access should be granted. The mother has accepted the removal and declared that she will not use access as a means to reclaim custody. There is also nothing to suggest that the boy will gain premature knowledge of his history if visitation is carried out. The concern for the boy's and the parents' right to a family life suggests that a certain extent of access should be granted. Supervision during visitation is accepted.

(18) A has submitted this prayer for relief:

> **"C, b. 00.00.14, is to have access to A as determined by the Supreme Court."**

(19) The appellant no. 2 – *B* – has mainly endorsed A's submissions. He has, in addition, contented the following:

(20) The court of appeal has incorrectly assumed that the boy's injuries are caused by his father. The father has accepted that the child has suffered injuries caused by one of the parents, but he has not pleaded guilty to this offence.

(21) It is a weakness in the court of appeal's judgment that the biological principle has not been reviewed in more detail. This is a fundamental and weighty principle in cases concerning the relationship between parents and children.

(22) B has submitted this prayer for relief:

> **"B, b. 00.00.14, is to have access to his son C as determined by the Supreme Court."**

(23) The respondent – *the municipality of Oslo*– has contended the following:

(24) The court of appeal's conclusion is correct, but the application of the law is wrong. In its review, the court of appeal has applied a legal requirement that is too strict in its assessment of whether there is reason to deny the parents access.

(25) In a case like the one at hand, where there is no bond between the boy and his parents, the issue of access must be determined based solely on the child's best interest. Thus, an additional requirement for special and strong reasons cannot apply.

(26) In the alternative, if the Supreme Court should find that the requirement for special and strong reasons applies, the court of appeal has correctly concluded that the requirement is met. Both the assessment of evidence and the application of the law are, under this premise, correct.

(27) Based on the evidence presented, it is 'more likely than not' that the father caused his son's serious injuries and that neither of the parents ensured necessary medical treatment. It is not an error that the court of appeal has placed importance on the uncertainty as to how the boy will react to contact. In the longer term, it cannot be a requirement that it is 'more likely than not' that contact will harm the child. It is sufficient that there is a certain risk of negative effects. In the municipality's view, there is a genuine risk that the boy will be retraumatised if access is granted. He has been subjected to very serious violence, and the parents have proved themselves unfit. C has currently no need for access to his parents. The ties between him and his parents were severed when he was an infant, and neither the biological principle nor the parents' right to a family life can justify access in this matter. Access will also hasten the moment where the boy must deal with the misdoings of his parents, which will be unfortunate. It must also be considered that access may result in a subsequent claim for custody.

(28) In the municipality's view, it is in the child's best interest that no access is granted in the time to come, and this must be decisive for whether access should be facilitated.

(29) If the court should decide to grant access, such access should be strictly limited. Supervision must be exercised during visitation, and the foster parents must have the opportunity to be present.

(30) The municipality of Oslo has submitted this prayer for relief:

> "**Principally:**
> **The appeals are to be dismissed.**
>
> **In the alternative:**
> **The child welfare service is to be given the change to supervise and the foster parents are to be allowed to be present during visits."**

(31) *I have concluded* that the appeals succeed.

(32) As I see it, the evidence presented to the Supreme Court does not give grounds for setting aside the court of appeal's assessment of evidence. Nevertheless, I find it appropriate to review the specifics of the case in more detail before I consider the legal issues raised.

(33) I will first consider the bond between the boy and his parents.

(34) The municipality of Oslo took C into care when he was seven weeks old. After having been temporarily placed in two different institutions, he was moved, eight months old, to the foster home in which he now lives. C is currently three and a half years old. The parties agree that the conditions at the foster home are good and that the boy receives proper care.

(35) During the temporary placement of C, seven visits were arranged of a total of eight hours. Since January 2015, when he was moved to the foster home, only one visit has been carried out. This was in March 2016, and it was arranged for the appointed expert in the court of appeal to observe the interaction between the child and his parents.

(36) With reference to the restricted access, the court of appeal concluded that the bond, if any, between the boy and his parent is now very week. In the judgment, it is stated that the parents are like strangers to him, and that he meets them in the same manner as he meets people he does not know. The court of appeal also referred to the fact that the removal will be long-term.

(37) I agree with the court of appeal that the bond between the boy and his parents, apart from the biological, is minimal. This means that potential contact rights will not have as its object to preserve the parents' contact with their child, but to form a basis for later communication as to who the boy's biological parents are.

(38) It is clear that C, during his first six weeks, suffered serious injuries caused by his closest care persons. To decide the case at matter, it is not necessary to consider who carried out the abuse, or to distinguish between the parents when determining the right to access. Both knew that the boy had been exposed to violence, and neither of them ensured that he received medical treatment until they showed at a routine health check that had already been postponed by a week.

(39) The substantial injuries suffered by C were not permanent. He is nevertheless extremely vulnerable. Both during the two temporary placements and during the first period in the foster home he was uneasy and demanded much of his caretakers. It is set out in the court of appeal's judgment that he has improved considerably since then, as he is living in a foster home where he is looked after in the best possible manner. At the same time, he has a need for "peace, safety and predictability so far exceeding the needs of other children of his age". According to the supplementary statement given to the Supreme Court by specialist psychologist Eva Steinbakk, even small tensions may result in a negative development for C.

(40) Although C is currently in a care situation that protects his needs, his vulnerability is a particular concern in the assessment of the effects of potential access.

(41) Visitations so far have been carried out without much difficulty. C has had certain reactions afterwards, but there is nothing to substantiate that the reactions are caused by him meeting his parents.

(42) The expert has assessed whether contact rights will be retraumatising to C. The assessment is based on his history, vulnerability and reactions in connection with visitation, as well as his current situation. The statement sets out that the assessment has been difficult, but that there is no basis for concluding that visitation by his parents will be retraumatising as long as it takes place in an environment where the boy feels safe. In the summary, she states, however, that visitation by his biological parents might create a general insecurity for the boy, also in the longer term. The expert statement is based among other things on the insecurity a child may experience from the parents' wish to regain custody.

(43) I will now turn to the legal issues raised in the case at hand.

(44) It is the provisions in the Child Welfare Act regarding the best interest of the child that form the basis for the assessment to be made. However, the case must be considered in context with the overall legal framework.

(45) A decision to take a child into care and to regulate contact rights involves a considerable weakening of the family ties. The decision interferes with both the parents' and the child's right to respect for family life, a right protected under the Constitution Article 102 and the European Convention on Human Rights (ECHR) Article 8. For the child's part, one must also consider the UN Convention on the Rights of the Child, Article 16 and Article 9 no. 3 regarding a child's right to maintain personal relations after being separated from one or both parents.

(46) The provisions in the Constitution Article 102 and in ECHR Article 8 are concurrent, see the Supreme Court judgment in HR-2016-2554-P (Holship) para 81 with further reference to the Supreme Court judgment in Rt-2015-93 (Maria) paras 57 and 60. The question whether the right to a family life can be interfered with depends under both provisions on whether the restriction has a legal basis, pursues a legitimate purpose and is necessary in a democratic society – i.e. whether the interference is deemed proportionate after an overall assessment. It is this assessment of proportionality that is disputed in the case at hand.

(47) When assessing the proportionality, the Constitution Article 102 must be considered alongside the Constitution Article 104 and the Convention on the Rights of the Child Article 3 no. 1, setting out that the best interest of the child must be a basic concern in decisions involving children. It is stated in the Supreme Court judgment in Rt-2015-93 (Maria) para 60 that the two constitutional provisions are complementary, and the best interest of the child is thus weighty in the assessment of proportionality pursuant to the Constitution Article 102.

(48) According to long-term case law of the European Court of Human Rights (ECtHR), the concern for the child's best interest may justify interference with family life, as the latter is protected by ECHR Article 8. The fundamental decision, often referred to in ECtHR's own case law, is the judgment of 7 August 1996 *Johansen v. Norway*. Here, ECtHR stated that measures taken in child welfare cases must not harm the health and development of the child. If a measure is not consistent with the ultimate aim of reuniting the parents and the child, it can only be applied in "exceptional circumstances", and only if it is motivated by an "overriding requirement pertaining to the child's best interests", see para 78. These views are followed up by later case law, for instance the judgment of 22 October 2015 *Jovanovic v. Sweden*, para 74 and 77, and the judgment of 7 September 2017 *M.L. v. Norway*.

(49) In a number of decisions, the Supreme Court has expressed support in ECtHR case law. I confine myself to referring to the Supreme Court judgment in Rt-2014-976 paras 36 and 37, where the justice delivering the leading opinion first comments that the extent of access must be determined after a broad assessment, placing decisive weight on measures that are in the child's best interests. Shen then emphasises that the decision must be consistent with ECHR Article 8, as the provision is applied by ECtHR. After a review of previous case law of the Supreme Court and ECtHR, accounting for the Johansen judgment among others, it is then stated:

> **"… Based on ECtHR's decisions, the Supreme Court has found that there must be special and strong reasons for denying access, see for instance Rt-2002-908 page 913 and Rt-2004-1046 para 49.**
>
> **(37) In the case at hand, the municipality has referred to a more recent judgment by ECtHR, *R. and H. v. UK* of 31 May 2011 [ECtHR-2006-35348], where ECtHR in para 73 states that 'in all decisions concerning children, their best interest must be paramount'. But ECtHR continues to quote from its own judgment *Neulinger and Shuruk v. Switzerland* from 2010 [ECtHR-2007-41615], stating that the child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family may only be severed 'in very exceptional circumstances'. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development. I cannot see how this quote suggests a different norm than what the Supreme Court has now applied. This norm is in my view also consistent with the Constitution sections 102 and 104, see section 92."**

(50) In my view, this summary is still adequate.

(51) I will now turn to reviewing the relevant provisions in the Child Welfare Act.

(52) The Child Welfare Act section 4-19 subsections 1 and 2 reads as follows:

> **"Unless otherwise provided, children and parents are entitled to access to each other.**
>
> **When a care order has been made, the county social welfare board shall determine the extent of access, but may for the sake of the child also decide that there shall be no access. The county social welfare board may also decide that the parents shall not be entitled to know the child's whereabouts."**

(53) The provision must be considered in context with the Child Welfare Act section 4-1, which sets out that *"decisive importance shall be attached to finding measures which are in the child's best interests"*.

(54) When determining access, it is distinguished between temporary placement and long-term placement, see the Supreme Court judgment in Rt-2012-1832 para 31. In connection with long-term placement of the child, the object of contact rights is to give the child knowledge of its biological parents, which may give a "cognitive/intellectual understanding" of who they are, not to create or maintain an emotional connection, see extracts from the preparatory works quoted in the judgment.

(55) The statements focus on the frequency of visitation, whereas the case at hand questions whether visitation should be allowed at all. In my view, the concerns mentioned are also relevant in a case like this.

(56) As emphasised in the Supreme Court judgment in Rt-2014-976 para 36, there must be *special and strong reasons* for denying access. I consider this to be a parallel to ECtHR's criterion "very exceptional circumstances", for which I have accounted.

(57) The municipality of Oslo has contended that the requirement cannot be applied in cases where there is a weak or non-existent bond between the parents and the child. In the municipality's view, access in such cases must be determined based on the best interest of the child. The municipality argues that more recent ECtHR case law may suggest the same, particularly if the parents have proved themselves unfit. The municipality has also pointed out that the boy has no personal interest in maintaining the contact and that importance cannot be attached to the biological principle if the social relationship between the child and the parents is lacking.

(58) I cannot see that Supreme Court case law indicates that the requirement for special and strong reasons does not apply in cases where the bond between the child and its parents is weak. Also in decisions involving small children, where the Supreme Court has discussed whether or concluded that there should be no access, it is assumed that there must be special and strong reasons for denying contact rights. I refer in this respect to the Supreme Court judgments in Rt-2014-976, Rt-2004-1046 and Rt-2002-908, all involving children who were younger than 18 months when removed from their parents.

(59) Also the object of access after the child has been placed in potentially long-term care suggests that the requirement for special and strong reasons applies in cases like the one at hand. Even where the bond is weak at the time of removal, it will be of independent value that the child gains an understanding of who his or her biological parents are. In the specific assessment of the issue of visitation, however, a non-existent or weak bond will be an aspect, see the Supreme Court judgment in Rt-2012-1832 para 41.

(60) The provisions in the Constitution section 102 and the ECHR Article 8 on the right to a family life also suggest that a different norm should apply where the tie is weak.

(61) To support its view that a different norm applies where there is no bond between the parents and the child, the municipality has referred in particular to judgment of 28 October 1998 *Söderbäck v. Sweden*, judgment of 16 July 2002 *P., C. and S. v. UK*, dismissal order of 21 October 2004 *I. and U. v. Norway*, judgment of 28 October 2010 *Aune v. Norway*, judgment of 21 January 2014 *Zhou v, Italy*, judgment 22 October 2015 *Jovanovic v. Sweden* and judgment of 7 September 2017 *M.L. v. Norway*.

(62) I note that with the exception of the two latter judgments, these decisions existed when the Supreme Court, in its judgment in Rt-2014-976, made a thorough review of ECtHR case law and found Norwegian domestic law to be consistent with our international obligations in the field, see para 37 and the judgment in Rt-2012-1832 para 32. In the two most recent decisions – *Jovanovic v. Sweden* and *M.L. v. Norway* – ECtHR has applied its previous case law. I cannot see that the decisions referred to by the municipality of Oslo, or other ECtHR case law, indicates that a different norm should apply than the one the Supreme Court has applied so far in similar cases.

(63) I will now turn to the individual assessment of whether there are special and strong reasons for still denying contact between C and his parents.

(64) The interim order of 10 July 2014 involved interference with an established and genuine family life between a child and his parents. However, this family life had only lasted for seven weeks, and it was ended as a result of physical abuse within the home. Currently, no family community exists. C does not know his parents after years of no regular contact. A continued denial of access will thus involve maintenance of status quo to C.

(65) I specify that it is not a question of granting access with the object of reestablishing the family life. A future return of the boy to his parents is unrealistic. In the assessment of whether or not to grant access, it is exclusively a question of ensuring a certain minimum contact, so that he is given the opportunity to know who his parents are, and they him.

(66) The municipality has referred to three different aspects which suggest, in the municipality's view, that access should not be granted.

(67) First, it is contended that visitation will entail a risk of retraumatisation, since C was subjected to serious and painful violence while being in his parents' care.

(68) When assessing whether such a risk exists, my starting point is that retraumatisation is a process taking place when a person who has previously experienced something traumatic relives the event. This might happen if the memories activate strong emotional reactions without the person having methods to handle these feelings. It is clear that if such a genuine and relevant risk exists, it will be important in the issue of access.

(69) It is set out in the court of appeal's judgment that C was uneasy the night after having been observed by the specialist in psychology, the expert witness, and that he woke up screaming in anxiety. This eventually diminished. His reaction in isolation may suggest that access will not be in his best interest. However, according to the expert assessment, C is generally insecure towards strangers, and he demonstrates the same unease after meetings with other persons he does not know – for instance social workers visiting the foster home. It is also stated that the foster parents manage to calm him, and that his ability to deal with strangers is constantly improving. His parents are strangers to him. Thus, there is no reason to assume that a meeting with his parents will create more uncertainty than a meeting with others, or that any tension in this respect will be so strong that it causes permanent harm or becomes disproportionate.

(70) After having assessed the expert's report and heard her statement in court, the court of appeal has concluded that the issue of retraumatisation is open, without any certain answer. Nor the expert's supplementary statement to the Supreme Court, as I read it, gives grounds for concluding that there is a genuine and relevant risk of retraumatisation. I therefore find that this cannot justify a denial of access. But I emphasise that importance must be attached to the expert's assessment of the boy's general vulnerability and needs when determining the number of visits and how they should be arranged.

(71) Furthermore, the municipality has mentioned that granting of access will expose C to the truth about his first year, before he is mature enough to handle it. This too might be a relevant concern, especially in cases where a child has been subjected to violence. However, I cannot see that the challenges in this respect are larger than in other cases where small children are taken into care. Particularly important in this case is that it only concerns extremely limited access, that the expert has found that both parents are fit for visitation and that the child welfare service are to instruct the foster parents about how potential visitation is to take place so that C receives information suited to his age.

(72) As a third objection with regard to access, the municipality has mentioned that the parents might use access granted in later attempts to regain custody. This is also emphasised by the court of appeal and the expert. Repeated disputes concerning a return of custody will damage the positive development C is undergoing. However, I do not find that there are reasons for such concerns any longer. A return of custody is unlikely, which both parents seem to have accepted. Also, they have never questioned the removal of their child.

(73) The court of appeal has stressed that C neither knows nor has any connections with his parents, which means that he has no need of access. The same was held by the expert in her statement to the Supreme Court. As I see it, this cannot be decisive. It is expressly set out in the preparatory works of the Child Welfare Act that also in such cases, it will be an advantage to the child to have a certain knowledge of his or her biological origin, and that this principle must also apply when the relationship between the child and the parents is weak. The lawmaker has thus weighted these aspects somewhat differently than the expert and the court of appeal.

(74) Consequently, a visiting arrangement must be established for C and his parents. Considering the object of access, his age and his vulnerability, this should be limited to one visit of one hour once a year, as determined by the County Board. The visit must take place under the supervision of the child welfare service. The visit must also be adjusted to the needs of the child, so that the foster parents are to be present if the child welfare service deems it to be in C's best interest. This is not considered necessary to include in the conclusion of the judgment.

(75) I vote for this

J U D G M E N T :

Items 3 and 4 of the County Board's decision are upheld.

(76) Justice **Endresen:** I agree with the justice delivering the leading opinion in all material aspects and with her conclusion.

(77) Justice **Bårdsen:** Likewise.

(78) Justice **Høgetveit Berg:** Likewise.

(79) Chief Justice **Øie:** Likewise.

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

J U D G M E N T :

Items 3 and 4 of the County Board's decision are upheld.