



# SUPREME COURT OF NORWAY

## J U D G M E N T

given on 26 June 2019 by the Supreme Court composed of

Justice Bergljot Webster  
Justice Henrik Bull  
Justice Knut H. Kallerud  
Justice Ingvald Falch  
Justice Borgar Høgetveit Berg

**HR-2019-1230-A (case no. 19-009047SIV-HRET)**

Appeal against Agder Court of Appeal's judgment 21 November 2018

A	(Counsel Mette Renholt Ackenhausen)
v.	
B	(Counsel Leif Oscar Olsen)

- (1) Justice **Høgetveit Berg**: The case questions whether a parent can move abroad with children for whom both parents have parental responsibility.
- (2) B – mother – is born in 1980 in Italy. She grew up in a village in Toscana where her parents still live. She has no siblings. B speaks Norwegian, and she is a full-time employee in a kindergarten in Z. She has completed child and youth care studies in her spare time.
- (3) A – father – is born in 1974 and grew up in X. He has two children from an earlier relationship, born in 2000 and 2004, to whom he has had access every other weekend. A's parents are divorced. His mother lives in Y. A is a trained plumber with a diverse professional background. He has recently established his own business.
- (4) B and A met in 2007 and moved in together in Norway in 2008. They married in Italy in 2011. Together, they have two children, C and D, born in February 2013 and in April 2014.
- (5) The couple has previously considered moving to Italy. Already when B moved to Norway, she had an expectation that that the couple would later move to Italy. A has also had a wish to move to Italy. Language, economy and particularly the consideration for his other two children have prevented this.
- (6) B and A separated in 2016. After the breakup, mother has taken over the parties' joint residence in Z. Until February this year, father lived in a flat within his mother's house in Y. In February this year, he moved into his own flat in Z.
- (7) On 16 January 2017, mother brought an action against father claiming sole parental responsibility, and that the children live with her permanently with access to father. Father opposed this, claiming that the parties have joint parental responsibility, and that the children live with him with access to mother. At one of the preparatory meetings in the District Court on 15 March 2017, the parties reached a preliminary agreement under which the children were to live permanently with mother with extensive access to father, i.e. every other weekend, one day every other week and then gradually more, as well as three weeks during the summer holiday. This practice has been upheld with small adjustments.
- (8) In her closing statement before the District Court, mother extended her claim to include relocation to Italy with the children. Her claim with regard to sole parental responsibility was changed to joint parental responsibility. Father, too, changed his claim. He demanded that the children live permanently with both parents, and that mother could not move to Italy with them.
- (9) Psychology specialist Arne Brathagen was appointed as an expert witness before the District Court. He was of the opinion that the children should live with mother, that father should have access, and that there was no reason to be concerned about the children's situation. The way I read his report, he believed that the issue of moving to Italy had to be solved between the parties and not by the court. He did not take a clear stand on the issue.
- (10) On 17 April 2018, Nordre Vestfold District Court dismissed mother's claim for relocation to Italy with the children. Instead, the court ruled that the parties would have joint parental responsibility, that the children were to live permanently with their mother, that father was to have specific and relatively extensive access, and that the parties were to carry their own costs.

- (11) The mother appealed the District Court's judgment – on the issue of relocation – to the Court of Appeal. The father responded by demanding more access. During the appeal hearing, it was clarified that the parties would enter into a new access agreement if mother should succeed in her claim for relocation with the children.
- (12) Psychology specialist Arne Brathagen gave a new statement before the Court of Appeal, and, once more, he did take a stand on the relocation issue. The court perceived him to have expressed that both options could be good for the children if proper arrangements were made and the parties cooperated well.
- (13) By the judgment of Agder Court of Appeal 21 November 2018, mother succeeded in her claim for relocation to Italy with the children. The court arrived, with some doubt, at the conclusion that, in an overall perspective, it was “more likely than not that moving to Italy with mother [would] be in the best interests of the children”. Each of the parties had to carry their own costs also in the Court of Appeal.
- (14) The father appealed the judgment to the Supreme Court, challenging the Court of Appeal's application of the law and findings of fact. The Supreme Court's Appeal Selection Committee granted leave to appeal with regard to both, see the ruling HR-2019-199-U.
- (15) Psychologist Wenke Siljeholm is appointed as a new expert witness before the Supreme Court. She has submitted a written statement in addition to giving an oral statement during the hearing. Evidence has been taken from the parties for the Supreme Court to consider. Siljeholm's conclusions deviate from those of psychology specialist Brathagen. Her advice is that mother be allowed to move to Italy with the children.
- (16) The appellant – *A* – contends:
- (17) The best interests of the child determine whether mother should be allowed to move to Italy with the children. It must be demonstrated that it is more likely than not that such relocation will be best for them, since it involves changing a well-functioning arrangement. It is a presumption that relocation is not in the best interests of the child.
- (18) Both children are well functioning with a safe and good attachment to both parents. They are established in Z where mother has taken over the former joint residence. The children go to the same kindergarten and have friends in the local community. Father and parts of father's family also live in Z. The children are not particularly vulnerable and have no special needs. Both parents attend to the children's needs in a good way.
- (19) In the assessment of the best interests of the child, the dominant aspect is the best possible overall contact between the child and his or her parents. Something more must be required to obtain acceptance for moving abroad than for moving within the country. Since the courts now have jurisdiction to allow one parent to move abroad without simultaneously granting him or her sole parental responsibility, there must be special reasons for such moving. It will be demanding to father to claim changed access before an Italian court. Moving to Italy will imply that the children will no longer have father present as an everyday resource, as he will be reduced to a “holiday dad” unable to influence the children's daily lives. Nor will the children be able to have the same contact with their older half siblings. Extensive access after

moving is unrealistic. The long journey will be tiresome for the children and expensive for the parents.

(20) It has not been demonstrated that that the children's overall care situation will improve by moving to Italy with mother instead of staying in Norway where father also lives. The *status quo* principle, the consideration for the best possible overall contact between the child and his or her parents, and the risk involved in the change of environment suggest that the children should continue to live in Norway. The present care situation with both parents nearby is good and functions well. The mother is a good care person for the children also in Norway.

(21) A has submitted this prayer for relief:

**"1. B is not to be allowed to move to Italy with C, born 00.00.2013 and D, born 00.00.2014.**

**2. C, born 00.00.2013 and D, born 00.00.2014, are to have the following access to their father A:**

- even weekends from Friday afternoon after kindergarten/school to Monday morning. Father collects and brings the children from/to kindergarten/school.
- even weeks from Wednesday afternoon to Thursday morning. Father collects and brings the children from/to kindergarten/school.
- odd weeks from Wednesday afternoon to Friday morning. Father collects and brings the children from/to kindergarten/school.
- every other Christmas and New Year. Christmas is from 23.12 to 28.12 and New Year is from 28.12 to 01.01. Christmas 2018 with father.
- Easter is shared. First part from Friday before Palm Sunday to Wednesday before Maundy Thursday. Second part from Wednesday before Maundy Thursday to Easter Monday. This alternates each year.
- every other autumn and winter holiday.
- three weeks during summer holiday, of which two consecutive.

**3. B is to cover the costs in the District Court, the Court of Appeal and in the Supreme Court."**

(22) The respondent – B – contends:

(23) The best interests of the child determine whether mother may relocate to Italy with the children, see section 48 of the Children Act. It is not a presumption that moving is not in the best interests of the child.

(24) Although the children have a strong attachment to their present home and network, they also have a strong attachment to mother's home in Italy. They have visited several times and they speak Italian. The children are more attached to their grandparents on mother's side than on father's side. Mother has a large network at home with family and friends. Mother is guaranteed work in Italy, and she will be debt free upon moving there. The risk of negative consequences for the children with such change of environment is minor, while mother will be better able to tackle the tasks as a care person for the children in Italy. Overall, it will clearly be better for the children to live with mother in Italy than to live with mother in Norway.

(25) Mother will do her utmost to ensure that the children have as much contact as possible to father and their half siblings after moving. Mother will arrange for extensive access, both in Italy and in Norway, particularly during holidays. Father can come to Italy as much as he

wishes, and he may stay free of costs in a separate part of the house of mother's parents. Mother will also see to that the children have regular contact with father through video chats.

(26) B has submitted this prayer for relief:

**“Principally**

**The appeal is to be dismissed.**

**In the alternative**

**Access is to be established in the Supreme Court's discretion**

**in both cases**

**A is to pay B's public costs in all instances.”**

(27) *I have concluded that the appeal must be dismissed.*

(28) *The legal starting points*

(29) Section 40 subsection 1 of the Children Act first sentence establishes that when the parents have joint parental responsibility, both of them must consent to the child moving out of the country.

(30) Previously, the practice was that if the parents did not agree, the parent who wanted to move had to institute proceedings to obtain sole parental responsibility. One of the consequences of one parent obtaining such responsibility was that he or she could move abroad with the child, see section 40 subsection 1 of the Children Act. This was amended in 2015 with effect from 1 July 2016. Section 56 subsection 1 of the Children Act third sentence now allows a parent with parental responsibility to claim international relocation without it being required that he or she has sole parental responsibility.

(31) The amendment in section 56 of the Children Act was adopted by Act of 4 September 2015 no. 85 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the Hague Convention Act 1996). The amendment was not required to implement the Convention into Norwegian law, but it facilitated compatibility with the Convention and its purpose, see Proposition to the Storting 102 (2014–2015) pp. 70–71 and 76. The followed a “least intrusive measure” principle, thus giving more leeway for the courts to find good solutions in the child's best interests in individual cases, see the Proposition pp. 76 and 77.

(32) According to section 48 subsection 1 of the Children Act, decisions on parental responsibility, international relocation, custody and access, and procedure in such matters, shall “first and foremost” have regard for the best interests of the child. The international relocation option was first added with the said amendment in 2015.

(33) The preparatory works to the amendment set out that the then condition regarding the best interests of the child should also apply in connection with moving abroad, see Proposition to the Storting 102 (2014–2015) pp. 9, 78 and 114. Nothing in the Proposition suggests that the child's best interests should be assessed differently in the issue of moving than in other respects. The Proposition seems to assume that the principle of the child's best interests in

section 48 of the Children Act, see also Article 104 subsection 2 of the Norwegian Constitution and Article 3 (1) of the UN Convention on the Rights of the Child, was to be continued also with regard to international relocation.

- (34) Section 48 of the Children Act is presented as follows in Proposition to the Odelsting No. 104 (2008–2009) pp. 19–20:

**“As set out in the introduction under the description of applicable law, it follows from current legislation that certain important considerations must be emphasised in the assessment of the child’s best interests. Furthermore, through case law, aspects have emerged that will be relevant in an assessment of the child’s best interests and may illustrate how different considerations are balanced against each other. Otherwise, ‘the child’s best interests’ is a relatively open term. [...]**

**As the Ministry sees it, it is a strength that the term child’s best interests is not too tied-up, but gives the necessary room for individual assessments and an overall assessment of the child’s situation in each case. [...]**

**In the Ministry’s opinion, it is hard to enact further considerations in a way that gives good guidance to the parents, including finding wordings giving adequate descriptions of the contents of them. Also, within the scope of a statutory provision, it can be hard to express how the various considerations should be stressed and balanced against each other [...]**

- (35) In some contexts, the legislature has nonetheless specified the assessment of the child’s best interests, see for instance section 43 subsection 2 third sentence of the Children Act on the process of deciding on access. Here, factors are mentioned that must be emphasised in the assessment. These factors will also be relevant outside the area of application, but they are not exhaustive.
- (36) Under any circumstances, what the child’s best interests are must be determined individually based on all relevant aspects, see the Supreme Court judgment Rt-2010-216 paragraph 26.
- (37) The burden of legal action lies with the parent who wants to move, section 56 subsection 1 third sentence of the Children Act. The appellant contends that the parent that wants to move also has the burden of proving that the conditions for moving are met and must demonstrate that the change is in the child’s best interests. I cannot see that the wording in the provision or in the Proposition supports such a view. What is best for the child is not determined by traditional findings of fact. It is a broad forward-looking assessment of the options present, where the possibilities for improvement are balanced against the risk that will become worse. For instance, one cannot rule out specific risk factors even if they are less likely.
- (38) The appellant also contends that when parental responsibility has been divided after the 2015 amendment, the conditions for removing joint parental responsibility after a breakup must also apply in connection with international relocation. This means that moving requires “special reasons” since the threshold for being deprived of parental responsibility is high. In other words, it is a presumption that *status quo* will be in the child’s best interests. I cannot see that such an additional condition or such a presumption is warranted under section 48 of the Children Act.
- (39) Against this background, the decision of what is best for the child will have to be based on which of the present options is more likely to safeguard the upbringing and development of the children after an individual assessment of all relevant aspects.

- (40) *The care situation and the two residence options*
- (41) Before I turn to the individual assessment of what is best for C and D, I will say a few words about their care situation and the two options present in Vestfold and Toscana.
- (42) C and D, now six and five years old, are described as well functioning and normally developed children who are safe and happy in the care of both parents. The children have shown signs of stress after their parents' breakup, but the reactions have not been serious. There is nothing to suggest that any of them has any special needs to consider when it comes to moving. The kindergarten has not expressed any concern for any of the children. The expert before the Supreme Court has however stated that C's conduct displays an "underlying vulnerability that is activated in situations that are unpleasant/stressing to him".
- (43) The expert before the Supreme Court has concluded that mother provides excellent care to her children, but that she is tired and feels lonely and without support. This is a challenge to her ability to provide care. The expert before the Supreme Court finds that there is a risk that this ability may be reduced if she stays in Norway. The expert before the District Court and the Court of Appeal did not question her ability to provide care, either. I conclude that mother is a good care person.
- (44) The expert before the Supreme Court has also assessed father's ability to provide care; however, not in equally positive terms. The expert before the District Court and the Court of Appeal, on the other hand, did not question father's ability to provide care. Nor did kindergarten personnel, who have observed both father and mother for a long time. The statement from the expert before the Supreme Court is formed as a comparison between mother's ability to provide care and that of father. However, the issue at stake is not whether the children are to live permanently with mother or father – nor is it really about the extent of access. Based on the total evidence presented, I trust that father is a generally good care person.
- (45) The issue in the case at hand is where mother and the children are to live. Mother and father agree on joint parental responsibility, and that the children have permanent residence with mother – whether in Norway or in Italy. The assessment of those two options must thus be made with that as a starting point.
- (46) Today, mother has custody of the children in the parties' former joint residence. The children have lived their entire life at the same place. Mother cares for the children alone when they are with her. She has no contact with father's family, except through the children. The children are well settled and have friends in kindergarten. If they stay in Norway, they will attend a school nearby. The distance to father's residence is short. The children have access to father every other week and every other Wednesday, in addition to holidays. The access constitutes around a third of the time.
- (47) The children have had contact with – and have a relation to – their two half siblings, but they have never lived with them on a daily basis. Based on the age, there is no reason to suspect that the contact will be more extensive than it has been. From June 2017 to February 2019, father lived in a flat within his mother's house in Y – where the children also stayed during access. The contact with grandmother will probably be reduced after father has moved back to Z. The children are attached to father's mother.

- (48) The children have often visited mother's parents in Italy – in recent years between three and five times a year. The grandparents have visited Norway equally often. Mother and the children have had regular contact with her parents by phone and video. There is no reason to suspect that this will change if mother and the children do not move to Italy.
- (49) If mother moves to Italy, she will settle with the children in the village where she grew up where she has a large network of family and friends. Mother and the children will live in the same house as mother's parents, in a separate flat. The children know the place well, also mother's network. The children can go to kindergarten and school nearby. I will revert to whether or not mother's ability to provide care will become more stable by moving to Italy.
- (50) A relocation to Italy will draw the children away from the environment to which they currently belong. Moreover, it is unrealistic that the access to father can continue with the same frequency as today. The daily contact with father will have to be maintained by use of phone and the internet.
- (51) Neither of the parties has asked the court to determine the access between father and the children if mother is allowed to move. Based on what was submitted on mother's behalf during the hearing in the Supreme Court, I trust that the access may be extensive, thus giving the children the possibility to maintain their close relationship with father. There is no reason to believe that a change of jurisdiction over the question of access from Norway to Italy will complicate father's contact with the children. According to the expert before the Supreme Court, the ground is well prepared for visits from father. I mention that father has expressed that he will visit the children in Italy if mother succeeds. Mother has in turn expressed that if the children move with her to Italy, father will always be welcome to visit, and he may bring his other children and stay as long as he likes. In such events, he will be welcome to stay in mother's flat and borrow her car. She will also visit Norway with the children. Mother stresses that the children are both Norwegian and Italian. She will speak Norwegian to the children since preserving the language is important to the contact with father, his family and Norway.
- (52) *The individual assessment of what is in C and D's best interests*
- (53) The question is whether living with mother in Italy will be better for C and D than living with mother in Norway. The advantages must be balanced against the disadvantages. Solid arguments must be present for both options. The children in this case will probably live good lives irrespective of option; the question is which solution would be best for them in an overall perspective. That must, as mentioned, be assessed individually.
- (54) One factor is which solution will provide best overall parent contact. The significance of contact with both parents is expressed in Article 9 (3) and Article 18 (1) of the Convention on the Rights of the Child. There is no doubt that the contents of the overall parent contact will change if mother moves with the children to Italy. By moving to Italy, the access to father will change its character. The contents of the current access cannot be compensated by longer holiday access and frequent phone calls and video chats. At the same time, there is reason to note that when emphasising access in the assessment of the child's best interests, one cannot only consider the extent and the frequency in isolation.
- (55) In continuation of this, the travel distance must be mentioned. The fact that there may be long travel distances also in Norway does not diminish this counterargument. At the same time,

there is reason to mention that the children are already used to relatively frequent travels between Norway and Italy. This will probably continue irrespective of where they live.

- (56) A second factor is the children's age, which is significant in many ways. I mention first that children have a right to be heard in questions that concern them, see Article 104 subsection 1 of the Constitution, Article 12 of the UN Convention on the Rights of the Child and section 31 of the Children Act. The right to express oneself is not restricted by age. The children's own opinion may under the circumstances be decisive. This requires that the children are able to consider the issue on an independent basis. That is not the case here. The children are too young to have any qualified opinion in this complex matter. The parties are agreed to shield the children against the issue of moving.
- (57) C and D are today six and five years old. As opposed to older children, there is a greater risk that they lose the Norwegian language in whole or in part and thereby have reduced possibilities of contact with father and his family. In the case at hand, it will be up to mother to ensure that the children preserve Norwegian as a language.
- (58) Attachment to the local environment is an important factor. Both children have good connections with the kindergarten and with friends in Norway. C, if staying in Norway, will start school this autumn with friends. A relocation will deprive C of the contact with father's family. At the same time, both experts hold that relocation will not involve much risk. The children already speak Italian, and they will arrive in an environment already familiar to them. Admittedly, they have only been to Italy in mother's spare time, but they know their grandparents and the surroundings well. In Italy, the children will live in the same house as their grandparents, to whom they already close. Kindergarten and school are nearby. The possibility of daily contact with the grandparents is positive for the children. Also in Norway, the children will in fact be exposed to environmental changes, for instance in the transition from kindergarten to school. Thus, in this particular case, the risks involved in the change of environment are small, if existent at all.
- (59) A final factor is the consideration for the child in general. In the case at hand, it has already been established that the children are to live with mother. I will therefore not place any emphasis on the children being somewhat less attached to father than to mother. Mother is, and will be, the primary care person. Mother's ability to provide care in Norway versus in Italy thus becomes crucial.
- (60) Mother's economy will certainly improve in Italy. Being a kindergarten employee in Norway, she does not have sufficient income to handle a house loan of more than NOK 2 million. In Italy, she will be debt free. Mother and the children will live free of costs in a flat that mother eventually will inherit from her parents. This will benefit the children.
- (61) Mother has expressed that she is alone and lonely. She constantly misses her home in Italy and the community that she has there with family and friends. The expert has pointed out that mother is tired. She is concerned about mother's well-being and finds that she is living under constant pressure with lack of support in Norway. This may exhaust her resources and eventually lead to depression. There is thus a risk that mother's parental abilities will be reduced if she and the children stay in Norway. If moving to Italy, mother will receive help from her parents, who will be living in the same house, and from her network in general. I find it clear that mother will have a better life in Italy than in Norway. This will probably improve her ability to care.

- (62) Since the risks involved in the change of environment are minor, and mother in any case has custody of the children, one must expect that the children will receive the most robust care base with mother in Italy. Relocation to Italy will best safeguard the children's upbringing and development. Their care situation is more uncertain if they stay in Norway. Although less frequent access to father will be a loss to the children, the conditions are well suited to maintain a solid connection also after moving.
- (63) Against this background, B has succeeded in her claim for international relocation with the children C and D. The appeal is dismissed.
- (64) *Costs*
- (65) The appellant has lost the case. The respondent is then generally entitled to full compensation for costs from the appellant, see section 20-2 subsection 1 of the Dispute Act. The case is the first of its kind and is apparently of great significance for the parties' wellbeing. Strong reasons therefore exempt the appellant from the liability of costs, see section 20-2 subsection 3. This applies to all three instances.
- (66) I vote for this

#### J U D G M E N T :

1. The appeal is dismissed.
2. Costs in the Supreme Court are not awarded.

Justice **Falch**: in agree with Justice Høgetveit Berg in all material respects and with his conclusion.

Justice **Bull**: Likewise.

Justice **Kallerud**: Likewise.

Justice **Webster**: Likewise.

Following the voting, the Supreme Court gave this

#### J U D G M E N T :

3. The appeal is dismissed.
4. Costs in the Supreme Court are not awarded.