SUPREME COURT OF NORWAY

O R D E R

issued on 9 June 2020 by the Supreme Court composed of

Justice Hilde Indreberg
Justice Knut H. Kallerud
Justice Arne Ringnes
Justice Wenche Elizabeth Arntzen
Justice Kine Steinsvik

HR-2020-1201-A, case no. 20-007980SIV-HRET
Appeal against the Supreme Court of Norway's order of 15 October 2012

A	(Counsel Gisken Elisabeth Brungot)
v.	
X municipality	(Counsel Øyvind Grødal)
B C	(Counsel Mette Yvonne Larsen)

(1) Justice **Ringnes:**

Issues and background

(2) This case deals with a request to reopen an order issued by the Supreme Court's Appeals Selection Committee after a judgment against Norway in the European Court of Human Rights (the Court) and whether it should be denied.

(3) A gave birth to a boy in September 2008. Three weeks later, the child was placed in emergency foster care with B and C. The boy, who is now 11 years old, has lived with B since. They are currently his adoptive parents.

(4) After the placement in emergency care, the County Social Welfare Board (the County Board) issued a care order. In Borgarting Court of Appeal's judgment 22 April 2010, the County Board's care order was upheld, and A was allowed to visit her son four times a year.

(5) Following A's application for a revocation of the care order of 29 April 2011, the municipal child welfare services forwarded the request to the County Board. Occasioned by this, the municipality proposed that A's parental responsibilities be withdrawn and that the boy's foster parents be granted permission to adopt him. On 8 December 2011, the County Board in Y issued an administrative decision rejecting the application for a revocation of the care order. A was deprived of her parental responsibilities, and adoption was authorised.

(6) The County Board's administrative decision was brought before the District Court. On 22 February 2012, Drammen District Court found in favour of the municipality.

(7) A appealed to Borgarting Court of Appeal, claiming that the District Court's ruling and reasoning were seriously flawed. She pointed out among other things that the District Court should have requested a new expert assessment of her current ability to care. The Court of Appeal found that no new information had emerged to indicate that the mother's parenting abilities had improved and found that none of the conditions for leave to appeal in section 36-10 subsection 3 of the Dispute Act had been met.

(8) The Court of Appeal's refusal to grant leave to appeal was appealed to the Supreme Court. The Supreme Court's Appeals Selection Committee issued an order on 15 October 2012, see HR-2012-1956-U. The Committee unanimously concluded that the appeal could clearly not succeed, and dismissed it in accordance with section 30-9 subsection 2 of the Dispute Act.

(9) A brought an application to the European Court of Human Rights (the Court). She claimed that the decision not to revoke the care order, to withdraw her parental responsibilities and to authorise adoption violated her and the child's right to respect for family life under Article 8 of the European Convention on Human Rights (the Convention). In a Grand Chamber judgment 10 September 2019 *Strand Lobben and Others v. Norway*, a majority of thirteen judges found a violation of Article 8, while four judges concluded the opposite. The majority consisted of fractions of seven and six judges. Based on Article 41 of the Convention, A was awarded EUR 25 000 as compensation for non-pecuniary damage.

(10) In the wake of this, A has made a request to the Supreme Court to reopen the order issued by the Supreme Court's Appeals Selection Committee on 15 October 2012. The boy has also been presented as a requesting party. A has invoked section 31-4 (b) of the Dispute Act as a

basis for reopening on grounds of errors in the ruling. The Supreme Court has also been requested to rule that a violation of Article 8 of the Convention has occurred and to set aside the County Board's administrative decision of 15 November 2011.

(11) X municipality submitted a response, addressing several procedural issues relating to the request.

(12) A's counsel was given oral and written guidance from the Supreme Court's Appeals Selection Committee regarding the content of the request. The following is stated in the Committee's letter of 26 February 2020:

> "….
>
> A has requested reopening of the Supreme Court's Appeals Selection Committee's order 15 October 2012 dismissing Borgarting Court of Appeal's decision 22 August 2012 not to hear the appeal against Drammen District Court's judgment 22 February 2012. Section 31-2 of the Dispute Act states that decisions that disallow an appeal may only be reopened on the grounds of procedural errors referred to in section 31-3. The legal basis for the request is, however, section 31-4 (b) of the Dispute Act, concerning reopening on the grounds of errors in the ruling. The Committee is therefore considering denying the request, as it is currently reasoned. In that case, A will have to submit her request to a court of the same level, see section 31-1 subsection 3 of the Dispute Act.
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> During the phone call, A was also reminded of the six-month time limit for requesting a reopening after the date on which the party became aware of the grounds for the request, see section 31-6 subsection 1 of the Dispute Act."

(13) In a pleading of 3 March 2020, section 31-3 (d) of the Dispute Act was presented as a legal basis for a reopening. Furthermore, on 10 March 2020, A made a request for reopening to Asker and Bærum District Court. The District Court has suspended the hearing pending the outcome of the Supreme Court proceedings.

(14) The Supreme Court's Appeals Selection Committee has decided that the request for reopening will be heard by the Supreme Court sitting as a division with five justices, see section 31-8 subsection 1 of the Dispute Act, cf. section 30-9 subsection 4, cf. section 5 subsection 1 second sentence of the Courts of Justice Act. The Committee has also decided that the hearing in the Supreme Court will be limited to only deal with whether the request for reopening should be denied, see section 31-8, cf. section 30-14 subsection 3 of the Dispute Act.

(15) The Appeals Selection Committee found that there was no basis for giving the child status as a party at the current stage of the case or for asking Counsel Brungot to present written authority proving that she represents the child, see section 3-4 subsection 2 of the Dispute Act.

(16) In a pleading of 27 April 2020, Counsel Mette Yvonne Larsen submitted a request on behalf of the adoptive parents that they be given status as parties in the case at hand. A opposed. The Supreme Court's Appeals Selection Committee decided on 6 May 2020 to give the adoptive parents status as parties.

The parties' contentions

(17) The requesting party – *A* – contends:

(18) The request cannot be denied. Article 46 of the Convention imposes the State to fully redress the effects of violation of the Convention and to restore the situation to that before the violation occurred. The result in the Court's Grand Chamber judgment entails that the Appeals Selection Committee's order must be reopened. It also implies that A is entitled to a judgment from the Supreme Court finding a violation. The judgment from the European Court of Human Rights also entitles her to a Supreme Court judgment setting aside the County Board's decision not to revoke the care order, but instead to withdraw A's parental responsibilities and authorise adoption. In the alternative, A asks that the Court of Appeal's refusal to grant leave to appeal be set aside. The adoption decision, as well the withdrawal of parental responsibilities and the care order, must be set aside by a new hearing in the Court of Appeal.

(19) Furthermore, A contends that the conditions in section 31-3 (d) of the Dispute Act are met, since the procedure that the Court criticised also relates to the procedure in the Supreme Court's Appeals Selection Committee, see in particular paragraph 220 of the Grand Chamber judgment.

(20) A invites the Supreme Court to issue the following order:

> "Principally
> 1. the Supreme Court's order of 15 October 2012 will be reopened.
> 2. the Supreme Court will consider the substantive aspects of the violations.
> In the alternative:
> 1. The Supreme Court's order of 15 October 2012 will be reopened.
> 2. The Court of Appeal's decision is set aside.
> In both cases:
> 1. Costs are awarded to the public authorities."

(21) *X municipality* contends:

(22) The request must be rejected. It is not disputed that *Strand Lobben and Others v. Norway* is a basis for reopening under section 31-3 subsection 1 (d) of the Dispute Act. However, the critique from the European Court of Human Rights is not directed at the procedure in the Appeals Selection Committee, see section 31-2 subsection 3 of the Dispute Act.

(23) The request must also be rejected on the grounds of flawed contents. Here, the municipality supports the adoptive parents' contentions.

(24) X municipality invites the Supreme Court to issue the following order:

> "The request for reopening is denied."

(25) *B and C* contend:

(26) The adoptive parents support the municipality's contentions. Another independent basis for denial is that the request does not meet the requirements in section 31-7, cf. section 9-2

subsection 3 of the Dispute Act.

(27) B and C invite the Supreme Court to issue the following order:

> "1. The request for reopening is denied.
> 2. Costs are awarded to the public authorities."

My opinion

Article 46 of the Convention

(28) Article 46 (1) of the Convention sets out that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". According to Article 46 (2), the Council of Europe's Committee of Ministers are to supervise the execution of the final judgment. Article 46 implies that the State Party, after a violation has been found, is not only obliged to put an end to the violation, but also to redress the effects thereof to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded, see the Court's Grand Chamber judgment 29 May 2019 *Ilgar Mammadov v. Azerbaijan* paragraph 150.

(29) It is primarily up to the State Parties to decide in which manner they wish to abide by their obligations under Article 46, see the Supreme Court ruling in Rt-2010-396 paragraph 26 and the *Mammadov* judgment, paragraph 148. According to Norwegian law, the possibility of reopening is a central tool in this context. In civil cases, reopening may only be requested if a final ruling by an international court or an opinion issued by the Human Rights Committee of the United Nations in respect of the same subject matter suggests that the ruling was based on an incorrect application of international law, see section 31-4 (b) of the Dispute Act, or if in a complaint against Norway in respect of the same subject matter it is determined that the procedure has violated a treaty which, pursuant to the Human Rights Act, is incorporated into Norwegian law, see section 31-3 subsection 1 (d). The latter provision is crucial in the case at hand, and I will revert to its implications.

(30) However, this does not mean that the State Parties have a general duty to facilitate reopening of court rulings in order to meet the obligation to redress, see paragraph 26 with further references of the Supreme Court judgment in Rt-2010-396. A condition for reopening is that it is necessary to rectify the violation, see paragraph 33 of the same judgment. In addition, section 31-5 of the Dispute Act sets limitations on the right to have a case reopened. According to subsection 3 of this provision, a case may not be reopened if there is a reasonable probability that a new hearing would not lead to an amendment of significance to the party.

(31) However, the obligation under Article 46 requires that the court hearing the request for reopening thoroughly assesses the conditions for reopening and ensures that the prejudicial assessment under section 31-5 subsection 3 rests on an adequate factual basis.

(32) In its closing statement before the Supreme Court, A has emphasised the *Mammadov* judgment. As I have already mentioned, paragraph 150 presents the general principles for redress under Article 46. Apart from that, the facts of the case have no points in common with *Strand Lobben*. In a judgment from 2014, the Court had concluded that the State of

Azerbaijan had violated Ilgar Mammadov's right under the Convention when he was charged and arrested without probable cause. Despite this judgment and supervision by the Committee of Ministers, he remained deprived of his liberty for four years after the Court's judgment. This was why the State of Azerbaijan was found to have violated Article 46.

(33) On this point, I conclude that the issue of whether or not to deny the request for reopening of the Appeals Selection Committee's order must be governed by the provisions of the Dispute Act. A has made a parallel request to a court of the same level regarding the District Court's judgment in the adoption matter. Considering the status of the case, the question comes down to which instance should hear the request for reopening.

The denial issue under the Dispute Act

(34) When a case has been heard by more than one instance, it follows from section 31-2 subsection 2 first sentence of the Dispute Act that it is only the ruling of the last instance that may be reopened. The second sentence sets out that this does not apply "if the circumstances on which the request for reopening is based fell outside the scope of the proceedings in the last instance".

(35) The Appeals Selection Committee's ruling that has been requested reopened is a dismissal of an appeal against the Court of Appeal's refusal to hear A's appeal against the District Court's judgment, see section 36-10 subsection 3 of the Dispute Act. In such an appeal, the Supreme Court may only examine the Court of Appeal's procedure, see section 29-13 subsection 5 of the Dispute Act, for instance whether the statutory conditions for appeal in the Court of Appeal have been met, including whether the District Court's ruling or procedure is seriously flawed, see section 36-10 subsection 3 (c). The Supreme Court has full jurisdiction to hear these issues. I refer to the Supreme Court's grand chamber ruling HR-2020-661-S paragraph 60. In paragraph 61 Justice Møse summarises what the Supreme Court is to examine:

> "As a step in this process, the Supreme Court must – like the Court of Appeal – assess whether the District Court's procedure, including its decision-making process, may amount to a violation of the right to family life in Article 102 of the Constitution or Article 8 of the Convention, if the District Court's judgment remains the final and binding ruling in the case."

(36) This means that it is *within the jurisdiction* of the Supreme Court to examine the District Court's procedure and whether it amounts to a violation of Article 8 of the Convention. The exception in section 31-2 subsection 2 second sentence is therefore not applicable to our case, nor has this been contended by the municipality. However, for the type of ruling concerned, section 31-2 subsection 3 is a special provision on the possibility of reopening:

> "Decisions that disallow an appeal and orders that dismiss an application for reinstatement may only be reopened on the grounds of procedural errors referred to in section 31-3."

(37) The provision also applies to orders to dismiss an appeal against a decision not to grant leave to appeal, see HR-2020-615-U paragraph 3 with further references.

(38) Paragraph 31-3 presents five procedural errors that may constitute grounds for reopening. In the case at hand, it is the option in (d) that is relevant, stating – as already mentioned – that reopening may be requested:

> "… if in a complaint against Norway in respect of the same subject matter it is determined that the procedure has violated a treaty which, pursuant to the Human Rights Act, is incorporated into Norwegian law, …"

(39) *Strand Lobben and Others v. Norway* is comprised by this provision. The critique from the majority – seven judges – in the majority faction is directed at the specific process. I refer to the summary in HR-2020-661-S paragraph 104 and will revert to this later.

(40) However, the question is whether the judgment is a legal basis for requesting reopening *the order by the Supreme Court's Appeals Selection Committee* or whether the request, procedurally, must be submitted to the District Court and directed at the District Court's judgment.

(41) Several rulings by the Supreme Court's Appeals Selection Committee establish that the right to have a ruling reopened is limited to errors in the proceedings on which the ruling is based. If the request concerns an order by the Supreme Court's Appeals Selection Committee dismissing an appeal against the Court of Appeal's refusal to grant leave to appeal, the procedural error must – in other words – relate to the hearing in *the Appeals Selection Committee*, see Rt-2012-1917 paragraph 5.

(42) When reading section 31-3 subsection 1 (d) in context with section 31-2 subsection 3, it is natural to assume that a condition for reopening of the Appeals Selection Committee's order is that the Court has found that the procedure in the Supreme Court's Appeals Selection Committee amounted to a violation of the Convention. Section 31-3 subsection 1 (d) is based on the provision in section 407 subsection 1 (7) (b) of the former Dispute Act, where this was expressed more clearly. Here, it was specified that it had to concern the procedure "on which the ruling is based".

(43) I also refer to the discussion in the preparatory works of the considerations suggesting that the request for reopening should be directed at the judgment in the first instance when the error has been committed there, see NOU 2001:32 A *Rett på sak* page 441:

> "In the Committee's view, the best solution is that a request for reopening on the grounds of evidence or other aspects of the procedure in the first instance is directed at the judgment in the first instance and not at the decision not to grant leave to appeal. It is generally simpler to assess the basis provided in a reasoned judgment rather than in an unreasoned refusal of leave. Moreover, the rules regarding reopening of rulings provide the best regulation of the conditions for having a final and enforceable ruling reconsidered. The conditions for refusing to hear an appeal on its merits are strict, because it implies that the possibility of hearing the ruling on its merits is precluded in an ordinary review situation, before the judgment is final. Once the case has been finally decided, it is less relevant for the ruling to which extent new information has the effect that it is no longer clear that the appeal cannot succeed. This may easily result in the threshold for rehearing the case being too low, compared to the conditions for criticising the judgment in the first instance…"

(44) In this regard, I note that if it concerns reopening of a ruling from the Supreme Court's Appeals Selection Committee dismissing an appeal against a refusal to grant leave to appeal, "the question of reopening relies on whether the Supreme Court's Appeals Selection Committee now – on an independent basis – finds that the appeal against the Court of Appeal's refusal to grant leave to appeal is unlikely to succeed", see Rt-2014-536 paragraph

9. As expressed by the Dispute Act Committee in what I have quoted, this is a different and less relevant issue to consider than the District Court's assessment of whether a reopening will lead to a change of the *substantive aspects of the judgment* that affect the party.

(45) Against this background, I *summarise* my interpretation of section 31-3 subsection 1 (d) as follows: When a request is made for reopening of an order by the Supreme Court's Appeals Selection Committee based on a judgment by the European Court of Human Rights, it is a condition for hearing the request that the judgment establishes that the procedure in the Appeals Selection Committee amounts to a violation of the party's rights under the Convention.

(46) I will now consider the procedure at which the Court's critique is directed.

(47) Paragraphs 81 to 121 of *Strand Lobben* give an account of A's application of 29 April 2011 for termination of the care order and the municipality's proposal of 13 July 2011 instead to withdraw A's parental responsibilities and authorise adoption, a process that started with the County Board's decision of 8 December 2011 and ended with the order by the Appeals Selection Committee. In paragraph 203, it is stated that the Court's assessment must be made in light of "the case as a whole". The implication of this is that the Grand Chamber did not only observe this recent case, but also the former proceedings and decisions relating to the care order, see paragraphs 148 and 152, cf. HR-2020-661-S paragraph 152.

(48) Paragraph 215 sets out that the Court's assessment will be centred on the District Court's judgment 22 February 2012:

> "Bearing in mind the limitations on the scope of its examination as described in paragraphs 147 to 148 above, the Court will centre its examination on the City Court's review as reflected in its judgment of 22 February 2012, which ultimately gained legal force on 15 October 2012 when the Supreme Court Appeals Board dismissed the first applicant's appeal …". [1]

(49) In the subsequent paragraphs – 218 to 224 – the Grand Chamber observes in particular *the District Court's* individual assessment of the case. Then it concludes the following in paragraphs 225 and 226:

> "225. Against this background, taking particular account of the limited evidence that could be drawn from the contact sessions that had been implemented (see paragraph 221 above), in conjunction with the failure – notwithstanding the first applicant's new family situation – to order a fresh expert examination into her capacity to provide proper care and the central importance of this factor in the City Court's assessment (see paragraphs 222-3 above) and also of the lack of reasoning with regard to X's continued vulnerability (see paragraph 224 above), the Court does not consider that the decision-making process leading to the impugned decision of 22 February 2012 was conducted so as to ensure that all views and interests of the applicants were duly taken into account. It is thus not satisfied that the said procedure was accompanied by safeguards that were commensurate with the gravity of the interference and the seriousness of the interests at stake.
>
> 226. In the light of the above factors, the Court concludes that there has been a violation

[1] TN: City Court is an alternative translation of *tingrett* (District Court) and the Appeals Board is an alternative translation of *ankeutvalget* (the Appeals Selection Committee).

of Article 8 of the Convention in respect of both applicants."

(50) From what I have quoted, it appears that the majority's critique is mainly directed at *the District Court's* basis for decision-making and reasoning. Although the order by the Supreme Court's Appeals Selection Committee finalised the case in Norwegian courts, nothing suggests that the Court also finds that the procedure in the Supreme Court's Appeals Selection Committee amounted to a violation. In my opinion, this implies that it is the District Court's judgment that must be requested reopened – as A also contends in her parallel request – and that the request for reopening of the order issued by the Supreme Court's Appeals Selection Committee must be dismissed.

Legal costs and conclusion

(51) C and B have been granted free legal aid and have proposed that the public authorities be awarded costs in the Supreme Court, see section 20-8 subsection 1 of the Dispute Act 20-8. The claim amounts to NOK 166 950. The municipality has not claimed any costs. The case has raised issues of principle, and it is important to A's welfare. In my opinion, the public authorities should not be awarded costs, see section 20-2 subsection 3 of the Dispute Act.

I vote for this

O R D E R :

1. The request for reopening is denied.

2. Costs in the Supreme Court are not awarded.

Justice **Steinsvik:** In agree with Justice Ringnes in all material respects and with his conclusion.

Justice **Arntzen:** Likewise.

Justice **Kallerud:** Likewise.

Justice **Indreberg:** Likewise.

Following the voting, the Supreme Court issued this

O R D E R :

1. The request for reopening is denied.

2. Costs in the Supreme Court are not awarded.