SUPREME COURT OF NORWAY

J U D G M E N T

given on 15 September 2020 by the Supreme Court composed of

Justice Hilde Indreberg
Justice Aage Thor Falkanger
Justice Arne Ringnes
Justice Cecilie Østensen Berglund
Justice Kine Steinsvik

HR-2020-1788-A, case no. 20-035781SIV-HRET
Appeal against Agder Court of Appeal's judgment 20 December 2019

A B	(Counsel Mehvish Taj Haider)
v.	
X municipality	(Counsel Mette Yvonne Larsen) (Assisting counsel: Bendik Falch-Koslung)

(1) Justice **Østensen Berglund:**

Issues and background

(2) The case concerns a request for revocation of a care order and return to biological parents, see section 4-21 of the Child Welfare Act. The key issue is whether a child's attachment to the foster home may lead to serious problems for her if removed.

(3) On 5 September 2016, the child welfare services in X municipality made an emergency order that C, born 00.00.2014, be placed in public care. C is the daughter of A and B. Her mother is born in Thailand, but she has lived in Norway for many years. She has a daughter from a previous marriage, D, to whom she has access. C's father is Norwegian. He has an older daughter with whom he has no contact.

(4) Before the emergency order, C had had been voluntarily placed in the care of her father's cousin for some four months, but had been returned to her parents shortly before the emergency placement. During this period, both parents had psychological difficulties and serious drug problems, and consented to the public authorities taking over the care of C.

(5) On 18 November 2016, the County Social Welfare Board in Y decided to place C in a foster home. Access between the child and her parents was set at three hours, six times a year, under supervision.

(6) During the winter 2017/2018, various measures were initiated by the child welfare services as a step towards a possible return of C to her mother, as she was both healthy and sober and no longer lived with C's father. His abuse had not been clarified at that time. During this period, the access between the mother and child was increased. On 2 February 2018, the mother requested revocation of the care order. Psychologist specialist Christina Salthaug was appointed to examine the case. She advised the child welfare services not to increase the access until it had been clarified where the child would live, with which the child welfare services complied.

(7) On 21 August 2018, the County Board turned down the request for revocation. The County Board found that the parents could not provide the daughter with proper care, and that it was not possible to implement measures to remedy this. Significant weight was given to the child's attachment to the foster home, and not so much to the biological principle or the serious problems that a return could cause.

(8) The parents brought the case to the District Court, which on 8 May 2019 ruled as follows:

> "1. The County Social Welfare Board in Y's [order] in case Y -2018/000000 is set aside, and the child C b. 00.00.2014 is to be returned to her biological parents, see section 4-1 of the Child Welfare Act."

(9) The District Court concluded that the mother and father had sufficient caring skills, and believed that they would welcome necessary assistance in connection with a return. The child had not been asked about her opinion of a possible return, as she was only five years old. The expert lay judge dissented, as he found that the conditions for a return were not met.

(10) X municipality appealed to Agder Court of Appeal, requesting postponement of the implementation of the District Court's judgment to avoid moving C before a final decision was made. On 10 July 2019, Agder Court of Appeal granted leave to appeal, and the District Court's judgment was not given anticipatory effect, see section 36-9 subsection 2, cf. section 36-10 subsection 2 last sentence.

(11) On 20 December 2019, Agder Court of Appeal ruled as follows:

> "1. The application for revocation of the public care of C, born 00.00.2014, is rejected.
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> 2. B and A are to have access to C according to the following scheme:
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> - 3 times of 8 hours each during the first half of 2020. The child welfare services may supervise the contact sessions.
> - 6 times of 8 hours each during the second half of 2020.
> - 12 times per year of 8 hours each from and including 2021."

(12) The judgment was not unanimous. A united Court of Appeal found that the parents had sufficient skills to have daily care of C, while the majority found that C's attachment to the foster home implied that a removal could be detrimental to her. The majority assumed that the parents would not cooperate with the foster parents or the child welfare services during a return process. Because of C's age, no significant weight was given to information that she wished to stay in the foster home. Extensive access was granted to maintain the possibility of reunification at a later stage. The minority, the extraordinary appellate judge, did not consider it substantiated that the child would suffer serious harm if returned to the biological parents.

(13) A and B have appealed the Court of Appeal's judgment to the Supreme Court.

(14) Psychologist specialist Bjørn Solbakken was appointed a new expert to the Supreme Court. He has submitted a written report, and he gave an oral statement during the main hearing. The report has been presented to the Child Expert Commission, which had no comments. During the period after the Court of Appeal's judgment, contact sessions have been held as decided by the Court of Appeal. Some new documentary evidence has been presented to the Supreme Court. Apart from that, the case stands as in the Court of Appeal.

(15) The hearing has been held by video conference in accordance with section 3 of Temporary Act of 26 May 2020 No. 47 on adjustments to the procedural set of rules as a consequence of the Covid-19 outbreak. The case was heard jointly with HR-2020-1789-A, concerning the Court of Appeal's decision not to grant leave to appeal in a case dealing with revocation under section 4-21 of the Child Welfare Act.

The parties' contentions

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

(17) The conditions for revocation of a care order under section 4-21 subsection 1 of the Child Welfare Act are met, and no considerations suggest that a return cannot be effected. The child is about to start school, which makes a return even more pressing.

(18) The requirement in section 4-21 subsection 1 first sentence of the Child Welfare Act that it must be highly probable – i.e. it requires more than preponderance of the evidence – that the parents may provide the daughter with adequate care is incompatible with the right to family life in Article 8 of the European Convention on Human Rights (ECHR).

(19) According to case-law from the European Court of Human Rights (ECtHR) relating to Article 8, the child's best interests are paramount, and any interference with the right to private life must have a legal basis and be necessary and proportionate. The basis for decision-making must be broad and updated, the reasoning must be relevant and adequate, and there must be a balancing of interests. These requirements are not met in the case at hand.

(20) A care order is considered a temporary measure, as family reunification is the ultimate goal. It is in the child's best interest to be returned to its biological parents. Any omission to effect a return will be contrary to Article 104 of the Constitution, Article 8 ECHR and Article 3 of the Convention on the Rights of the Child.

(21) C's attachment to her foster parents does not preclude a return, nor will a return lead to problems for her. The former expert in the case has not sufficiently discussed the child's vulnerability, and his conclusions are drawn on an inadequate basis. In addition, the parents do not agree with the assessments of the expert in the Supreme Court.

(22) The child welfare services were originally of the opinion that the child could be returned to her mother, but stopped the process without proper justification. Since the first expert's report in 2018, the child welfare services have worked towards family reunification, but with the assumption that the placement will be long-term. The result thereof is that no measures have been made to develop the relationship between the child and her biological parents, her cultural bonds have not been maintained and the municipality has been criticised by the County Governor for its failure to follow up the case. Nor have the foster parents facilitated a return, as they want the child to stay with them.

(23) Even so, the child is closely connected to her biological parents and seems to thrive in social settings. She is well functioning with no special needs, and she will handle a return well. Her biological parents will be able to help her with any difficulties that may arise, and they will welcome any assistance the child welfare services may offer. If a return is effected gradually, while the contact with the foster parents is maintained, the child will not develop such psychological problems as the experts believe she might. A return to the biological parents will also safeguard her ethnic and cultural belonging. Considering the child's age, decisive weight should not be given to her opinion, as she does not understand the implications of a return.

(24) In the alternative, the access should be increased to prepare for future reunification and to strengthen the biological bonds. Extensive contact rights should be granted, preferably including overnight stays.

(25) A and B invite the Supreme Court to pronounce the following judgment:

"Principally:
1. C born 00.00.2014 may be returned to her biological parents.

In the alternative:
2. Access is granted as the Supreme Court deems fit, based on the goal of family reunification."

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

(27) The Court of Appeal's judgment is correct. The conditions for revoking a care order under section 4-21 of the Child Welfare Act are not met at this point.

(28) As a starting point, a care order is as a temporary measure. One must therefore work towards family reunification, which is what the municipality has done and will continue to do. The consideration of the best interests of the child, see Article 104 of the Constitution, case-law relating to Article 8 ECHR, Article 3 of the Convention on the Rights of the Child and section 4-1 of the Child Welfare Act, entails that the goal of reunification and the right to family life cannot be fulfilled for the time being.

(29) The standard of proof in section 4-21 subsection 1 first sentence of the Child Welfare Act is not incompatible with Article 8 ECHR. However, the issue is not prominent here, as the second sentence precludes a return. It is reflected in the expert's assessment that the child is particularly vulnerable to a possible separation from her primary care persons, the foster parents. Because of her attachment to the foster home, at return at this stage entails a risk of serious psychological harm. The biological parents' conduct demonstrates their lack of understanding and skills to be ready for a return at present, and the negative effects can therefore not be remedied by assistance measures. The risk of serious harm entails that the conditions for interfering with the right to family life in Article 8 ECHR are met. Furthermore, the child's desire to stay with her foster parents must be given weight.

(30) Extensive access has been granted through a gradual increase, which strengthens the possibility of future reunification. The municipality is not requesting any changes in this respect.

(31) X municipality invites the Supreme Court to pronounce the following judgment:

"Principally:
The appeal is dismissed.

Alternatively:
1. The request for revocation of the care order for C, born 00.00.2014, is rejected.

2. B and A are to have such access to C as the Supreme Court deems fit."

My opinion

(32) The key issue in the case at hand is whether the conditions for revoking a care order are met, see section 4-21 of the Child Welfare Act. In the alternative, the case concerns the extent of access between the child and the biological parents.

(33) The Supreme Court has jurisdiction to hear all aspects of the case, see section 36-5 subsection 3 of the Dispute Act. The Supreme Court is only bound by the parties' procedural actions to the extent that these are compatible with public considerations, see section 11-4 of the Dispute Act. The assessment of whether the conditions for revocation are present, must be based on the circumstances at the date of the judgment, see HR-2020-662-S paragraph 42 with further references.

The conditions for revoking a care order

(34) The conditions for revoking a care order are provided in section 4-21 of the Child Welfare Act:

> "The county social welfare board shall revoke a care order when it is highly probable that the parents will be able to provide the child with proper care. The decision shall nonetheless not be revoked if the child has become so attached to persons and the environment where he or she is living that, on the basis of an overall assessment, removing the child may lead to serious problems for him or her. Before a care order is revoked, the child's foster parents shall be entitled to state their opinion.
>
> The parties may not demand that a case concerning revocation of a care order shall be dealt with by the county social welfare board if the case has been dealt with by the county social welfare board or a court of law in the preceding twelve months. If a demand for revocation of the previous order or judgment was not upheld with reference to section 4-21, first paragraph, second sentence, new proceedings may only be demanded when documentary evidence is provided to show that significant changes have taken place in the child's situation."

(35) The main rule according to the first sentence of subsection 1 is that the child is to return to its biological parents when it is highly probable that they may provide proper care. However, an exception must be made if the child's attachment to the current care base is so strong that a removal may lead to serious problems, see the second sentence. The provision also lays down certain limitations on the possibility of raising a new case, as I will return to.

(36) In the following, I will take a closer look at the various interpretations of the conditions for revoking a care order in preparatory works and case-law, before I turn to the requirements set out in the Constitution and Norway's international obligations.

Starting point and basic conditions for revocation

(37) According to section 48 of the former Child Welfare Act, a care order was to be revoked "when the measure [was] no longer justified". The absence of circumstances justifying the interference suggested, at the outset, that the requirement of proper care had been met. The goal was for children to grow up with their parents, which was also assumed in case-law, see Rt-1984-289. However, according to Supreme Court case-law, the provision could not be interpreted to mean that the parents were entitled to have their child returned to them if the interference was no longer justified. The consideration of the child's best interests could allow for exceptions, for instance if the child was so strongly attached to its foster home that a removal would imply a genuine risk of significant harm, see the above mentioned 1984 ruling, page 298.

(38) The current Child Welfare Act of 1992 maintained the condition that the parents had to be able to provide proper care before a return could be effected. It was laid down that the care order was nonetheless to be upheld if the child's attachment to people and environment could lead to serious problems in the event of removal. Also, it is set out in preparatory works that children should normally grow up with their biological parents, see Norwegian Official Report 1985:18 Act on social services etc., and Proposition to the Odelsting No. 44 (1991–1992) Act on child welfare services (the Child Welfare Act). The Proposition states on page 54 that it lies in the "alternative nature of the proposition that children, at the outset, should grow up with their parents". On the following page, it is stated that during family reunification, one must bear in mind that "the attachment to the biological parents may in itself be an asset for the child".

(39) Thus, according to both the wording of the provision and the preparatory works, the main rule is that a care order is to be revoked if the parents may provide proper care.

(40) When discussing the basic requirement of proper care, an overall assessment must be made of the parents' ability to fulfil basic material needs and of their emotional skills, see Proposition to the Odelsting No. 69 (2008–2009) Act relating to amendments to the Child Welfare Act. The following is set out on page 19:

> "when making this assessment, one must consider both whether the parents are able to fulfil the basic needs of the child, such as housing, clothing, hygiene and necessary follow-up with regard to school and leisure time, and whether the parents may fulfil the child's need of emotional contact and protection".

(41) It is stated next that the assessment must cover the present as well as the future, and that proper care must be defined based on the needs of the individual child. If the child needs special care, general caring skills are not necessarily sufficient. At the same time, one must consider to which extent assistance measures may ease the situation and whether the parents are willing to accept them. The latter derives from the principle of least interference, on which the Child Welfare Act is based.

The "highly probable" requirement

(42) In order for a child to be returned, the parents' caring skills must be stable, see Proposition to the Odelsting No. 69 (2008–2009) page 18, with reference to Norwegian Official Report 1985: 18. This requirement is justified by the consideration of the child, and entails that a temporary and uncertain improvement of the caring skills are not sufficient to meet the basic requirement.

(43) To underline this requirement and limit the practice, the Ministry proposed in 2009 to include in section 4-21 of the Child Welfare Act that a care order was not to be revoked if there was "genuine doubt" that the parents would be able to provide proper care, see Proposition to the Odelsting No. 69 (2008–2009). Based on feedback from various bodies entitled to comment, the term "genuine doubt" was replaced by a requirement that it had to "highly probable" that the biological parents were able to give the child proper care, which entailed a stronger standard of proof. This requirement was included the same year.

(44) The appellants contend that the standard of proof is incompatible with Article 8 of the European Convention on Human Rights (ECHR), and that it cannot be found in the case-law from the European Court of Human Rights (ECtHR).

(45) The reason for the amendment was the need to avoid the risk of new placement for the child shortly after a return. In Proposition to the Odelsting No. 69 (2008–2009) pages 20 and 21, the amendment is deemed compatible with Norway's international obligations in the area, including the UN Convention on the Rights of the Child and Article 8 ECHR. It is stated that the amendment is made in the child's best interest, while it is not intended to diminish the biological principle or the principle of least interference. A number of bodies entitled to comment supported the Proposition, including the Norwegian Association of Judges, maintaining that most judges already practiced a stricter standard of proof than general preponderance of the evidence. However, the Bar Association objected, arguing that it render a return a return more difficult. The Association believed that it diminished the biological principle, and was therefore incompatible with ECtHR case-law.

(46) ECtHR case-law does not seem to support a view that a stricter standard of proof is incompatible with Article 8 ECHR. ECtHR, too, emphasises that a stable care base after a return is best for the child. In its judgment in plenary session 24 March 1988 *Olsson v. Sweden,* ECtHR examined whether the parents' improved situation was stable, and stated in paragraph 76:

> "it is justifiable not to terminate public care unless the improvement in the circumstances that occasioned it appears with reasonable certainty to be stable".

(47) ECtHR thus found that it must be established with "reasonable certainty" that the improved caring skills are not temporary.

(48) In Norwegian Official Report 2016:16 New Child Welfare Act – Safeguarding of the child's right to care and protection, the standard of proof in section 4-21 is proposed continued. On page 349, it is assumed that the standard is compatible with Article 8.

(49) As I see it, the standard of proof contributes to continuity in the care of children, which according to section 4-1 of the Child Welfare Act is decisive for determining the child's best interests. The standard of proof means that the importance of offering the child stability and calm becomes prominent, without diminishing the goal of family reunification, the biological principle or the principle of least interference. I can thus not see that the standard is incompatible with Norway's international obligations. As I will revert to, ECtHR, too, attaches great importance to the consideration of the child's best interest.

The application of section 4-21 subsection 1 first sentence versus subsection 1 second sentence of the Child Welfare Act

(50) As mentioned, section 4-21 subsection 1 first sentence states that the care order is to be revoked when it is highly probable that the biological parents may provide the child with proper care. Nonetheless, according to the second sentence, this is not to take place if removal may lead to serious problems for the child due to its attachment to persons or the environment – the *attachment exception*.

(51) Before I start discussing the attachment exception, I will comment on the question whether difficulties arising during a return should be included in the assessment of caring skills under the first sentence or whether this falls under the second sentence only.

(52) According to Proposition to the Odelsting No. 44 (1991–1992) page 113, the requirement of proper care suggests that any difficulties that arise must be given weight, as well as the child's new adult attachment. Then it is stated: "This factor deserves nonetheless to be included in the provision".

(53) If the first sentence had stood alone, as it did in the former provision, *proper care* would surely have comprised the significance of possible difficulties relating to a return. However, the express condition that this must be assessed under the second sentence implies that the factor is to be assessed here only. This interpretation is also adopted by Kirsten Sandberg in her thesis, "Return of children after revocation of a care order", 2003, pages 210-211:

> "... when the second sentence is added as an exception, it lies in the structure of the provision that the difficulties relating to a return cannot be relevant under the first sentence. It would not only give an ill-structured discussion, it would also be contradictory. The difficulties cannot first be considered under the first sentence, and then under to the second."

(54) The assessment under the first sentence thus relates to the parents' ability to fulfil the child's general need of care, as well as any special needs that are unrelated to a possible return. I refer to the above discussion of this condition. If the conclusion is that the parents do possess such caring skills, it must be assessed next how removal from the foster home will affect the child, and whether the parents will be able to handle any negative reactions from the child because of the separation, with assistance if relevant, see Sandberg page 211. In Rt-2004-1683 paragraph 50, the Supreme Court has endorsed this interpretation of the law. As set out in that paragraph and pointed out by Sandberg, the parents' ability to take care of the child on a general level does not necessarily mean that they will also be able to handle the challenges a return may cause.

Attachment and the risk of serious problems

(55) I will now examine further what lies in the attachment exception and in the requirement of serious problems.

(56) According to the provision, attachment refers to the child's relations to the people and environment at its location, i.e. the child's present care base. This will normally be the foster family, and the foster parents in particular, but the criterion may also be relevant at other care bases. The term also covers school, friends, local surroundings etc. In the cases where the child has lived in the same foster home for a long time, the attachment will normally be strong.

(57) A safe and good attachment to a foster home is not sufficient to preclude a return to the biological parents. A care order is intended as a temporary measure, and the ultimate goal is family reunification. Thus, a care order is to be upheld only when a return may lead to *serious problems* for the child. This is outlined in detail in Proposition to the Odelsting No. 44 (1991–1992) page 55:

> " … Because also where the child has been placed outside its home for a period of time, it will be possible and preferable that the child moves back to its parents, the Ministry concluded in the draft document that it is correct to make certain requirements to the nature of the problems that a child may have in connection with a removal. It is given that any removal may cause problems for a child, and it is a goal to avoid removal to the extent possible. However, an assessment must be made of the situation and the problems the child will have, both in the short and long run in the question of removal. The term 'serious problems' entails a guarantee that both a short-term and a long-term assessment is required."

(58) Both the provision and the preparatory works thus assume that the second sentence refers to serious difficulties over time, which clearly exceeds the unrest and worrying most children will feel when removed from a care base. This is in accordance with case-law, and summarised as follows in the Supreme Court judgment Rt-2004-1683 paragraph 32:

> "… the decisive factor is whether a return process will expose the child to 'genuine risk of harm in the long run'. In that case, a return cannot take place unless it will be in the child's best interest after all."

(59) If the main concern is transitional problems, the child's attachment will not preclude a return, see Rt-1984-289. On the other hand, a return cannot be effected if it may lead to more long-term and serious problems, see for instance HR-2016-2262-A, which concluded that separation from the foster parents would trigger serious changes in the child's psychological functioning and a lasting personality change.

(60) To determine whether the child's attachment may preclude a return, a broad and thorough assessment of various factors is required. Among these factors are the child's age at the time of the care order, to which extent the child was harmed by the process, the child's development during placement, the length of placement, the child's attachment to the foster home and the surrounding environment, and whether the child is vulnerable in general or only when it comes to separation. In addition, the child's relations with its biological parents must be thoroughly assessed, taking into account how well the child knew its biological parents prior to the care order, the access between them during placement and the success of possible contact sessions. The parents' ability to deal with the child's reactions may be of great impact, and so will their ability and will to cooperate with the foster parents and the child welfare services during a return. The same applies to their ability and will to accept assistance. Depending on age and maturity, importance will be attached to the opinion of the child, see section 6-3 of the Child Welfare Act. The decisive point is whether – despite the goal of family reunification and the principle that a child should grow up with its biological parents – there is a significant risk of harm in the end, so that the child would be better off if the care order was maintained.

The attachment exception, the application of the Constitution and Norway's international obligations

(61) The provision in section 4-21 of the Child Welfare Act must be applied in accordance with Article 104 of the Constitution on the rights of the child and Article 102 on the right to family life, as well as Norway's international obligations. Although it is assumed in Norwegian Official Report 2016: 16 page 158 that the applicable conditions for a return are compatible with those set out in the Constitution, the Convention on Human Rights and the Convention

on the Rights of the Child, I find, in the light of more recent judgments from ECtHR against Norway, that there is reason to discuss the application of section 4-21 of the Child Welfare Act balanced versus Article 8 ECHR on the right to family life.

(62) I will base my discussion on the three grand chamber rulings handed down by the Supreme Court on 27 March 2020. The three rulings concerned the right to family life in cases relating to deprivation of parental responsibility and consent to adoption, care orders and contact rights. In subsequent rulings, the Supreme Court's Appeals Selection Committee has assumed that the principles discussed in the grand chamber rulings are applicable in cases concerning family reunification, see for instance HR-2020-916-U paragraph 17 and HR-2020-964-U paragraph 20. I will base my further deliberations on the same assumption.

(63) It is expressed in the grand chamber rulings that there is no conflict between ECtHR case-law and the substantive and procedural principles following from the provisions in the Child Welfare Act on deprivation of parental authority, adoption and care order, see HR-2020-661-S paragraph 170 and HR-2020-662-S paragraph 56. In the latter paragraph, it is assumed that the current threshold for a care order may be continued.

(64) In the three rulings, the Supreme Court stresses at the same time the significance of applying the provisions in the Child Welfare Act within the scope set out in ECtHR case-law. In HR-2020-661-S paragraph 112, it is set out that recent ECtHR case-law calls for adjustments in Norwegian child welfare practice because the decision-making process, the balancing exercise or the reasoning has not always been adequate. This is particularly related to the authorities' duty to work towards reunification of the child and parents, and is therefore of particular importance when the question of return arises.

(65) While a rejected application for family reunification does not imply that the child will be separated from its parents, it implies a continued weakening of family bonds that interferes with both the child's and the parents' right to family life under Article 8 ECHR.

(66) An interference with the right to family life must be in accordance with the law, have a legitimate purpose and be necessary in a democratic society, see Article 8 (2) ECHR. Since the measure has a legal basis and is meant to protect both the rights and the health of the child, the question remains whether it is necessary in a democratic society. As pointed out in HR-2020-662-S paragraph 49 et seq, a number of interests must thus be balanced against each other, but the those of the child are the most important. This is clearly expressed in the ECtHR Grand Chamber judgment 10 September 2019 *Strand Lobben and Others versus Norway* paragraph 204, where it is stressed that the child's best interests are of "paramount importance", and that "the child´s interests must come before all other considerations…".

(67) It is set out in *Strand Lobben* that at the outset, it is assumed to be best for the child to live with its parents, but that this does not apply unconditionally. I refer to HR-2020-662-S paragraphs 51 to 53:

> "(51) At the outset, it is assumed to be best for the child to live with its parents. This is emphasised by the Court in many cases, including in *Strand Lobben* paragraph 207:
>
> 'Generally, the best interests of the child dictate, on the one hand, that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off

> from its roots. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family ...'

(52) That this principle is not absolute, is also reflected in the Court's further deliberations:

> '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 .... In addition, it is incumbent on the Contracting States to put in place practical and effective procedural safeguards for the protection of the best interests of the child and to ensure their implementation (see the United Nations Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration ...)'

(53) Where the child's and the parents' interests come into conflict, the Court stresses in paragraph 206 that the authorities must strike a fair balance between these interests. However, the Court also stresses that 'particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents'. Hence, among all of the conflicting interests, those of the child are the most important."

(68) The general principles for the balancing of interests provided in *Strand Lobben*, are summarised as follows in HR-2020-661-S paragraph 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."

(69) A further reading of ECtHR case-law shows that the child's best interests are given much weight in the balancing of interests, but if the goal of reunification has been abandoned early on without further reasoning or is out of reach, this will often amount to a violation of the right to family life. I refer to the Grand Chamber judgment 6 July 2010 *Neulinger and Shuruk v. Switzerland* paragraph 135 on child abduction, highlighting the significance of the child's best interest, and judgment 22 October 2015 *Jovanovic v. Sweden*, emphasising the child's particular vulnerability. No violation of Article 8 was found in either case. However, ECtHR concluded the opposite in *Strand Lobben* on deprivation of parental responsibility and adoption, stating that measures had not been taken to facilitate family reunification. For the same reason, violations were found in the two rulings of 10 March 2020 *Pedersen and Others v. Norway* on deprivation of parental responsibility and adoption and *Hernehult v. Norway* regarding a care order.

(70) A distinct factor is the time passed since the care order. In the ECtHR judgment 12 July 2001 *K. and T. v. Finland*, it was assumed that the possibility reaching the goal of family

reunification might be gradually reduced as time passes. The following is set out in paragraph 155:

> "When a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited."

(71) This is repeated in subsequent judgments, including one of 14 January 2003 *K.A. v. Finland*. In certain cases where the child has lived in a foster home for a long time, the relationship between the child and the foster family may also have developed to such extent that that it, too, may be protected by the right to family life. I refer to the Grand Chamber judgment 24 January 2017 *Paradiso and Campanelli v. Italy* paragraph 149.

(72) The further significance of the goal of reunification and of a care order being a temporary measure, is set out in Article 9 of the Convention on the Rights of the Child, with comments. Also the UN General Assembly's resolution 18 December 2009, Guidelines for the Alternative Care of Children, sets out:

> "All decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family...
>
> Removal of a child from the care of the family should be seen as measure of last resort and should, whenever possible, be temporary and for the shortest possible duration …"

(73) Next, the resolution sets out that the authorities must examine on a regular basis the possibility of a return and work toward this end, see also section 4-16 of the Child Welfare Act on follow-up of care orders.

(74) In summary, I find that section 4-21 of the Child Welfare Act is formulated such that it allows the flexibility necessary to maintain the obligations towards children in accordance with the Constitution and the Convention on the Rights of the Child, as well as the right to family life in Article 8 ECHR. When assessing both the basic caring skills condition and the attachment exception, the principle that a child, at the outset, should grow up with its biological parents, the goal of reunification and the principle of least interference, are vital. At the same time, it must be borne in mind that the child's best interests are a superior consideration. During a hearing of family reunification issues, the discussion must be founded on an adequate and updated basis for decision-making, a sufficiently broad balancing of interests and satisfactory reasoning, see HR-2020-661-S paragraph 171. A rejection of an application for family reunification must reflect how the goal of reunification is to be maintained during the period to come or explain why, if that is the outcome, the goal must be abandoned. As long as the provision is practiced in line with this, I do not consider it a breach of human rights obligations.

The possibility of demanding new revocation proceedings

(75) According to section 4-21 subsection 2 of the Child Welfare Act, a revocation of the care order may be requested anew twelve months after the case has been heard by the County Board or in court. According to the last sentence of the provision, new proceedings may only be demanded when documentary evidence is provided to show that significant changes have taken place in the child's situation.

(76) I the light of recent ECtHR case-law, where the goal of family reunification and the biological principle are highlighted in particular, I note that the condition "significant changes" cannot be interpreted restrictively. If a high threshold is used here, it may imply a breach of the substantive and procedural principles under Article 8 on the right to family life. I do not consider it relevant whether this may differ in other cases expressing that the goal of reunification has been abandoned and why.

The question of reunification in this case

(77) I now turn to the individual assessment of whether the conditions for reunification are met in the case at hand.

(78) As mentioned initially, the Supreme Court has jurisdiction to hear all aspects of the case. However, the parties agree that it is highly probable that the parents may provide the child with proper care, which means that the conditions in section 4-21 subsection 1 first sentence of the Child Welfare Act are met. The Court of Appeal was of the same opinion:

> "A united Court of Appeal has concluded that it is highly probable that the parents are able to provide C with proper care, which is how the condition in section 4-21 of the Child Welfare Act subsection 1 first sentence is to be interpreted. The factors justifying the care order in 2016, primarily the parents' extensive drug abuse, mental difficulties and lack of stability and predictability in the care situation as a result, are no longer present. The parents have been sober for about three years, both have permanent employment and they have shown a positive development, particularly the mother, with respect to caring skills and participation. It is considered clear that, today, there would not have been a basis for issuing a care order under section 4-12 of the Child Welfare Act, the way the parents' situation has improved."

(79) The expert in the Supreme Court, psychologist specialist Bjørn Solbakken, has also concluded that the parents, both separately and jointly, will be able to give the child proper care. As no new evidence has been presented to the Supreme Court suggesting otherwise, I will base myself on the same conclusion.

(80) According to section 4-21 of the Child Welfare Act, C, who is currently six and half years old, is to be returned to her biological parents unless a it entails a risk of harm in the long run due to her attachment to the foster home.

(81) I mention that there has been no disagreement as to the necessity of the original care order, and the parents gave their consent back then. Nor do I find reason to doubt that the conditions in section 4-12 of the Child Welfare Act were met in the autumn of 2016. I refer to the Court of Appeal's description of the situation:

> "As the majority sees it, there is no doubt that C, particularly from the summer of 2015 when she was one year old, was living under conditions that were clearly unsatisfactory and detrimental to her development. The parents have described a large crisis in life that resulted in mental difficulties and extensive use of drugs such as hashish, amphetamine and methamphetamine. The parents have stated that they abused drugs on a regular basis, either individually or together, through the use that took place outside of their home. The daily care of C was mainly maintained by family members on the mother's side, who arrived from Thailand with residence granted for three months each. The majority also concludes that the parents in periods were C's only care persons. In March 2016, the

> family moved to Z, closer to the father's family. Here, C's grandmother allegedly had the main care of C, until C was placed in emergency foster care with her father's cousin in May the same year.
>
> C returned to her parents in August 2016. In September, her parents were stopped by the Police with C unsecured back in the car, on their way home from Æ where they had bought drugs. On the following day, C was placed in foster care with the family E. She was then nearly two and a half years old.
>
> In their statements in the Court of Appeal, the parents have given few signs of reflection on how C must have experienced the period from 2015 until placement, but they have claimed that they realised she should not live at home until they had pulled their lives together. Apart from physical absence due to work and drug abuse, they have both explained that they in periods have also been mentally absent due to aftereffects of the abuse and mental difficulties. They have both admitted that it is hard to remember anything from that period. However, it is clear that there were also good periods for C, which has been documented to the Court of Appeal through photos and videos."

(82) The expert in the Supreme Court has explained that this life situation implied that C was deprived of both physical and mental interaction with her parents, and that both the drug abuse and depressions entailed that their caring skills were seriously reduced. As a result, at the time of the care order, C showed signs of an early attachment disorder. However, it seems that the family's situation was satisfactory during C's first year, which allowed her to establish a sound basis for developing bonds. This contributed to her settling relatively quickly in the foster home and establishing a safe connection with her foster parents.

(83) When I am now to consider whether the conditions for revoking the care order are met, I will start with C's development in the foster home and assess whether she has any special needs at present.

(84) This is thoroughly assessed in psychologist expert Solbakken's written statement. Based on the case documents, talks with the parents, kindergarten staff and the child welfare services, he has concluded that C functions as normal in everyday life, but that she occasionally experiences an unusually high amount of stress, resulting in strong emotional and physical reactions. This happened for instance when her biological parents unexpectedly turned up in the kindergarten and when she realised that a return to her biological parents meant that she was no longer to live with her foster parents. These stress reactions have been observed both by the foster parents and by kindergarten staff and they occur in situations disturbing her care base. C's statements to kindergarten staff, to the expert in the lower instances, psychology specialist Christina Salthaug, and to supervisor Flak, have consistently shown that the question of moving makes her very restless and anxious.

(85) Psychology specialist Solbakken's assessment of C's ability to function and her reactions coincides with the findings of psychology specialist Salthaug. In both experts' opinion, the reason for C's reactions is her particular vulnerability to the possibility of being separated from her primary care persons, her foster parents. This vulnerability is caused by previously experienced relational insecurity and separation. When the vulnerability is triggered, it affects her general functioning, and causes increased watchfulness and need of control and overview, which is described in detail in the expert statement to the Supreme Court. It is set out in the statement that such strong stress reactions may harm a child's development and quality of life, and lead to an increased risk of developing various psychological, social and behavioral difficulties.

(86) As pointed out by the expert, most children around the age of six who are informed of possible relocation become anxious. He is nonetheless of the opinion that C's reactions are of a completely different nature. Psychology specialist Salthaug shared this opinion.

(87) Based on evidence presented to the Supreme Court, where I have emphasised in particular the expert's exhaustive and balanced report, I conclude – like the majority of the Court of Appeal – that C is a well-functioning child without special needs of care in everyday life. However, due to the hardships she faced early in life, she is particularly vulnerable to separation.

(88) I will therefore take a closer look at C's attachment to her foster home and to her biological parents.

(89) C was two and half years old when she came to the foster home. Prior to the placement, she had been voluntarily placed with her father's cousin for about four months, but between the voluntary and the forced placement she was returned her to her parents for a short period of time, without success. The care order therefore entailed that she, in the course of six months, experienced two separations from her biological parents. Yet, she bonded quickly with her foster parents and the other children in the foster family. According to the experts, kindergarten staff and the supervisor, C currently has a strong attachment to the foster home, where she has lived for four years. She turns to her foster parents for comfort and safety, and she has bonded with the family in general as well as with her friends and her surroundings.

(90) C's strong attachment to the foster home means that a return to her biological parents involve such a separation to which C is particularly vulnerable. A return is thus conditional on the biological parents being able to handle the challenges involved.

(91) Today, C has good relations to her biological parents. This is due to the bonds developed during her first year as well as good contact sessions over time. The contact sessions generally function well and contribute to maintaining her cultural belonging. The recent increased duration and frequency of the contact sessions has contributed to a closer relationship. She expresses joy every time she sees her parents, and approaches them both. The general interaction between C and her parents gives thus no reason for concern.

(92) However, it is uncertain how the parents will face the reactions that will occur in connection with a return, with regard to their understanding of C's needs as well as their ability and will to accept assistance measures.

(93) When it comes to the ability to understand C's needs, it appears from the expert reports, protocols from meetings with the child welfare services and the evaluation of COS guidance that the parents do not really grasp the harm she has suffered because of their previous drug abuse and mental difficulties. Following guidance, the mother seems to have gained some more understanding, while the father generally maintains that any harm caused is due to the care order. The Court of Appeal has based its judgment on the same assessment of the parents' reflections in this regard.

(94) Before the Supreme Court, the parents have nonetheless contended that C is not particularly vulnerable, and that she will handle a return well. As I see it, this substantiates that the parents have not fully understood that the repeated rejections in C's second year of life, and the

separations she experienced during the voluntary and the forced care order, have made her far more vulnerable than other children when it comes to the issue of separation.

(95) Here, I note that the expert has stressed that her everyday needs, including during contact sessions, cannot be compared with the situation following a return. The report states:

> " … Even though the child does not have special needs in everyday life, the situation is likely to change radically if she is returned to her biological parents. This will trigger a crisis that will demand a lot from the care persons' ability to perceive and prioritise the child's needs, also when they conflict with their own wishes and needs."

(96) Therefore, the parents' lack of understanding of C's vulnerability gives greater cause for concern. Due to her vulnerability, a close cooperation between the biological parents and the foster parents during a return is imperative. Assistance will also be required from the child welfare services, since neither the mother nor the father has any experience with children in a similar situation.

(97) At the same time, it is clear that the parents, especially the father, have a highly strained relationship with the foster parents and the child welfare services, which has been the case for years. The parents have submitted a number of groundless notes of concern to the child welfare services regarding the foster home, threatened to report the foster parents to the Police and submitted complaints against staff in the child welfare services. They seem generally to believe that the foster parents are lying and exposing the child to neglect. The explicit accusations against the foster parents have lately changed from allegations of physical abuse to allegations of mental abuse.

(98) When measures under the Child Welfare Act are implemented, it is not unusual that a demanding and in periods strained and conflict-filled relationship develops between the parents and the child welfare services. Also, the parents have prevailed in two complaints to the County Governor against the failure to facilitate sibling contact and the lack of documentation that the parents had been adequately followed up. However, according to the most recent decision, there has been extensive contact between the child welfare services and the parents, and from the documents presented to the Supreme Court, it appears that guidance has been provided in various forms.

(99) Based on the case documents and the expert report, the level of confrontation seems extraordinary. I point out the numerous notes of concern and complaints to the County Governor, the harsh characteristics set out in protocols from follow-up meetings with the parents, accusations against the supervisor of sabotage of contact sessions, and complaints against the foster mother submitted as close to the Supreme Court hearing as 23 June 2020, and new threats of calling the police.

(100) Despite the extremely high level of conflict, the expert has assessed whether it will be possible for the biological parents to cooperate with the foster parents and the child welfare services during a return process. The father has expressed orally, both now and before, that he wants this. However, his actual conduct suggests that it is unlikely. The report says the following in this regard:

> "It is remarkable that the father chooses a confronting style despite this earlier having been held against him as injurious both for the child and for his own prospects of succeeding with his request. An explanation may be that it has to do with the father's

> fundamental way of perceiving, interpreting, reacting and acting in an environment that he finds unfriendly and hard to trust. Trivialities, such as a bruise, a small scratch on the neck and a broken toenail, are interpreted as signs of neglect. When the child describes contact sessions in a way the father does not recognise, he assumes that this springs from conscious lies from the foster parents to sabotage a return. He has no reflections on the possibility that a story may change radically when passing from person to person, like in the 'whispering game'. The way the story changes upon delivery from the father to the child to the foster parents to the child welfare service and back to the father, is interpreted as such a clear sign of the foster mother lying that it ends with notes of concern and threats of calling the police.
>
> Reports have also been made that the father has accused the child welfare services in Ø municipality of bringing false accusations and of harassment.
>
> The father has demonstrated with his changed oral communication that he is able to control his behaviour, but his situational perception remains the same. The expert deems it likely that this is connected to stable character traits that are insusceptible to change through conversation and argumentation."

(101) It has also been pointed out that the father's perception of reality and choice of strategy are supported by his mother, who has gone even further when it comes to accusations and immoderate behaviour.

(102) The concerns are hence connected to the father's actions and situational perception. It follows from the expert's report that the mother would probably have been able to cooperate with the foster home and the child welfare services on a return, and that she would have the necessary skills to fulfil the special needs a return would trigger. The expert has therefore assessed whether the mother can make up for the father's inability to cooperate, but has concluded that it will be difficult for the mother to win through with a perception of reality so decidedly different from the father's. Moreover, the mother has loyally supported the father for years.

(103) With C's particular vulnerability, a return depends on the parents' ability and will to cooperate with the foster parents and the child welfare services, and in such a manner that possible assistance measures may be implemented. Based on the overall presentation of evidence, I cannot see that this is possible in light of the current situation. I add that the Court of Appeal's majority, having had the advantage of direct access to evidence including the parents' oral statements, has concluded likewise. The poor prospects of cooperation entail that the biological parents will be unable to fulfil the special needs that will be triggered for C in connection with a return.

(104) I add that C herself has consistently expressed that she wants to stay with her foster parents, towards the expert in the case, the kindergarten, the child welfare services and towards the foster parents. She has also said that she has been scared to express joy over the contact sessions, because she has feared that it may be interpreted as a signal of her wanting to move.

(105) According to section 6-3 of the Child Welfare Act, a child who has reached the age of 7, and a younger child who is capable of forming his or her opinion, is to be given the opportunity to state his or her opinion in the case. Important must be attached to the child's opinion in accordance with his or her age and maturity. The information from C is important, especially because she, according to the expert in the Supreme Court, appears reflective. In my view, however, her age and the unlikelihood that she can fathom the consequences of her position in a case like this, must dictate which importance to attach to her opinion.

(106) After an overall assessment, I find that a return to the biological parents at this stage will cause serious problems for C due to her bonds with the foster home. I stress that when the special needs triggered by a possible return will not be fulfilled, there is a genuine chance that C will undergo severe stress over a long period of time, with strong emotional and physical reactions likely to cause long-term relational trauma and mental, social and behavioural problems. The conditions for a return under section 4-21 subsection 1 first sentence, cf. second sentence, of the Child Welfare Act are therefore not met.

(107) Although the conditions for a return are not met at present, there is no basis for abandoning the goal of family reunification altogether. I refer to the child welfare efforts to facilitate a return to the mother, by offering guidance and extended access among other things. This work was put on hold upon the advice of the expert who assessed a possible return, which must be considered appropriate. In addition, the child welfare services started to doubt whether the mother ought to have sole parental responsibility. Counsel for the municipality has maintained before the Supreme Court that the child welfare services will continue to work towards family reunification, in line with the Child Welfare Act and human rights obligations.

(108) Naturally, it is burdensome for the foster parents, and may be so for C if she is not protected, that a possible return may be reassessed after some time. However, this is a consequence of a care order being a temporary measure, and a consequence of the principle that a child should preferably grow up with its biological parents.

(109) The expert has mentioned in his assessment that the question of a return may change as C develops her capacity to independent reflections on relations, belongings and identity. There could be a time when she is no longer as vulnerable to separation. The same will apply if her acquires the capacity to change his behaviour, which would reduce the risks attached to leaving her foster parents. Under any circumstance, it would be vital for C if her biological parents and her foster parents could exercise mutual respect, and her bonds to both sides should be met with acceptance from all the affected parties.

Contact rights

(110) Then it is left for me to determine the extent of access between C and her biological parents, see section 4-19 of the Child Welfare Act. The provision gives the child and parents a right to mutual access. This right is also protected by Articles 102 and 104 of the Constitution, Article 3 of the Convention on the Rights of the Child on the child's best interest and Article 9 on care orders, as well as Article 8 ECHR on the right to family life.

(111) The Supreme Court's grand chamber ruling HR-2020-662-S paragraph 114 et seq, provides a more detailed presentation of the legal starting points when it comes to arranging access. These are summarised as follows in paragraphs 137 and 138:

> "(137) The extent of access must be determined individually in each case. In the assessment, the best interests of the child are the primary consideration. At the outset, it is best for the child to live with its parents. The purpose of the contact must therefore be to facilitate family reunification. Moreover, contact has a value in itself regardless of the prospects of family reunification, but must not expose the child to undue hardship.

> (138) Only when exceptional and strong reasons are present, the aim of family reunification may be abandoned, and on those grounds, the parents' contact rights may be strongly limited or completely removed."

(112) I add that paragraph 130 states that this is compatible with ECtHR case-law.

(113) The Court of Appeal determined the extent of access based on these principles, and emphasised at the same time the significance of well-functioning contact sessions, the need to maintain C's cultural background and the possibility of sibling contact. With this in mind, the Court of Appeal set up a scheme for gradually increased access, according to which C and her parents are to have six contact sessions of eight hours each these six months. From and including 2021, the access will increase to 12 contact sessions per year of eight hours each.

(114) The parents contend that the access should be extended to include overnight stays. In turn, the municipality finds that the current arrangement and a gradual increase as stipulated in the Court of Appeal's judgment, is apt.

(115) I have concluded that the access arrangement made in the Court of Appeal's judgment takes into account both the goal of family reunification and the idea that a care order is a temporary measure, while it secures stability for C in everyday life. The expert in the Supreme Court has not had any objections to the Court of Appeal's stipulation of access. As pointed out by the Court of Appeal, the access granted is minimum access. If the circumstances in time allow for overnight stays and possibly extended access in connection with holidays and celebrations, the child welfare services may consent to this.

(116) Against this background, the appeal is dismissed.

Conclusion:

(117) I vote for this

J U D G M E N T :

The appeal is dismissed.

(118) Justice **Falkanger:** I agree with Justice Østensen Berglund in all material respects and with her conclusion.

(119) Justice **Ringnes:** Likewise.

(120) Justice **Steinsvik:** Likewise.

(121) Justice **Indreberg:** Likewise.

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

J U D G M E N T :

The appeal is dismissed.