SUPREME COURT OF NORWAY

O R D E R

issued on 27 March 2020 by a grand chamber of the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Magnus Matningsdal
Justice Erik Møse
Justice Wilhelm Matheson
Justice Aage Thor Falkanger
Justice Kristin Normann
Justice Henrik Bull
Justice Knut H. Kallerud
Justice Arne Ringnes
Justice Espen Bergh
Justice Cecilie Østensen Berglund

HR-2020-661-S, (case no. 00-0000001SIV-HRET)
Appeal against X Court of Appeal's decision 12 August 2019

A	(Counsel Halvard Helle)
B	(Counsel Paal Berg Helland)
v.	
Y municipality	(Counsel Mette Yvonne Larsen) (Assisting counsel Bendik Falch-Koslung)
KS (third-party intervener)	(Counsel Frode Lauareid)
Participating in accordance with section 30-13 of the Dispute Act: The State represented by the Ministry of Justice and Public Security	(The Office of the Attorney General represented by Marius Emberland), (Assisting counsel: Henriette Lund Busch)

(1) Justice **Møse:** The case concerns an appeal against the Court of Appeal's refusal to hear an appeal in a case regarding deprivation of parental responsibilities and consent to adoption, see section 36-10 subsection 3 of the Dispute Act and section 4-20 of the Child Welfare Act. It mainly raises questions regarding the right to family life in Article 8 of the European Convention on Human Rights (the Convention), particularly in light of the Grand Chamber judgment 10 September 2019 from the European Court of Human Rights (the Court) in *Strand Lobben and Others v. Norway*.

Background and proceedings

Introduction

(2) A and B are the biological parents of C, who is born 00.00.2016 and thus currently three years and nine months old. The parents separated before their daughter was born, but they have joint parental authority.

(3) The mother has five children with four different fathers. The daughter in the case at hand is her fourth child. Her oldest child was born in 2005 and the youngest in 2018.

Care order in 2017 and court review

(4) Starting in 2005, the child welfare services had carried out several investigations into the family and offered various assistance measures, including advising and guidance. After the birth of the daughter in the case at hand, unannounced inspections of the home took place from 30 September 2016.

(5) On 9 November 2016, the child welfare services requested a care order for this daughter and the oldest child. In accordance with section 7-5 subsection 1 of the Child Welfare Act, the County Social Welfare Board (the County Board) consisted of three members: One chair who is qualified to act as a judge, see section 7-2, one ordinary member, and one expert that was a psychologist. On 1 February 2017 – one the basis of direct evidence – the County Board issued a care order. Included in the basis for the care order was an expert report prepared by two psychology specialists on the care situation for the three oldest children.

(6) In its decision regarding the daughter in the case at hand, the County Board stated that the placement would be long-term and that she was likely to grow up in foster care. The mother was granted access of two hours three times per year, under supervision. These were minimum legal contact rights, which could be increased later by the child welfare services.

(7) The County Board did not grant any access to the father, referring to what it deemed to be special and strong reasons: The father had been convicted of two rapes and of violence against the mother, he was part of a drug environment, and there were worrying circumstances relating to his personality. Taking the lack of bonds between the father and daughter into account, as well as her vulnerability, the County Board found that access, at that time, would not be in the child's best interests.

(8) On 3 February 2017, seven months old, the daughter was taken into emergency foster care. On 22 April 2017, she was moved to a foster home, where she has lived since.

(9) In 2017, the District Court decided in a parental dispute that the two other children were to live permanently with their father. Hence, the mother did not have care of any of the children she had at that time.

(10) The parents requested a review of the County Board's care order and stipulated contact rights. By Z District Court's judgment 15 May 2017, the care order was upheld, with the change that the father was allowed visits of one hour twice a year, under supervision. In accordance with section 36-4 of the Dispute Act, the District Court was composed of one professional judge and two lay judges, one of which was an expert – a psychologist.

(11) The District Court endorsed most of the County Board's assessments, and assumed, like the Board, that the placement would be long-term. Furthermore, the daughter needed calm to bond with her new care persons.

(12) During the preparatory phase, the District Court had rejected the mother's request to have a new expert appointed. The reason given was that it was not necessary for creating an appropriate factual basis for decision-making. There would be testimonies from people working at the child welfare services, from a nurse at the child health clinic and from one of the previous experts. The Court had asked the experts to update their report, but they did not have the opportunity to do so.

(13) The parents appealed to X Court of Appeal, which refused leave to appeal in a decision of 25 July 2017, see section 36-10 subsection 3 of the Dispute Act. The Court of Appeal specifically assessed the significance of the expert report being issued before the daughter was born, and found under the circumstances that the District Court's reliance on the report was appropriate.

Adoption order in 2018 and court review

(14) On 22 May 2018, the municipality submitted a request to the County Board for removal of parental responsibilities and consent to adoption of the child. Later, the County Board was requested to consider contact visits between the child and her biological mother.

(15) On 25 September 2018, the County Board, consisting in accordance with the Child Welfare Act of a chair, an ordinary member and an expert – a psychologist – issued the following order:

> **"1. A and B are deprived of parental responsibilities for C, born 00.00.2016, see section 4-20 subsection 1 of the Child Welfare Act.**
>
> **2. Consent is given to D and E's adoption of C, see section 4-20 subsection 2, cf. subsection 3.**
>
> **3. Contact visits between C and her mother are set at one hour once a year."**

(16) No new expert statement had been obtained before the adoption order.

(17) Both parents brought the County Board's adoption order before Z District Court. The District Court appointed a psychologist as an expert. She submitted a report and testified during the main hearing.

(18) In its judgment 15 April 2019, the District Court, one member dissenting, upheld the County Board's decision. The District Court was composed of one professional judge and two lay judges, one of whom was an expert – a psychologist. The District Court concluded:

> **"The County Social Welfare Board's adoption order of 25 September 2018 in case XX-00/00 is upheld."**

(19) The parents appealed to X Court of Appeal. The two appeals from the mother and the father did not concern the conditions in section 36-10 subsection 3 of the Dispute Act regarding leave from the Court of Appeal in child welfare cases. The mother's contention was that the recent development in the case, including the lack of concern relating to her ability to care for her youngest child born in November 2018, suggested that consent to adoption of her daughter should not be given. The father's appeal focused on the biological principle and the adoption's effect that all contact with his daughter would cease, since the foster parents had not consented to contact visits on his part.

(20) On 12 August 2019, the Court of Appeal ruled as follows:

> **"Leave to appeal is not granted."**

(21) The Court found that the conditions for granting leave to appeal under section 36-10 subsection 3 (a) of the Dispute Act – that the case must raise issues of significance beyond the scope of the current case, and (c) – that the District Court's ruling must be seriously flawed – were not met.

Preparations for the Supreme Court hearing

(22) Both parents have appealed to the Supreme Court. The municipality has responded. On 16 October 2018, the Supreme Court's Appeals Selection Committee referred the appeals to a division of the Supreme Court sitting with five justices, see section 5 subsection 1 second sentence of the Courts of Justice Act.

(23) Subsequently, on 22 October 2019 (HR-2019-1951-J), the Chief Justice decided to refer the case to a grand chamber, see section 6 subsection 2 third sentence of the Courts of Justice Act, and to hear it together with case no. 00-000000SIV-HRET, case no. 00-000000SIV-HRET and case no. 00-000000SIV-HRET. The two latter have been joined, which means that three cases are now being considered by the Supreme Court.

(24) According to the Supreme Court's rules of procedure, adopted on 12 December 2007 pursuant to section 8, cf. section 7 subsection 2 of the Courts of Justice Act, a grand chamber of the Supreme Court is, in addition to the Chief Justice, composed of ten justices, all of whom are selected by drawing of lots. In the Supreme Court's order 16 January 2020, Justice Falch was recused from participation, see HR-2020-83-S.

(25) On 20 December 2019, the Chief Justice decided that the appeal, which deals with issues normally heard behind closed doors, would be heard in open court, and that photography and recording would not be allowed without special consent by the Supreme Court.

(26) On 13 January 2020, the Supreme Court's Appeals Selection Committee consented to KS (the Norwegian Association of Local and Regional Authorities) acting as third-party intervener for the respondents in the three cases, see section 15-7 subsection 1 (b) of the Dispute Act.

(27) The State represented by the Ministry of Justice and Public Security has participated in the case to safeguard the State's interests, see section 30-13 subsection 1 of the Dispute Act.

(28) The Supreme Court hearing took place from 4 to 10 February 2020. On 10 March 2020, the European Court of Human Rights handed down two new judgments in cases against Norway. The parties have been given the opportunity to submit comments as to the relevance of these judgments to the case at hand.

The parties' contentions

(29) The appellant – *A* – contends:

(30) In the mother's opinion, the Court of Appeal erred in refusing leave to appeal under section 36-10 subsection 3 of the Dispute Act (a) and (c). The appeal concerns issues with significance beyond the scope of the current case and points at serious flaws in the District Court's ruling.

(31) The District Court has failed to assess and consider the case under the principles drawn up by the European Court of Human Rights in its Grand Chamber judgment 10 September 2019 *Strand Lobben and Others v. Norway* and subsequent case-law.

(32) Family reunification is the basic point of departure in child welfare cases and is linked to the biological principle. There is no conflict between this principle and the consideration of the child's best interests.

(33) There is a very high threshold for making exceptions from the biological principle. This applies even when the placement in foster care is expected to be long-term. The threshold is particularly high in matters involving forced adoption, which is a radical and irreversible interference. This requires a large likelihood that there is a pressing need to sever the family ties.

(34) The State has a positive duty to apply measures enabling continued contact between the child and the biological parents. Adoption must be the last resort. Contact rights must be stipulated with the aim of family reunification in mind.

(35) The District Court has not followed these principles. The threshold for adoption has been set too low. The significance of shortcomings in the preceding care order should have been addressed. The procedural requirements of the European Court of Human Rights in these types of cases have also not been met. The basis for decision-making is weak because of absent or inadequate expert reports. The District Court also failed to assess whether the limited access and sparse contact between the mother and the child were due to factors for which the authorities were responsible, such as inadequate assistance measures.

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

> **"X Court of Appeal's decision of 12 August 2019 is set aside."**

(37) The appellant – *B* – contends:

(38) The father endorses the mother's arguments that the Court of Appeal erred in not granting leave to appeal and in its interpretation of Article 8 the Convention. B also contends that the Court of Appeal should have granted leave to appeal to clarify whether section 4-20 of the Child Welfare Act on contact visits after adoption must be interpreted restrictively. It is unreasonable that contact visits may only be arranged upon the adoptive parents' consent, and the father has no legal remedies at his disposal to fight the refusal.

(39) B invites the Supreme Court to issue the following order:

"X Court of Appeal's decision of 12 August 2019 is set aside."

(40) The respondent – *Y municipality* – contends:

(41) The Court of Appeal found correctly that the conditions for granting leave to appeal were not met. The District Court's judgment is not seriously flawed and the appeals do not raise issues of significance beyond the current case.

(42) Any issues of principle raised in the case will in any case be clarified during the Supreme Court's grand chamber proceedings. Moreover, there is no basis for a restrictive interpretation of section 4-20 (a) of the Child Welfare Act on contact visits, and the Court of Appeal did not err in refusing leave to appeal to have this issue clarified.

(43) The District Court has applied section 4-20 of the Child Welfare Act on removal of parental responsibilities and adoption in line with the case-law of the European Court of Human Rights. Adoption under the provision's subsection 3 depends on a balancing between the biological principle and the consideration of the child's best interests. The factors included in the balancing exercise, and thus the threshold for adoption, have developed from an interaction between the Supreme Court's case-law and that of the Court. Recent case-law of the Court does not suggest that the Supreme Court has to adjust this threshold.

(44) According to the Convention, the goal of reunification does not apply if the parents are particularly unfit or when the child has been separated from them for a considerable period of time. The District Court's starting point and application of the law are therefore compatible with the Court's case-law and method.

(45) The Convention's procedural requirements have also been met. The District Court had a solid factual basis for evaluating the child's vulnerability and the mother's lack of caring skills. An updated report had been prepared by the court-appointed expert. The various interests and considerations were duly discussed and balanced. The parents were represented by an advocate and were able fully to present their case.

(46) Y municipality invites the Supreme Court to issue the following order:

"The appeals are dismissed."

(47) The third-party intervener – *KS (the Norwegian Association of Local and Regional Authorities)* – contends:

(48) KS endorses the municipality's contentions. In a municipal sector perspective, it is also important to emphasise both the responsibility and the many tasks the municipalities have involving children. Decisions in accordance with the Child Welfare Act raise difficult

questions. The local authorities must have a margin of appreciation when making such decisions. On many points, the municipality's interests coincide with the interests of the parents and the child.

(49) KS invites the Supreme Court to issue the following order:

> **"The appeals are dismissed."**

(50) *The State represented by the Ministry of Justice and Public Security* contends:

(51) The State does not have an opinion as to how the individual cases should be solved, but stresses that the provisions in the Child Welfare Act cannot be set aside or interpreted restrictively in light of the Constitution or international law. Measures under the Child Welfare Act are not in themselves incompatible with the Convention.

(52) In the State's opinion, *Strand Lobben and Others v. Norway* is not a turning point in Convention case-law. Article 8 primarily lays down requirements for the procedure of the County Boards and the courts, including with regard to the decision-making process.

(53) It is appropriate that the Supreme Court gives guidance for the application of the legislative provisions in line with the guidelines from the European Court of Human Rights. According to Convention case-law, it must appear from the reasoning that a thorough assessment has been made of the entire family situation. Special requirements apply when the goal of reunification seems to have been abandoned. Furthermore, it must be explained why a less radical measure has not been considered sufficient, why the child is vulnerable, if this is a relevant issue in the case, and how the vulnerability manifests itself.

(54) The State represented by the Ministry of Justice and Public Security has not requested any specific court conclusion.

(55) After the Court of Appeal decided the case, the Court has handed down several new judgments, including the mentioned Grand Chamber judgment *Strand Lobben and Others v. Norway*. Apart from that, the case mainly stands as it did in the Court of Appeal.

My opinion

The rules on the Court of Appeal's decision to grant leave to appeal in child welfare cases

(56) The Supreme Court is to clarify whether the Court of Appeal was correct in refusing to hear the mother's and the father's appeals against the District Court's judgment. Leave to appeal in child welfare cases is regulated in section 36-10 subsection 3 of the Dispute Act. The provision is found in chapter 36 on cases involving administrative coercive measures in the health and social services, and reads:

> **"(3) An appeal against the judgment of the District Court in cases concerning the County Board's decisions pursuant to the Child Welfare Services Act requires the leave of the Court of Appeal. Leave can only be granted if:**
> **a) the appeal concerns issues which are of significance beyond the scope of the current case,**
> **b) there are grounds to rehear the case because new information has emerged,**
> **c) the ruling of the district court or the procedure in the district court are seriously flawed, or**

d) the judgment provides for coercion that has not been approved by the County Board."

(57) Hence, the Court of Appeal may only grant leave to appeal if at least one of the conditions in (a)–(d) is met.

(58) As mentioned, neither of the parents invoked any of the conditions in section 36-10 subsection 3 in their appeals to the Court of Appeal. However, when the parties have a limited right of disposition in the action, the court has a different responsibility than usual and may rule beyond the parties' grounds for appeal and contentions, see section 11-4 of the Dispute Act.

(59) The Supreme Court ruling HR-2017-776-A, particularly in paragraphs 51–52 and 57–58, gives a thorough account of the requirements for the Court of Appeal's reasons for refusing leave to appeal under section 36-10 subsection 3. Read in context, I interpret the premises to mean that the consideration of due process suggests, according to the circumstances, that the Court of Appeal must present thorough grounds for concluding that the conditions in section 36-10 subsection 3 (c) are not met, irrespective of what has been contended in the appeal on this subject.

The Supreme Court's examination of the Court of Appeal's decision

(60) In an appeal against the Court of Appeal's refusal to grant leave to appeal under section 36-10 of the Dispute Act, the Supreme Court may only rule on the Court of Appeal's procedure, see section 29-13 subsection 5 of the Dispute Act and the Supreme Court ruling HR-2017-776-A paragraph 27. This includes examining whether the statutory conditions for a hearing in the Court of Appeal are met. The Supreme Court has full jurisdiction in this regard.

(61) 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.

(62) A special characteristic of the present case is that the submissions to the Supreme Court are mainly based on *Strand Lobben and Others v. Norway*, the Grand Chamber judgment handed down by the European Court of Human Rights on 10 September 2019 – about one month *after* the Court of Appeal's decision. The Supreme Court is then to examine the case based on sources of law that did not exist at the date of the Court of Appeal's ruling. I stress that whether or not *Strand Lobben* represents a development in the Court's case-law, which means that Norwegian case-law must be changed accordingly, is a different question to which I will return. Apart from that, I should add that it is not a condition for setting aside the Court of Appeal's ruling that the Court of Appeal has committed errors deserving of critique.

(63) Questions have been raised in the case on which factual grounds the Supreme Court is to base its ruling. The municipality has submitted that the information presented to the Supreme Court must be decisive, which means that any *factual changes* after the Court of Appeal's ruling may also be included. The appellants contest this.

(64) I cannot see that the issue of new information emerging after the Court of Appeal's ruling is clarified in any Act or preparatory works.

(65) In my opinion, systemic considerations suggest that the Supreme Court, when examining an appeal against the Court of Appeal's decision under section 36-10 subsection 3 (c) of the Dispute Act, should not take into consideration new factual circumstances. The subject of appeal is the Court of Appeal's decision, and the Supreme Court has only jurisdiction to rule on the Court of Appeal's procedure, see section 29-13 subsection 5 of the Dispute Act and the Supreme Court ruling HR-2017-776-A paragraph 27. This implies that the ruling must be examined based on facts as they were presented to the Court of Appeal. The Supreme Court's task is not to act as a fourth instance, but to examine whether the procedure of the Court of Appeal has been adequate.

(66) However, according to section 36-10 subsection 3 (b) of the Dispute Act, the Court of Appeal may grant leave to appeal when "there are grounds to rehear the case because new information has emerged". When no new information has emerged after the Court of Appeal's refusal to grant leave, the Supreme Court may, according to the circumstances, set aside the Court of Appeal's decision since the conditions in section 36-10 subsection 3 (b) of the Dispute Act are thus met, see for instance the Supreme Court decision HR-2018-1252-U paragraph 14 with further references. This provision has not been invoked in the case at hand.

(67) Section 36-10 subsection 3 (b) of the Dispute Act will cover situations in which important new information has emerged that in itself suggest a rehearing. This limits the need for the Supreme Court, also in other respects, to consider new facts when examining the Court of Appeal's refusal of leave to appeal. The possibility of the private parties to demand new proceedings after twelve months, see section 4-19 final subsection and section 4-21 final subsection first sentence of the Child Welfare Act, also implies that the need is limited.

(68) My conclusion is therefore that, in this case, information regarding factual circumstances which emerged after the Court of Appeal's ruling may not be taken into account.

Whether the District Court's ruling or procedure is seriously flawed – general remarks on Article 8 of the Convention and the Child Welfare Act

Introduction

(69) The main question to be answered in the case is whether the Court of Appeal should have agreed to hear the appeals because – in light of the case-law of the European Court of Human Rights – it may amount to a violation of Article 8 of the Convention if the District Court's judgment remains the final ruling in the case. When considering this issue, I find it natural to take section 36-10 subsection 3 (c) as a starting point and assess whether the District Court's ruling or procedure is seriously flawed. I will then return to the condition under section 36-10 subsection 3 (a) – that the appeal must raise issues of significance beyond the current case.

Some starting points

Article 8 of the Convention on the right to family life

(70) I take as a starting point Article 8, which is central to the case. The provision states that everyone has a right to respect for his or her family and private life, and reads:

> **"1. Everyone has the right to respect for his private and family life, his home and his correspondence.**

> **2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."**

(71) In Article 8 (1) it is stated that everyone has a right to family life. Measures under the Child Welfare Act, such as care orders, removal of parental responsibilities and adoption, undoubtedly constitute an interference with the children's and the parents' family life. Article 8 is therefore applicable.

(72) According to Article 8 (2), an interference with someone's life will not amount to a violation if three conditions are met. In our case, it is undisputed that the interference is in accordance with the law, and that it pursues a legitimate aim, see the Convention's reference to inter alia the protection of health or morals and the rights of others. The disagreement revolves around the third condition – that the measure must be *necessary in a democratic society*.

(73) First, I recall that the issues in the case at hand have become topical as a consequence of the Court's Grand Chamber judgment in the case of *Strand Lobben and Others v. Norway* on adoption, handed down on 10 September 2019 – after the Court of Appeal's ruling. A majority of thirteen judges found that Article 8 had been violated, while four judges reached the opposite result. The majority consisted of two fractions of seven and six judges. I will return to this.

(74) Later in 2019, the Court handed down three Chamber judgments finding a violation: judgment 19 November 2019 *K.O. and V.M. v. Norway* on care order and contact rights, judgment 17 December 2019 *A.S. v. Norway* on care order and judgment 17 December 2019 *Abdi Ibrahim v. Norway* on adoption. *A.S. v. Norway* is final. Two judgments were also handed down on 10 March 2020: *Pedersen and Others v. Norway* on adoption and *Hernehult v. Norway* on care order, neither of which is final. In both cases, Article 8 was considered violated. The five Chamber judgments are unanimous and based on the general principles in *Strand Lobben*.

(75) In *Strand Lobben* paragraphs 202 to 213, the Court reproduces the general principles following from Convention case-law. There was no disagreement about these principles in the Grand Chamber. The following is stated in paragraph 203 with regard to the requirement that the interference must be necessary:

> **"… the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify that measure were relevant and sufficient for the purposes of paragraph 2 of Article 8. ... The notion of necessity further implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests."**

(76) This implies that the reason given for the measure must be relevant and sufficient. Furthermore, the condition that the interference must be necessary, has been interpreted as a requirement of proportionality between the aim and the means employed, implying that a fair balance must be struck between competing interests.

(77) In paragraph 204, the Court reiterates that there is a broad consensus, including in international law, in support of the idea the best interests of the child are of paramount importance in all decisions concerning children. At the same time, it follows from paragraph

205 that regard for family unity and family reunification in the event of separation are inherent considerations in the right to respect for family life.

(78) These two paragraphs illustrates that both the consideration of the best interests of the child and of family reunification must be included in the balancing exercise under Article 8 (2). I will return to this.

Balancing of various interests under Norwegian law

(79) Article 102 of the Constitution establishes that everyone has a right to respect for their privacy and family life. Furthermore, Article 104 subsection 2 states that the best interests of the child shall be a fundamental consideration in actions and decisions that affect children. Like Article 8 of the Convention, the Constitution deals with the principles of family life as well as the best interests of the child.

(80) As I see it, it is not necessary to address the Constitution any further. I emphasise nonetheless that both Article 104 of the Constitution and the UN Convention on the Rights of the Child express the paramount importance of safeguarding the best interests of the child or – as laid down in Article 3 (1) of the Convention – that the best interests of the child "shall be a primary consideration". This principle is also expressed in Article 9, which on certain conditions allows for separating the child from his or her parents if such separation is necessary for the best interests of the child. The Convention on the Rights of the Child is – like the Convention on Human Rights – incorporated into Norwegian law and takes precedence over other legal provisions that conflict with it, see section 2 (4) and section 3 of the Human Rights Act. The Supreme Court has applied the Convention on the Rights of the Child in many cases, and great emphasis has been placed on the General Comments by the Committee on the Rights of the Child, including no. 14 "on the right of the child to have his or her best interests taken as a primary consideration". The principle of the best interests of the child is also expressed in section 4-1 of the Child Welfare Act.

(81) The more overall balancing of the various considerations relating to adoption, which is the main question in the case at hand, is formulated as follows in the Supreme Court judgment Rt-2015-110 paragraph 46 and repeated in several subsequent judgments:

> **"A forced adoption has a strong impact on the biological parents. The emotional pain of your child being adopted is usually profound. The family ties severed by forced adoption are protected under Article 8 of the Convention and Article 102 of the Constitution. Adoption is also a radical measure for children, which under Article 21 of the Convention on the Rights of the Child may only be decided if this is in the best interests of the child. On the other hand, the interests of the parents must yield where crucial factors relating to the child indicate adoption, see Article 104 subsection 2 of the Constitution and Article 3 (1) of the Convention on the Rights of the Child. …"**

(82) Thus, the starting point are the family ties – often referred to as the biological principle – both for the parents and for the child. Included here is also the child's interest in having a family life with his or her biological parents, and one must bear in mind that adoption is therefore also a radical measure towards the child. However, the child may have interests that come in conflict with those of the parents, and their interests must then yield to crucial factors relating to the child.

(83) Nonetheless, there is reason to note that from time to time, depending on the case, the perspective in judgments from the European Court of Human Rights to some extent differs

from that in decisions made by Norwegian authorities and courts:

(84) In the applications to the European Court of Human Rights, the general contention is that the child welfare services and national courts have placed too little emphasis on the family bonds. These interests are therefore often essential in the individual balancing in the Court's judgments, although the Court consistently emphasises the paramount importance of the best interests of the child, see for instance *Strand Lobben* paragraphs 204 and 220.

(85) In Norwegian decisions, the consideration of family ties tends to be more of an understated and partially unspoken precondition, while the consideration of the child's best interests is more prominent, although the Supreme Court has, as mentioned, emphasised the importance of family ties in its rulings.

(86) *Strand Lobben* illustrates the importance of such an underlying precondition like the consideration of family ties – both for the parents and for the child – being clearly visible in the reasons given by the child welfare services, the county boards and the courts. In the individual case, it must be clearly stated that these considerations have been assessed, and which weight they have been given when balanced against factors related to the child. In *Strand Lobben* paragraph 220, it is stated that Court is fully conscious of the primordial interest of the child in the decision-making process, but also that the proceedings must show that a genuine balancing exercise has been performed between the interests of the child and its biological family.

Section 4-20 of the Child Welfare Act

(87) Section 4-20 of the Child Welfare Act on removal of parental authority and adoption lays down a number of requirements, including the following in (a) and (b):

> **"If the County Social Welfare Board has made a care order for a child, the County Social Welfare Board may also decide that the parents shall be deprived of all parental authority.**
> **…**
>
> **When an order has been made depriving the parents of parental authority, the County Social Welfare Board may give its consent for a child to be adopted by persons other than the parents.**
>
> **Consent may be given if**
>
> **a) it must be regarded as probable that the parents will be permanently unable to provide the child with proper care or the child has become so attached to persons and the environment where he or she is living that, on the basis of an overall assessment, removing the child may lead to serious problems for him or her and**
>
> **b) adoption would be in the child's best interests and …"**

(88) Further clarification and specification of the requirements are provided in the Supreme Court judgments Rt-2007-561, Rt-2015-110, Rt-2015-1107, HR-2018-1720-A and HR-2019-1272-A. In these cases, Convention case-law has been a weighty source of law. The Supreme Court has taken the Court's judgments as a starting point and later maintained or adjusted its case-law depending on how the Court has evaluated Norwegian rulings, and in light of judgments concerning other countries.

(89) An example of such an adjustment to Convention case-law, is the requirement laid down by the Supreme Court that the consideration of the child's best interests must be supplemented by a requirement that adoption can only take place if there are "particularly weighty reasons", see Rt-2007-561 paragraph 51. This judgment was later brought before the Court, see judgment 28 October 2010 *Aune v. Norway*, where no violation of Article 8 was found.

(90) The requirement of "particularly weighty reasons" has been maintained in subsequent Supreme Court case-law, see Rt-2015-110 paragraph 46, Rt-2015-1107 paragraph 44, HR-2018-1720-A paragraph 42 and HR-2019-1272-A paragraph 62. Moreover, the term is specified in Rt-2015-1107, where the Supreme Court found that the adoption issue should be postponed until the child's needs and relationship to its biological father had been further clarified. As for the importance of the biological bonds, the following is stated in paragraph 44 second sentence:

> **"The factors relating to the child that suggest adoption must be so strong that the consideration of maintaining the biological ties between the child and its parents must yield."**

(91) Here, I mention that the Court in *Abdi Ibrahim v. Norway* concerning adoption applies the evaluation standard that "the circumstances of the case were so exceptional that they justified a complete and final severance of the ties between [the child] and the applicant", see paragraph 57. This is very similar to the wording in Rt-2015-1107 paragraph 44.

(92) I emphasise that in cases where the child welfare services request a consent to adoption, while the parents have not requested a revocation of the care order, the choice is between continued foster care and adoption. Thus, in these cases it is not a question of choosing between reunification on the one side and adoption on the other, where all family ties are severed. This must be clear in the decision-making process. The same applies if the parents in connection with the adoption case demand a revocation of the care order, but without success: The alternative to reunification is still continued foster care, not adoption.

More with regard to the balancing exercises in the Court's case-law and in Norwegian law

The case-law of the European Court of Human Rights

(93) I have already presented the main considerations to be balanced against each other according to *Strand Lobben and Others v. Norway* paragraphs 204 and 205 when the authorities implement measures separating children from the parents – the best interests of the child and the regard for family unity. On this general balancing exercise, paragraphs 206 and 207 set out the following:

> **"206. In instances where the respective interests of a child and those of the parents come into conflict, Article 8 requires that the domestic authorities should strike a fair balance between those interests and that, in the balancing process, 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 … .**
>
> **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 … 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 … ."

(94) These paragraphs provide the general principles for the fair balance that must be struck between the interests of the child and those of the parents. The principles have also been applied in earlier judgments from the Court. In Norwegian law, they apply in connection with care orders, removal of parental responsibilities and adoption.

(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.

(96) For a *care order*, this implies that interference based on the substantive conditions in section 4-12 of the Child Welfare Act must be in accordance with the requirement of very exceptional circumstances. I mention that the States have a wide margin of appreciation in connection with care orders, but that it is not unfettered, see for instance *Strand Lobben* paragraph 211.

(97) A care order must be considered a temporary measure, and national authorities have a duty to implement measures that facilitate reunification as soon as feasible without setting aside the best interests of the child. In cases where the Court has found a violation in Norwegian child welfare cases, it has often related to the requirement of temporariness and reunification, see for instance *Strand Lobben* paragraph 208. I will return to this.

(98) As regards the balancing of interests in connection with *removal of parental responsibilities and adoption*, which is a particularly far-reaching measure, the Court maintains the following principle in paragraph 209:

"As regards replacing a foster home arrangement with a more far-reaching measure such as deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicants' legal ties with the child are definitively severed, it is to be reiterated that 'such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests' (see, for example, *Johansen*, cited above, § 78, and *Aune*, cited above, § 66). … .»

(99) Here, the Court emphasises that the removal of parental responsibilities and adoption are subject to strict requirements, since these measures entail that the family ties are definitively severed. They should only be applied in exceptional circumstances and be motivated by an overriding requirement pertaining to the child's best interests. These formulations, too, have been used by the Court in a large number of cases.

(100) I add that in cases involving removal of parental responsibilities and adoption, the authorities have a narrower margin of appreciation than in care order cases, which means that the Court exercises a stricter scrutiny, see for instance *Strand Lobben* paragraph 211. The same applies

to further limitations beyond a care order that effectively prevents access and entails the danger that the family relations between the parents and a child are effectively curtailed. This is illustrated in the Court's judgment 6 September 2018 *Jansen v. Norway* regarding a care order without contact rights, where a violation of Article 8 was found, see particularly paragraphs 93 and 103–104.

Norwegian case-law

(101) As for adoption in particular, Norwegian case-law is based on the substantive conditions for such an interference in the case-law of the European Court of Human Rights. In Rt-2015-110 paragraph 46, the Supreme Court refers to *Aune v. Norway*, where – as mentioned – no violation was found, and states that the requirement of "particularly weighty reasons" for adoption listed in section 4-20 of the Child Welfare Act expresses the same as "an overriding requirement" pertaining to the child's best interests. Nor in *Strand Lobben* did the Court have any comments on the application of the conditions for consenting to adoption in the Norwegian judgment.

(102) I add that, while the Court in *Strand Lobben* paragraph 209 states that such measures should only be applied "in exceptional circumstances", the wording in paragraph 207 is "very exceptional circumstances". A similar issue is commented in HR-2019-1272-A paragraph 70, where the Supreme Court states that the Court's varying language constitute a part of the established state of the law, by which Norwegian case law is motivated. I agree.

(103) Against this background, I cannot see that *Strand Lobben* contains statements demanding rephrasing of the general *substantive* conditions for adoption laid down by the Supreme Court based on section 4-20 of the Child Welfare Act and the case-law of the European Court of Human Rights.

(104) In this context, I attach some importance to the fact that the criticism from the majority – seven judges – in the majority fraction in *Strand Lobben* does not concern the general conditions for consenting to adoption under the Child Welfare Act, but relates to the individual proceedings. The majority found a violation in respect of the decision-making process and the reasoning. The other six judges in the majority fraction also argue along procedural lines, but have, in addition, critical remarks of a substantive nature.

(105) Furthermore, I recall that also in the three unanimous Chamber judgments against Norway from 2019, Article 8 was found to have been violated due to the unsatisfactory decision-making process and reasoning. And in *Abdi Ibrahim v. Norway*, which concerned adoption, the evaluation standard was very similar to the wording in Rt-2015-1107 paragraph 44, and the conditions for consenting to adoption under the Child Welfare Act were not commented.

(106) It is also significant that Rt-2015-110 was evaluated in *Pedersen and Others v. Norway* concerning adoption. I will first highlight that a violation of Article 8 was found because the authorities in an early phase had not adopted adequate measures with a view to reunification, to which I will return. However, there is also reason to note the Court's statement to the effect that the factors on which the Supreme Court had relied when consenting to adoption were "relevant factors", see paragraph 64.

(107) Here, the Court refers to *Aune v. Norway*, which I have just mentioned, and to the judgment 10 October 2002 *Johansen v. Norway*. In the latter case, the question was whether Norwegian

authorities had violated Article 8 by consenting to adoption of the applicant's daughter despite the judgment 7 August 1996 *Johansen v. Norway*, in which the Court found that deprivation of parental rights was a violation of Article 8. The Court declared the new application inadmissible as being manifestly ill-founded and had no objections to the legal requirements for adoption in Norwegian law.

(108) *Pedersen and Others v. Norway* is also of interest, as it demonstrates that the Court does not consider it to be its task to assess whether adoption or long-term foster care is best for the child, see paragraph 65:

> **"In addition, the Court reiterates that it has previously refrained from attempting to untangle the opposing considerations inherent in questions concerning whether adoption or long-term foster care may be in the best interests of a child in a specific case (see, in particular, *P., C. and S. v. The United Kingdom*, no. 56547/00, § 136 …).**"

(109) Against this background, I consider that the general substantive conditions for consenting to adoption in Norwegian case-law correspond to those in Convention case-law.

(110) The overall evaluation standard to be applied in adoption matters may thus be expressed as follows: The reasons for consenting to adoption rather than continued foster care must be so weighty that they justify a complete severance of the family ties.

(111) Inherent in this standard is both the protection of the child's best interests, including the regard for the child's family life with its parents, and the protection of the parents' family life with their child.

(112) Even if the evaluation standard – as it is expressed in Supreme Court case law – may be maintained, adjustments are still called for in Norwegian child welfare practice. Some judgments by the Court have demonstrated that the decision-making process, the balancing exercise or the reasoning has not always been adequate. In particular, the Court has found violations with regard to the authorities' duty to work towards reunification of the child and the parents.

(113) There is also room for a somewhat different perspective. In child welfare cases, the Court balances the proceedings as a whole against the requirements in Article 8. In several cases, a violation has been found because the authorities committed errors at an early stage, for instance by failing to apply appropriate measures to facilitate reunification. The question for the Court to answer is whether the national authorities – the child welfare services, the County Social Welfare Board or the courts – have fulfilled their obligations deriving from the right to family life in Article 8. If a violation is found, it follows from the system of the Convention and Convention case-law that the Court's conclusion in its judgment briefly states that Article 8 has been violated. The conclusion does normally not state explicitly the specific or general consequences to be drawn from of the violation, for instance the effect it has for the latest Norwegian ruling in the case. It depends on an interpretation of the judgment as a whole, primarily the reasoning. This is assessed in connection with the Contracting States' implementation of the judgment under the supervision of the Council of Europe's Committee of Ministers.

(114) When Norwegian courts, and ultimately the Supreme Court, review orders issued by the child welfare authorities, they apply the Child Welfare Act in line with the principle of the best interests of the child, see Article 104 subsection 2 of the Constitution, Articles 3 and 9 of the

Convention on the Rights of the Child and section 4-1 of the Child Welfare Act, which I have already mentioned. At the same time, case-law must be in accordance with the European Convention on Human Rights, and the Supreme Court has adjusted its interpretation of the Child Welfare Act to the Court's case-law.

(115) If errors have been committed by the child welfare services or the County Board at an earlier stage of the proceedings, the court may, depending on the circumstances, seek to remedy such errors by setting aside a care order or an adoption order, for instance due to inadequate relief measures, or because the basis for the decision or its reasoning is unsatisfactory. In other cases, the court may change a previous decision, for example by increasing the granted access. However, if no such options are available, the court will, depending on the situation, have to choose foster care or adoption if it is clear at the time of the judgment that this is in the best interests of the child, despite previous mistakes during the consideration of the case. To which extent not just the error, but also the final Norwegian ruling, must be regarded as a violation Article 8, if the Court finds a violation at a later stage, thus relies on an interpretation of the Court's judgment.

(116) Also to prevent that such a situation occurs before the review instances, it is important that the child welfare services and the County Board – in their work towards finding the measures that best serve the child – from the very outset consider all relevant requirements laid down in Article 104 subsection 2 of the Constitution, Article 8 of the Convention, the Convention on the Rights of the Child and chapter 4 of the Child Welfare Act.

The wish for increased use of adoption

(117) In Proposition to the Odelsting No. 69 (2008–2009) pages 33–34, the Ministry of Children and Equality proposed that the practice should be adjusted to better facilitate that children who need it are given the possibility to be adopted by their foster parents. Before the Supreme Court, the mother's counsel has maintained that the goal of increased use of adoption is incompatible with the Court's case-law.

(118) In this regard, I note that according to the Proposition pages 33-34, the reasoning behind the proposal was that research shows that for *some* children, adoption may give safer and more predictable upbringing conditions than long-term foster care. And, as the Ministry did not consider it necessary to amend the Child Welfare Act to change the practice, it referred to the intrusive nature of the case and the fact that "the Convention and the Court's case-law set the framework for the use of adoption as a child welfare measure". Thus, an individual assessment must be made within the limitations provided by the Court's case-law.

(119) These views are in line with the Supreme Court judgment Rt-2015-110 paragraphs 47–49 and 57, where it is stated that the wish for increased use of adoption and the possibility of open adoption with contact visits under section 4-20a of the Child Welfare Act does not imply that the threshold for adoption has been lowered. I also refer to HR-2018-1720-A paragraph 65, which emphasises the need of an individual assessment in each case if the use of adoption increases.

The goal of family reunification

Norwegian law

(120) I take section 4-16 of the Child Welfare Act as a starting point, which contains provisions on *follow-up of care orders*. The duties of the child welfare services include supervising the development, evaluating possible changes, offering the parents guidance and follow-up as well as facilitating reunification between the parents and the child – often referred to as a revocation of the care order – where the regard for the child does not suggest the opposite.

(121) In Rt-2012-967 concerning a care order revocation, the Supreme Court considered inter alia the child welfare services' continuous duty to follow-up after having ordered measures. In paragraph 23, reference was made to Proposition to the Odelsting No. 64 (2004–2005) section 4.1, stating the following with regard to section 4-16:

> **"The child welfare services shall ensure that the placement in foster care does not become more long-term than appropriate with the best interests of the child in mind. In the cases where the child welfare services find that the conditions are no longer met, they have an independent duty to propose to the County Social Welfare Board that it revoke the care order, see section 4-21 of the Child Welfare Act."**

(122) The passage stresses the correlation with section 4-21 of the Child Welfare Act, which reads:

> **"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."**

(123) In this regard, I also mention Rt-2012-1832 concerning contact rights in connection with a care order. Here, the Supreme Court stresses the starting point that children and parents are entitled to have contact and that this derives from the biological principle, see paragraphs 26–28. In paragraph 29, a reference is also made to Norwegian Official Report 2012: 5, where a committee had proposed introducing "the development-supported bonding principle" and recommended that this principle take "precedence over the biological principle" in cases where the bonding and affiliation quality prevents the child's development. The Supreme Court states the following in paragraph 30:

> **"The recommendation has been opposed, as several hearing instances have been critical. Against that background, it is unclear what will come out of the committee's work. The decision in the present case must in any case be motivated by applicable law and, as such, the report does not give much guidance."**

(124) The proposals in the report have not been followed up. The goal of reunification is expressly stated in the Child Welfare Act and in the Supreme Court's case-law. Furthermore, I have noted that the Ministry in Proposition to the Storting 169 L (2016–2017) page 65, from which the amendment of 20 April 2018 to the Child Welfare Act derived, stated that a care order is a temporary measure as a starting point. A different matter is that the specific evaluations in individual cases may have shortcomings, to which I will return.

(125) As regards *access*, one should also note the consultation paper from the Ministry of Children and Families on a new Child Welfare Act from 2019, which on page 166 refers to an

unfortunate practice that has developed: In connection with long-term foster care for children under school age, a frequent practice has been to recommend contact sessions four to six times per year, without this "standard" being supported by research. I have also noted that the Ministry in its assessments and propositions on pages 171–172 emphasises that contact arrangements must not be motivated by uniform and general evaluation standards, for instance with regard to the extent or quality of annual contact sessions. Instead, an individual assessment must be made based on the best interests of the child. I agree, and this is also the position in the Court's case-law, which I will now address.

The European Convention on Human Rights

(126) According to the Court's case-law, family reunification is an inherent consideration under Article 8 of the Convention and must be the starting point for any measure separating children from their parents. The following general statement is provided in *Strand Lobben and Others v. Norway* paragraph 205:

> **"At the same time, it should be noted that regard for family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Article 8. Accordingly, in the case of imposition of public care restricting family life, a positive duty lies on the authorities to take measures to facilitate family reunification as soon as reasonably feasible (*K. and T. v. Finland*, cited above, § 178)."**

(127) In paragraph 207, it is established that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family. This view is amplified in paragraph 208:

> **"Another guiding principle is that a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child … . The above-mentioned positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child … ."**

(128) It follows from paragraphs 205 and 208 that a care order is to be a temporary measure, and that the domestic authorities have a positive duty to take measures with a view to family reunification as soon as feasible, while always bearing in mind the best interests of the child.

(129) On the other hand, after a certain point, family reunification is no longer an option. It cannot take place if the parents have proven particularly unfit or the measure will harm the child's health and development, see *Strand Lobben* paragraph 207 on these two scenarios. According to paragraph 208, family reunification may also be precluded when a considerable period of time has passed since the care order, and the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited. Decisive weight cannot always be attached to the fact that a parent has recovered his or her capacity to assume care, see *Pedersen and Others v. Norway* paragraph 65 with further references.

(130) The fact that the circumstances may preclude reunification, is also expressed in *Strand Lobben* paragraph 209, where the Court sums up the following with regard to adoption:

> **"It is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family (see *R. and H. v. The United Kingdom*, no. 35348/06, § 88, 31 May 2011)."**

(131) The Court has applied the general principles on reunification in many Norwegian cases. In *Strand Lobben* paragraph 220 it is stated that the authorities should seriously contemplate any possibility of the child's reunification with his biological family, which did not seem to have been done in the Court's opinion. Violations were also found in subsequent cases, because the decision-making process or reasons given left the impression that the authorities, contrary to their positive duty, had given up reunification as the ultimate goal, for example by imposing a strict visiting regime alienating the child from its parents, by failing to ensure the necessary quality of the visits and thus preventing the parents from demonstrating their parenting skills, or by applying inadequate assistance measures. Such factors may cement the situation and complicate reunification. I refer to *K.O. and V.M. v. Norway* paragraph 68 as well as *A.S. v. Norway* paragraphs 62 and 63, both concerning a care order and contact rights, as well as *Abdi Ibrahim v. Norway* paragraph 61 and *Pedersen and Others v. Norway* paragraph 68, both concerning adoption.

(132) In several cases where the Court has found a violation, it is stated that the child welfare services' conclusion that the placement must be considered to be long-term, and thus the imposition of a very strict visiting regime, should have been drawn after careful consideration and also taking account of the authorities' positive duty to take measures to facilitate family reunification. I mention *A.S. v. Norway*-judgment paragraph 62, *Abdi Ibrahim v. Norway* paragraph 61, cf. also *Pedersen and Others v. Norway* paragraph 67–68, as well as *Hernehult v. Norway* paragraph 74 regarding placement of three children – here too, the domestic authorities had failed to make a sufficient individual assessment of each child, see paragraph 76.

(133) As mentioned, the aim of family reunification does not only entail a requirement of *frequency*, but also of *quality*. This is illustrated in *Strand Lobben*, where the Court in paragraph 221 stated that the contact sessions had not been particularly conducive to letting the mother freely bond with the child. And although the contact sessions had often not worked well, it appeared that little was done to try out alternative arrangements for implementing contact. The last statement exemplifies that there may be a need for the child welfare services to implement assistance measures. I also refer to *Pedersen* paragraph 69 and *Hernehult* paragraph 73.

(134) Consequently, it follows from Convention case-law that as long as family reunification is the goal, the purpose of access is not only to allow the child to know who his or her parents are, but also to maintain the possibility of reunification. And even if family reunification is no longer the goal, the child and the parents still have the right to respect for their family life, see *Abdi Ibrahim* paragraph 57.

The effect of the authorities' failure to fulfil the duty to facilitate family reunification

(135) *Strand Lobben* paragraph 208 concerns, among other things, the situation that the authorities have not done enough to fulfil their duty to facilitate family reunification:

> "**Thus, where the authorities are responsible for a situation of family breakdown because they have failed in their above-mentioned obligation, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child … .**"

(136) The principle is repeated in *Abdi Ibrahim* paragraph 61 last sentence and in *Pedersen* paragraph 68: When the authorities have failed in their obligation to take measures to

facilitate family reunification, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child. The authorities will still have a duty to work towards strengthening the bonds.

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

(138) If the situation involving continued foster care instead of adoption may harm the child, the paramount importance of the best interests of the child, expressed among other places in *Strand Lobben* paragraphs 204 and 206, suggests that adoption may be implemented despite any errors made by the authorities, provided that it is based on a thorough assessment.

(139) The principle that the authorities cannot assert an existing situation because they have previously acted incorrectly, applies to errors concerning their failure to fulfil their positive duty to facilitate reunification. However, errors that have not affected the prospects of reunification are in a different category, for instance certain types of procedural errors.

The significance of the parents' use of legal remedies

(140) It follows from the Court's general principles, including paragraph 212 in *Strand Lobben*, that parents' exercise of judicial remedies with a view to obtaining family reunification with their child cannot as such be held against them. This is a consequence of the parents' right to be involved in the decision-making process, **so** that they to an adequate extent may safeguard their interests and be able to present their case. This must apply in particular if errors have been committed during the legal proceedings. In its individual assessment, the Court noted in paragraph 223 that it could not be held against the mother that she had failed to appreciate that repeated legal proceedings could be harmful for the child in the long run, considering the lack of a fresh expert examination.

(141) The expression "as such" suggests nonetheless that the principle in paragraph 212 is not absolute. If repeated legal proceedings undoubtedly will harm the child, it must – in light of the paramount importance of the best interests of the child, see paragraph 204 and 206 – be possible to take this into account even if the parents cannot be reproached for their exercise of legal remedies. Such a standpoint must in any case be rooted in a thorough assessment.

Summarising remarks on reunification

(142) Based on the presentation of the Child Welfare Act as interpreted in case-law and judgments by the European Court of Human Rights, the status of the law may in my opinion be summarised as follows:

(143) Under both Norwegian law and the European Convention on Human Rights, the overall goal is to have the care order revoked and the family reunited. A care order is therefore always

temporary as a starting point. The authorities have a positive duty to actively strive to maintain the relationship between the child and the parents and to facilitate reunification. This implies that the authorities must monitor the development closely. Contact rights and assistance measures are crucial here. As long as reunification is the goal, the contact must be arranged to make this possible. The authorities are to ensure, to the extent possible, that the contact sessions are of a good quality. If the sessions do not work well, one must try out adjustments or alternatives, for instance arranging them elsewhere, or under guidance.

(144) As long as family reunification is the goal, the purpose of access is not only to ensure that the child knows who his or her parents are, but also to preserve the possibility of reunification. This requires a thorough assessment of the frequency and quality of the contact sessions. And even when reunification is not possible, it has an intrinsic value to maintain family bonds as long as it does not harm the child.

(145) In my opinion, and depending on the situation, the child welfare services should in principle not be prevented early in the process – when choosing where to place a child (section 4-14 of the Child Welfare Act) and preparing a care plan (section 4-15) – from assuming that the placement will be long-term. If siblings are involved, an individual assessment must be made with regard to each child. However, the extent of contact must in any case be determined with a view to a future return of the child to his or her biological parents. This applies until a thorough and individual assessment at a later stage demonstrates that this goal should be given up, despite the authorities' duty to facilitate reunification. At any rate, the frequency of the contact sessions cannot be determined according to a standard, and it must be borne in mind that a strict visiting regime may render reunification more difficult.

(146) It is crucial that the authorities do their utmost to facilitate family reunification. However, this goal may be abandoned if the biological parents have proved *particularly unfit*, see for instance *Strand Lobben* paragraph 207. Such a situation may also affect which measures the child welfare authorities need to apply. The interests of the child is also in this assessment of paramount importance. However, this does not automatically preclude contact altogether while the child is in foster care. The parents may be competent in contact situations, but lack the caring skills necessary for reunification. Maintaining the family ties, even if the goal of reunification has been given up, still has a value in itself.

(147) Secondly, the parents cannot request measures that may *harm the child's health and development*, see *Strand Lobben* paragraph 207. Adoption may therefore take place if it can be established that continued placement will harm the child's health or development. In addition, reunification may – without such damaging effects – be ruled out when a *considerable amount of time* has passed since the child was originally taken into care, so that the child's need of stability overrides the interests of the parents, see *Strand Lobben* paragraph 208. At any rate, the child welfare authorities and the courts must, before possibly deciding on adoption, make an individual assessment based on a solid factual basis and thorough proceedings.

(148) Accordingly, in these three situations, one must bear in mind that it is in the very nature of adoption that no real prospects for family reunification exist and that it is instead in the child's best interests to be placed permanently in a new family, see *Strand Lobben* paragraph 209.

Procedural guarantees – adequate basis for decision-making

Norwegian law

(149) Chapter 7 of the Child Welfare Act provides a number of procedural rules for the County Social Welfare Board. For instance, section 7-3 sets out that the County Board shall ensure that the evidence submitted provides an adequate factual basis for decision-making – this cannot be left to the parties to the case. Moreover, it is normal practice that that the child welfare services engage experts, see for instance section 4-3 subsection 4, and experts are also called before the County Board.

(150) The requirement of an adequate basis for decision-making also applies to the courts. According to section 21-3 of the Dispute Act, the court has a duty – in cases where public considerations imply limitations to the parties' right of disposition, see section 11-4, which is the case in child welfare cases – to ensure that the presentation of evidence creates an adequate factual basis for decision-making. Furthermore, it is provided in section 25-2 subsection 1 that the court may appoint experts "when such an appointment is necessary to establish a sound factual basis for the ruling in the case".

The European Convention on Human Rights

(151) According to long-standing case-law, the European Court of Human Rights examines the decision-making process when determining whether there has been a violation of Article 8, see in particular the general principles in *Strand Lobben* paragraphs 212 and 213.

(152) When assessing whether the measure is necessary under Article 8 (2), the Court will not only assess the final domestic proceedings; it will also assess whether the reasoning is well founded in light of the case as a whole. In *Strand Lobben*, this entailed that the Grand Chamber did not only observe the process leading to the authorisation of the adoption, but also the former proceedings and decisions relating to the care order, see paragraphs 148 and 152. Other Norwegian cases are also based on such an approach, most recently *Pedersen and Others v. Norway* paragraph 66.

(153) This suggests that previous errors cannot necessarily be disregarded when assessing an adoption order. In my opinion, this is well founded: Any errors made in early stages may be transmitted and be relevant to the assessment of the current situation. At the same time, this principle must entail a certain limitation, so that previous errors that have not affected the result cannot be given weight when assessing the case later. An example may be the failure to engage an expert at an early stage of the process when it is later clarified – by an expert report – that the parents' caring skills are inadequate with regard to the child's needs.

(154) Convention case-law has laid down several special requirements for the domestic proceedings. Whether or not they are met must be assessed individually. For example, it is stated in *Strand Lobben* paragraph 213 that it may be relevant that the domestic court has not appointed an *expert*, even though the courts are not generally required to do so. Whether or not this amounts to an error depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.

(155) One should also be careful about drawing conclusions as to the parents' caring skills and competence in contact situations based solely on *sparse* or *unsatisfactory contact*. This is

expressed in *Abdi Ibrahim* paragraph 63. In *Strand Lobben*, both the majority of seven judges and the faction of six judges were critical towards conclusions being drawn from contact arrangements that had not worked well. The sessions took place under supervision and with the foster mother present. The following is stated in paragraph 221:

> **"As regards the implementation of the contact arrangements, the Court also notes that these had not been particularly conducive to letting the first applicant freely bond with X, for example with regard to where the sessions had been held and who had been present. Although the contact sessions had often not worked well, it appears that little was done to try out alternative arrangements for implementing contact. In short, the Court considers that the sparse contact that had taken place between the applicants since X was taken into foster care had provided limited evidence from which to draw clear conclusions with respect to the first applicant's caring skills."**

(156) In this regard, I also mention that the Court in *K.O. and V.M. v. Norway* paragraph 69 emphasises that *invariable supervision* during contact sessions must be justified on special grounds in every case, since the purpose of contact visits is the strengthening of family ties.

(157) Furthermore, the authorities should, depending on the situation, be careful about basing their findings *solely on the foster parents' reports*, see *A.S. v. Norway* paragraph 69.

(158) It must be observed that if one of the parents claims to have gone through substantial changes that have improved his or her caring skills, this must be assessed on a *sufficiently broad and updated factual basis*. I refer to *Johansen v. Norway* from 1996 paragraph 83, *Strand Lobben* paragraph 220 and *A.S.* paragraph 67.

(159) In *Strand Lobben*, the domestic authorities' evaluation of the mother's caring skills was considered inadequate, see paragraph 222–223. When the District Court heard the case, the expert reports available were more than two years old. Only one of the reports was based on observations of the interplay between mother and child, and only two occasions were described. The mother's counsel had expressly requested that a new expert assessment be made. It had been argued that the mother's caring skills had improved. The majority was also critical towards the lack of an assessment of the boy's vulnerability.

(160) Also in *A.S.* paragraph 66, the Court emphasises the importance of having a sufficiently broad and updated factual basis for the most far-reaching measures, in particular when a parent submits that there have been positive developments as to his or her parental abilities. The District Court had rejected all evidence in the applicant's favour with limited or no reasoning. It concerned information regarding how the mother's situation had improved by measures such as parenting courses and work in a kindergarten. She had limited contact rights, her request to have an expert appointed was rejected, and a discontinuance of the foster placement was refused based to a large part on the assessment of the child's reactions to the contact sessions, see paragraphs 67–69.

(161) These illustrations support that single factors are often not decisive; an *overall assessment* must be made to ensure that all views and interests of the parents are duly taken into account, see *Strand Lobben* paragraph 225.

(162) Finally, I mention that Convention case-law also attaches importance to general rule of law guarantees, such as the right to be heard, the parents' possibility to be involved in the proceedings and present their case and evidence, the access to exercise legal remedies, and process in due time. The Norwegian cases considered by the Court indicate that these

principles – which are also set out in Norwegian procedural rules – are normally not violated, but they must also be observed during the proceedings.

Procedural guarantees – requirements for the reasoning

Norwegian law

(163) Section 19-6 of the Dispute Act lays down requirements to the grounds given by the court. Among other things, subsection 5 states that the court shall give an account of its assessment of the evidence and the application of law upon which the ruling is based. These principles are reflected in extensive case-law, which is unnecessary to address here.

The European Convention on Human Rights

(164) Convention case-law clearly demonstrates the general requirements of the European Court of Human Rights relating to the reasoning. In child welfare cases, this is linked to the basic principle that domestic authorities must strike a *fair balance* between the relevant competing interests, see *Strand Lobben* paragraph 203. Furthermore, it follows from paragraphs 220 and 224–225 that all central factors must be presented and justified, and that competing arguments must be subject to a genuine balancing exercise. It must appear from the decisions that all evidence has been thoroughly assessed.

(165) If the authorities have *given up the goal of family reunification*, the Court's case-law shows that the requirements for reasoning become stricter. This is because such a conclusion requires careful consideration, and importance must be attached to the authorities' positive duty to facilitate family reunification. Illustrative in this regard is *A.S. v. Norway* paragraph 62, where the Court stated that a stricter scrutiny was called for. Otherwise, I refer to Convention case-law on reunification, which I have already addressed.

(166) Another example is *K.O. and V.M.* paragraph 68, where the authorities had in fact given up reunification without demonstrating why the ultimate aim of reunification was no longer compatible with the child's best interests. According to the Court, it must be expressly stated in the reasoning why reunification is not an option. Here, any measures taken by the child welfare services to facilitate reunification should be included, see *A.S.* paragraph 67 and *Abdi Ibrahim* paragraph 61. In the latter judgment, the fact that little had been done to facilitate reunification was included in the Court's assessment, see paragraph 63.

(167) If the factual basis for decision-making is inadequate, this may have consequences for the assessment made and thus for the reasoning. In *Strand* Lobben, the Court found that shortcomings in the decision-making process had the result that competing interests were not sufficiently balanced to decide whether removal of parental responsibilities and adoption were necessary, see paragraphs 224–225.

(168) Another shortcoming in the reasoning may be that it does not demonstrate whether *less far-reaching measures* have been contemplated, and why they were not considered sufficient. An example is the possibility of improving the contact between the parents and the child, see *Abdi Ibrahim* paragraph 63.

(169) The Court has also criticised the lack of explanations as to *the child's vulnerability*. Convention case-law indicates that the domestic authorities to the extent possible should give

a specific description, referring to the factual circumstances, of the cause of the vulnerability, how it manifests itself, whether it may be remedied by relief measures, and its significance for the child's care situation. I refer to *Strand Lobben* paragraph 224, *Abdi Ibrahim* paragraph 62 and *A.S.* paragraph 69.

General conclusion on the relationship between Norwegian law and the Convention

(170) Based on the comparison between the Child Welfare Act and the Convention, my conclusion is that there is no conflict between the Court's case-law on the one hand and the general substantive and procedural principles regulating adoption under chapter 4 of the Child Welfare Act on the other. Thus, there is no basis for setting aside provisions in the Child Welfare Act or for interpreting them restrictively.

(171) However, the Norwegian legal provisions must be applied within the framework of the Court's case-law. Here, it is imperative to comply with the principles regarding the domestic authorities' duty to facilitate reunification, including by individual and thorough evaluations of sufficient contact and assistance measures. Orders issued under the Child Welfare Act must be founded on an adequate and updated basis for decision-making, reflect a fair and sufficiently broad balancing of interests and have a satisfactory reasoning. The exact requirements depend on the circumstances in each case and the nature of the relevant measures.

Whether the District Court's ruling or procedure is seriously flawed – individual assessment

Introduction

(172) I now turn to my individual assessment of the District Court's judgment in light of the general principles of the Child Welfare Act and the Court's case-law.

(173) The District Court has taken the correct *legal starting points* with regard to the importance of the family ties and the further conditions for consenting to adoption. In line with Supreme Court judgments Rt-2015-110 and Rt-2015-1107, which I have accounted for, the District Court has emphasised that consent to adoption under section 4-20 of the Child Welfare Act requires particularly weighty reasons, and that factors relating to the child suggesting adoption must be so strong that the consideration of maintaining the biological bonds between the child and the parents must yield.

(174) When examining the District Court's *individual assessment*, it is expedient – as the case stands – to examine the District Court's basis for decision-making and its reasoning together.

(175) The mother's counsel submits that the authorities have attached too little importance to the value of maintaining the ties between the mother and the child through contact sessions, and that a sufficiently broad assessment of the prospects of reunification is lacking. The municipality's decision-making process was also inadequate, particularly because no expert evaluation of the child during contact sessions had been conducted – only of the siblings.

(176) The municipality contends that the parents have proven particularly unfit, and that the goal of family reunification is not compatible with the child's best interests.

(177) The question is therefore whether the District Court had an adequate factual basis for evaluating the mother's caring skills and competence in contact situations. The same applies to the child's vulnerability and the need for adoption now instead of continued foster care. Furthermore, the reasoning must sufficiently demonstrate that the relevant factors and interests are duly assessed and balanced against each other.

(178) In my assessment, I will consider the process as a whole including the process leading to the care order in 2017 to see if any errors made during that period may have influenced the adoption order in 2018.

The care order in 2017

(179) The County Board's care order of 1 February 2017 was motivated among other things by an expert rapport of 10 June 2016 on the care of the three oldest children, prepared by two psychologist specialists. The report was thus updated, and issued shortly before the birth of the daughter in the case at hand. The Board made an individual assessment of the report's relevance for the daughter, considered against factors relating to her in particular. It endorsed the experts' conclusions and found – with a reference to the mother's involvement in violent relationships, reckless alcohol consumption and poor functioning as a care person – that there was a very high risk that the daughter would sustain the same ordeals as her older siblings. The Board further pointed at specific observations by the child welfare services which had been made during their unannounced visits after the daughter was born, and which in the Board's opinion supported this.

(180) Also the District Court based its ruling on the expert report. No new expert was appointed, despite the mother's request, as the District Court did not consider it necessary. The original experts did not prepare a fresh report, but gave statements in court.

(181) In my view, it is important that less than a year passed from the expert's report was submitted until the District Court's judgment. Furthermore, the District Court was composed with an expert lay judge – a psychologist. A total of 15 witnesses were called, among them people connected to the mother and her network, the child welfare service, the emergency home, the child health clinic and the police. Among the witnesses were also, as mentioned, the two experts that had issued the previous report on the three oldest children. In view of the evaluations in the expert report and the overall evidentiary situation, it was justifiable that the District Court relied on the report although it did not comprise the daughter in the case at hand.

(182) Based on an overall assessment of the care order in 2017, I therefore find that an adequate basis for decision-making existed, and that the proceedings contained no flaws that may have influenced the adoption order.

The adoption order in 2018

(183) I will now consider the adoption process. When the County Board made its decision on 25 September 2018 on removal of parental responsibilities and consent to adoption, supervisors had already prepared reports on the child's bonds to her foster home and on the access to her mother. The Board stated that although the child welfare services had not recently had much contact with the mother, their presumption was nonetheless that there were fundamental limitations to the mother's caring skills. No fresh expert report was requested during these

proceedings.

(184) In my opinion, the County Board should have sought to update the existing information. However, the error cannot have influenced the District Court's basis for decision-making: The District Court appointed a psychologist as an expert. She issued a comprehensive report, based on her own observations as well as comparable information. The Expert Commission on Children had no comments on the report.

(185) The District Court was convinced that the child had a special need of care based on, among other things, the expert's report that emphasised her special need of stability, predictability and calm persons around her. The court's assessment of the mother's caring skills included her turbulent childhood and youth; a very difficult period in 2014–2015, which the mother trivialises; the mother's tendency to conflict with others; her variable caring skills, as well as her failure to see her daughter's particular vulnerability and challenges. I note that these are clearly relevant factors.

(186) However, in the District Court, references were made to the child welfare services' depictions of the mother's positive development after her change of environment and moving to a different municipality. She has given birth to another child who is in her care, under tight supervision by the local child welfare services. The court also found it positive that the mother was about to attend a guidance course for parents with regard to the care for the youngest child. However, the majority found that the mother's change of environment and moving were not sufficient. With reference to the expert report, the majority pointed at the mother's limited ability to care for herself. Except for the planned guidance course, the court could not see that the mother had taken any steps of a durable nature relating to her own emotional development and caring skills.

(187) The majority agreed that the mother's ability to care for her youngest child could be a token of the mother's progress, but attached decisive importance to the very different care needs of the daughter in the case at hand and the youngest child, as well to the risk that the mother would not be able to care for both children.

(188) The minority found, among other things, that it was premature to conclude that the mother was permanently unable to care for her daughter. She has changed environments, she takes care of her youngest child without this giving rise to serious concern and she cooperates with the welfare services of her new municipality. The minority also emphasised that the child welfare services ought to have implemented assistance measures at an earlier stage.

(189) As I will elaborate on in the following, I find that the majority's basis for decision-making and grounds are inadequate in light of the complex situation that existed. I have also noted that the expert report on the ability to care for the daughter on some points expresses uncertainty relating to the mother's positive development.

Family ties

(190) Although a unified District Court emphasises that adoption is a radical measure severing the ties of a biological family, the majority's further discussion is not entirely consistent on this point. After having taken as its starting point that the foster care is likely to be long-term, the majority rejects the mother's submission that her daughter will have nothing to lose from continued placement in the foster home. Admittedly, references are made to individual

circumstances, but the District Court seems to rely on research saying that adoption, as an alternative to foster care, may *generally* contribute to a positive development for children in long-term placement. In support of this, the majority refers to Proposition to the Odelsting No. 69 (2008–2009) and Norwegian Official Report 2012: 5.

(191) As already mentioned, the view expressed in the Proposition was that research exists showing that *some* children may obtain safer upbringing conditions if they are adopted. Although much importance must be attached to such research and experience-based knowledge on what is generally best for children, a concrete, individual assessment must be made in each case, see HR-2018-1720-A paragraph 65 with a further reference to Rt-2007-561 paragraph 50. The court's general approach with regard to the mother's submission is thus not sufficiently nuanced. In particular, the specific advantages of adoption should have been balanced more thoroughly against the significance of very reduced contact with the mother and the severance of the family ties with the father.

(192) After a further account of the child's vulnerability and bonding with the foster home, which are relevant and weighty aspects, the majority of the District Court concluded that terminating the existing contact arrangement – two hours three times a year with the mother and one hour twice a year with the father – only has a "limited negative effect" for the child. This standpoint had developed as the District Court, after having assessed the facts, had a clear impression that the contact sessions had been in the parents' interest, and that the daughter had "not benefitted much from them".

(193) This account should have been more comprehensive, considering how young the daughter was when taken from her mother. The District Court should have compared the long-term value of having a relationship with the mother with the effect of the very limited contact after a possible adoption, and considered whether contact with the father would be possible in the longer run.

Other factors

(194) Another shortcoming in the District Court's grounds is that they do not sufficiently clearly express how the mother's *previous* problematic period and lack of stability have affected her *current* caring skills and the risk involved for her daughter *now*. Nor has any in-depth analysis been made of whether the mother's improved situation may have increased her ability to care for her daughter. I refer to the decision of March 2019 by the child welfare services in the mother's new home municipality, which concerned assistance measures towards the youngest child:

> **"… The mother has had great difficulties as a care person. Very little has been done to help her change, and she is prepared to receive any guidance the child welfare services will provide.**
>
> **The mother has the daily care of [the youngest child], and provides, as the child health clinic and the child welfare services see it, the love [the child] needs in light of [his/her] age and development. [The child] receives the affection, support, physical and mental care [he/she] needs. The mother is able to have a realistic view of [the youngest] child and makes arrangements for a good development…"**

(195) In this context, it is also significant that a relatively short period of time has passed since the mother changed her environment and moved to another municipality. The fact base deriving from the mother's new situation when it comes to the daughter in our case is thus sparse. The

judgment is silent on the significance of increased contact for the interaction between the mother and her daughter versus possible disadvantages for the daughter and the measures child welfare services may apply. The District Court has also failed to assess whether the mother's current situation may improve with assistance measures and which concrete impact this may have on her ability to care.

(196) It must be emphasised that the choice currently stands between continued placement or adoption – the mother has not requested a revocation of the care order. Thus, the District Court's argument that "there is a qualified, genuine and imminent risk of serious problems for [the daughter] in the short and long run if she is to return to her mother now" is not pertinent. Equally irrelevant is the District Court's argument that it will probably be too demanding for the mother to care for both her youngest child and the daughter in the case at hand; continued foster care for the daughter does not entail that the mother is to resume any parental responsibilities for her.

(197) In addition, I have noted that the District Court, when assessing possible damaging effects of continued foster care versus the effects of adoption, only emphasises general risk factors without basis in the daughter's actual situation, apart from her being particularly vulnerable.

(198) The majority refers to disadvantages relating to possible legal disputes into which the daughter may be drawn when she gets older, and which may create great uncertainty and insecurity, as well as to her increased contact with the child welfare services and her being in the care of the public authorities. Although these factors do mot manifest themselves for the time being, they may become relevant in the future if the placement continues. These are normal risk factors for children who are vulnerable, which children in foster care often are.

(199) In my view, the District Court's assessment should have been more focused on the specific factual circumstances, including the effect for future conflicts that the mother so far has not requested a revocation of the care order. Since the mother has not done so, the District Court's strong emphasis on the risk of future disputes is misplaced. It should instead have examined more thoroughly the need of adoption at this stage as opposed to continued foster care, having regard to the fact that adoption will entail a material weakening of the child's bonds with her mother and a complete severance of her bonds with her father.

Conclusion

(200) In my view, the District Court's basis for decision-making is flawed, primarily when it comes to its assessment of the recent change in the mother's situation. Furthermore, in its reasoning the District Court has failed to strike a fair balance between key issues in the case, particularly the value of the contact between the mother and her daughter in the long run versus the necessity of adoption now. These factors heavily suggest – not least when considered in context – that the Court of Appeal should have granted leave to appeal.

(201) Against this background, the District Court's ruling or procedure is seriously flawed, see section 36-10 subsection 3 of the Dispute Act (c), and the Court of Appeal's decision not to grant leave to appeal must be set aside.

Section 36-10 subsection 3 (a) of the Dispute Act

(202) In the appeals to the Supreme Court, it was contended that the new judgments by the

European Court of Human Rights raised issues of significance beyond the current case, so that the Court of Appeal should have granted leave to appeal under section 36-10 subsection 3 (a).

(203) As I see it, new case-law from the European Court of Human Rights may, according to the circumstances, imply that this condition is met. However, the issues of principle that are significant to the case at hand, have now been clarified through the Supreme Court's hearing in a grand chamber, which means that section 36-10 subsection 3 (a) is not applicable.

(204) Further, the father has contended that the Court of Appeal should have granted leave to appeal to clarify the application of section 4-20a of the Child Welfare Act.

(205) Section 4-20a on contact visits between the child and its biological parents after adoption lays down as a requirement that both adoption applicants consent to the visits. The father contends that the provision must be interpreted restrictively, so that the requirement of such consent is not absolute, and that the Court of Appeal erred in refusing leave to appeal to have this issue clarified.

(206) I cannot see that the Court of Appeal had any reason to grant leave to appeal to have this issue clarified. It is clear from the wording in section 4-20a subsection 1 of the Child Welfare Act that one of the conditions for contact visits is that the adoption applicants consent thereto. There are no sources of law suggesting that this provision may be given limited application. The case-law of the European Court of Human Rights is based on the principle that adoption may be approved without permitting contact visits. Hence, contact visits must upon certain conditions, for instance the adoptive parents' consent, be compatible with the European Convention on Human Rights.

(207) Section 36-10 subsection 3 (a) of the Dispute Act on the Court of Appeal's consent in issues with significance beyond the current case, is therefore not applicable. Nonetheless, since I have concluded that the condition in (c) is met, the Court of Appeal's decision must, as already mentioned, be set aside.

Conclusion

(208) Against this background, I vote for the following

O R D E R :

The Court of Appeal's decision is set aside.

(209) Justice **Matningsdal:** I agree with Justice Møse in all material respects and with his conclusion.

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

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

(212) Justice **Normann:** Likewise.

(213) Justice **Bull:** Likewise.

(214) Justice **Kallerud:** Likewise.

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

(216) Justice **Bergh:** Likewise.

(217) Justice **Østensen Berglund:** Likewise.

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

(219) Following the voting, the Supreme Court issued this

O R D E R :

The Court of Appeal's decision is set aside.