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-2020-663-S, (case no. 00-000001SIV-HRET) and (case no. 00-000002SIV-HRET)
Appeal against X Court of Appeal's decisions 19 July 2019 and 29 July 2019

I.

A	(Counsel Bente Mostad Tjugum)
v.	
Y municipality	(Counsel Frode Lauareid) (Assisting counsel Trine Riiber)
KS (third-party intervener)	(Counsel Frode Lauareid)
B	(Counsel Steinar Thomassen)

II. B	(Counsel Steinar Thomassen)
v.	
Y municipality	(Counsel Frode Lauareid) (Assisting counsel Trine Riiber)
KS (third-party intervener)	(Counsel Frode Lauareid)
Attending 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 **Normann:** The case concerns appeals against the Court of Appeal's refusal to hear an appeal in two cases regarding a care order and contact rights under the Child Welfare Act, see section 36-10 subsection 3 of the Dispute Act. The appeals raise questions regarding the application of Article 8 of the European Convention on Human Rights (the Convention), inter alia regarding the appointment of a psychologist expert, contact rights for the mother and the threshold for a complete refusal of contact rights for a father who has had little or no contact with the child.

Background and proceedings

(2) B and A are the biological parents of C, born 00.00.2011. She is currently eight years old. The parents met in 2009 and moved together in 2010. They then lived in Z.

(3) In February 2011, while the mother was pregnant, the father was convicted of rape and sexual activity with two girls under the age of 14. The offences were committed between 2004 and 2009, and he was sentenced to four years and six months in prison. The father started serving the sentence in the summer of 2011, shortly before the daughter was born. He had some contact with the daughter in prison, and he was present during her christening.

(4) The child welfare services contacted the family in February 2012, when the girl was barely four months, after having received notes of concern from the prison. It was stated that the father had been granted overnight leave with the mother and child. He had neither admitted the crimes of which he had been convicted nor undergone any form of treatment or participated in behavioural programmes.

(5) The child welfare services initiated a supervisory inquiry. The mother expressed that she did not want to end the relationship with the father, and that she planned monthly contact sessions once the father was granted weekend leave from prison.

(6) After the child welfare services had decided to recommend the County Board to issue a care order, the mother ended the relationship with the father during the autumn of 2012 and moved to her parents in Æ.

(7) On 10 March 2014, in a case dealing with matters under the Children Act, Ø District Court granted the mother sole parental responsibility and denied the father access to his daughter. After the case in the District Court, the father had no contact with the mother and child.

(8) The child welfare services in the mother's original home municipality had already in 2012 decided to order an expert report, implement social measures in the home and to offer advice and guidance. When the mother moved to Æ, the child welfare services sent a note of concern to the new home municipality, where the local child welfare services initiated supervision shortly after. Despite several assistance measures and their subsequent frequent follow-up, the child welfare services concern for the girl's care situation and development increased. A main problem in the child welfare services' view was the mother's inability to see and fulfil her daughter's emotional needs. The girl had serious behaviour problems and struggled with learning at school. I will return to this in more detail in my individual assessment. In May 2018, the municipality requested the County Board to issue a care order. The girl was then seven years old.

(9) In August 2018, mediation was carried out before the County Board without the parties reaching an agreement on a temporary or permanent arrangement. Prior to the meeting, a spokesperson had been appointed, who talked with the girl. The girl told the spokesperson that she was fine with moving to a new family. When asked, she expressed that she would like to see her father.

(10) On 13 November 2018, the County Board, consisting in accordance with section 7-5 of the Child Welfare Act of a chair, an expert – a psychologist - and an ordinary member, issued the following care order:

> **"1. Y municipality will take over the care of C, born 00.00.2011.**
> **2. C will be placed in a foster home.**
> **3. C and her mother, B, are allowed access to each other six times a year, for two hours each time.**
> **4. The child welfare services may supervise the sessions."**

(11) On the same day, the County Board with the same members decided that there should be no contact visits between the father and his daughter. The conclusion reads:

> **"There will be no contact visits between C, born 00.00.2011, and her father, A."**

(12) At a meeting of 6 February 2019 with the child welfare services, the foster parents terminated the foster home agreement, referring to the difficulties with regard to their three biological children. The girl opposed everyday routines and often did the opposite of what she was told, and there was a negative interaction between her and the three other children.

(13) The mother requested a judicial review of the County Board's care order. The hearing in the District Court was held over three days, and 15 witnesses testified. On 29 March 2019, Ø District Court – composed in accordance with section 36-4 of the Dispute Act of a professional judge, a psychologist and an ordinary judge – concluded as follows:

> **"The County Social Welfare Board's decision in case FXX0/0 is upheld."**

(14) On 3 April 2019, the girl was placed in emergency foster care while waiting for a new foster home.

(15) The father, too, requested a judicial review of the County Board's decision. The hearing was held over one day, and two witnesses testified, including the child's spokesperson. Like in the mother's case, the District Court was composed of one professional judge, and two lay judges, one of whom was an expert – a psychologist, but with different members.

(16) Ø District Court's judgment 6 May 2019 in the father's case had the following conclusion:

> **"The County Social Welfare Board's decision in case FXX-0-0 is upheld."**

(17) The mother appealed to X Court of Appeal, which decided with dissenting opinions on 29 July 2019 not to grant leave to appeal, see section 36-10 subsection 3 of the Dispute Act.

(18) The father, too, appealed to X Court of Appeal. On 19 July 2019, the Court of Appeal unanimously refused to grant leave to appeal.

(19) Both parents have appealed the Court of Appeal's decisions to the Supreme Court.

(20) The Supreme Court's Appeals Selection Committee referred on 16 October 2019 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.

(21) Subsequently, on 22 October 2019, 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, HR-2020-661-S, and case no. 00-000000SIV-HRET, HR-2020-662-S. After the mother's and the father's respective cases had been referred to a grand chamber, they were joined, see section 15-6 of the Dispute Act. Rulings in the two other cases were handed down earlier today.

(22) According to the Supreme Court's rules of procedure adopted on 12 December 2007 in accordance with section 8 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.

(23) On 14 November 2019, the Office of the Attorney General declared that the State represented by the Ministry of Justice and Public Security would participate in the case to safeguard the State's interests, see section 30-13 subsection 1 of the Dispute Act.

(24) 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.

(25) The Supreme Court hearing took place from 4 to 10 February. On 10 March 2020, the European Court of Human Rights (the Court) handed down two new judgments 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

(26) The appellant in case no. 00-000002SIV-HRET – *B* – contends:

(27) In the mother's view, it is not reflected in the Court of Appeal's reasoning that the question of refusing leave to appeal has been adequately considered.

(28) The Court of Appeal should have granted leave to appeal. The appeal concerns issues with significance beyond the scope of the current case, see section 36-10 subsection 3 (a) of the Dispute Act. Both the District Court's judgment and the Court of Appeal's decision were handed down before the latest judgments against Norway in the European Court of Human Rights. These rulings imply that certain aspects of the District Court's judgment heavily suggest that the Court of Appeal should have agreed to hear the appeal.

(29) The District Court's judgment and procedure are seriously flawed. The judgment is poorly reasoned and given without an adequate basis for decision-making, see section 36-10 (c) of the Dispute Act. The District Court's judgment does not meet the requirements in recent child welfare case-law from the European Court of Human Rights applicable to the procedure and the basis for the decision, see Articles 8 and 6 of the Convention.

(30) In cases regarding care orders under section 4-12 (a) and (d) of the Child Welfare Act, independent expert statements regarding parents and children must as a main rule be ordered. It is the courts' duty to ensure that the statements are updated before they are used again.

(31) The expert statement presented to the County Board was ordered one and a half years before the District Court's procedure, and on insufficient grounds. The Expert Commission on Children had requested its principal to order a supplementary report to clarify the child's functioning and the mother's caring skills.

(32) The District Court has disregarded the statements from the mother's witnesses without further justification.

(33) When determining the contact visits, the District Court also disregarded the aim of family reunification without explaining why this was in the best interests of the child. Norwegian courts cannot conclude this early in the process that family reunification is not in the best interests of the child.

(34) The child has a right to be heard also in connection with the Supreme Court's proceedings. The Supreme Court's ruling is, irrespective of outcome, a ruling that "affects" the child, see section 6-3 of the Child Welfare Act. This is also supported by Article 104 of the Constitution. Case-law does not support a distinction between various types of cases.

(35) As a main rule, facts present at the time of the Court of Appeal's decision must be taken into account. The Supreme Court is to examine the Court of Appeal's procedure, and new facts may thus not be asserted.

(36) As for the father's appeal in case no. 00-000001SIV-HRET, the mother agrees with the municipality. In addition, the mother contends that the father is not protected by Article 8 of the Convention. The father did nothing to establish contact with the child before the child welfare case was initiated. He has used the care order case to establish the contact that he was denied in 2014.

(37) B invites the Supreme Court to pronounce the following judgment:

> **"In case no. 00-000002SIV-HRET**
>
> **The Court of Appeal's decision is set aside.**
>
> **In case no. 00-000001SIV-HRET**
>
> **The appeal is dismissed."**

(38) The respondent in case no. 00-000002SIV-HRET – *Y municipality* – contends:

(39) The case does not raise "issues of significance beyond the scope of the current case", see section 36-10 subsection 3 (a) of the Dispute Act. The municipality cannot see that the case involves issues of principle even if it is now to be decided by the Supreme Court's grand chamber. If the Supreme Court clarifies the issues of principle, the conditions in section 36-10 (a) of the Dispute Act are not met. The case will only raise issues of principle if the Supreme Court sets aside the Court of Appeal's decision without itself considering these issues, HR-2016-2314-U.

(40) The District Court's ruling or procedure is not "seriously flawed", see section 36-10 subsection 3 (c) of the Dispute Act.

(41) The District Court has emphasised the relevant considerations. The mother's caring skills must be significantly improved for reunification to be in the child's best interests. For a long period, the child welfare services have offered assistance without success, and done what may reasonably be required to facilitate reunification.

(42) Whether or not an expert should be appointed depends on an individual assessment, see the Grand Chamber judgment 10 September 2019 *Strand Lobben and Others v. Norway* paragraph 213. The mother's case was adequately clarified by several witnesses with professional backgrounds. It was not necessary to appoint a new expert in the District Court to establish a sound factual basis for the ruling in the case, see section 25-2 subsection 1 of the Dispute Act.

(43) The District Court's assumption that the foster care placement will be long-term, is not incompatible with Article 8 of the Convention, nor with the ultimate aim of family reunification. The best interests of the child are crucial. The child's interest in maintaining the bonds with its biological family is given weight as part of this assessment.

(44) Contact rights must be determined after an individual assessment.

(45) The District Court has determined the extent of access on a sound factual basis and within the scope of section 4-19 of the Child Welfare Act. It is not incompatible with Article 8 of the Convention to fix few annual contact visits if this is in the child's best interest. The contact must not prevent stability and continuity in the care situation and the child's development. In its rulings, the European Court of Human Rights have not stated that the interests of the parents override those of the child.

(46) In addition to the ordinary contact visits, the child sees her mother and other family members in other settings. This must also be given weight.

(47) The Supreme Court is to evaluate the Court of Appeal's ruling based on information presented before the Court of Appeal. New information may nonetheless be relevant if it is safe under the circumstances to base the ruling thereon. Here, it suggests that the appeal should be dismissed.

(48) The possibility to emphasise new information implies that it may be relevant to obtain an updated statement from the child.

(49) Y municipality invites the Supreme Court to pronounce the following judgment:

"The appeals are dismissed."

(50) The appellant in case no. 00-000001SIV-HRET – *A* – contends:

(51) In the father's view, the appeal concerns issues of significance beyond the scope of the current case, see section 36-10 subsection 3 (a) of the Dispute Act. In light of *Strand Lobben* the case raises overall questions related to requirements of reasoning under section 4-19, cf. section 4-1 of the Child Welfare Act, in cases where contact rights are not fixed. These

decisions are in themselves highly intrusive, see Article 8 of the Convention. The requirement of due process entails that the decisions made must be subject to strict scrutiny. It is contended that the question regarding leave to appeal under section 36-10 subsection 3 (c) of the Dispute Act has not been substantively and appropriately assessed.

(52) The District Court's judgment is seriously flawed, see section 36-10 subsection 3 (c) of the Dispute Act. The District Court's ruling is based on a thin and outdated factual basis. In their request for measures 30 May 2018, the child welfare services proposed denying contact rights without talking to the father in advance. Four documents were presented as evidence, of which the newest was from 2014.

(53) The principle of "equality of arms", see Article 6 (1) of the Convention, suggests that an expert should have been appointed to evaluate the father's competence in contact situations.

(54) The District Court's grounds are flawed, as the child's wish for contact is not discussed in more detail.

(55) Moreover, the father's general exclusion from the process amounts to a violation of Article 8 of the Convention, cf. Article 6 (1). The father was not permitted to participate in the mother's care order and contact rights case in the District Court, and he was not given access to relevant evidence that could shed light on the child's vulnerability balanced against his right to access. In a pleading from the municipality of 1 April 2019, the father was presented with four pages from the District Court's judgment in the mother's case. In that case, to which the father was not a party, the District Court considered it to be "more likely than not" that he would fail in his request for contact rights before the District Court.

(56) The Court of Appeal's decision leaves doubt as to whether the Court of Appeal has made a substantive and appropriate examination of the condition in section 36-10 subsection 3 (c) of the Dispute Act. The question of refusing leave to appeal under this provision has not been substantively or appropriately examined.

(57) A invites the Supreme Court to pronounce the following judgment:

"The Court of Appeal's decision of 19 July 2019 is set aside."

(58) The respondent in case no. 00-000001SIV-HRET – *Y municipality* – contends:

(59) The Court of Appeal's decision is based on a correct application of section 36-10 subsection 3 (a) of the Dispute Act. The case involves no issues of principle that necessitate clarification of the law, see the submissions in the mother's case.

(60) The District Court's ruling or procedure is not seriously flawed, see (c). The threshold for granting leave under this provision is high, and it is meant to function as a safeguard.

(61) Both aspects of the best interests of the child must be given weight in the overall assessment, including the child's interest in maintaining the bonds with its biological family. However, there are no rulings from the European Court of Human Rights stating that the interests of the parents override those of the child. The child's best interests are paramount under both Norwegian law and case-law from the Court.

(62) According to the Court's case-law, non-existing or weak family ties are less protected under Article 8 of the Convention than established family ties. The District Court correctly emphasised that possible reunification was not the purpose of establishing contact, and that there are no bonds between the father and the child. The duty to facilitate access is not absolute.

(63) The District Court has balanced the various interests, and it appears that it has taken into account that both the father and the child have a long-term interest in having contact. It is also mentioned that maintaining contact with one's biological origin is of intrinsic value to the child.

(64) At present, there are exceptional and strong reasons for refusing access. Decisive importance has been attached to the interests of the child. There is a material risk that the girl may suffer harm if she is to have access to her father before the criminal conviction against him is made known to her.

(65) The setting aside of the child's wishes is not a serious flaw in the District Court's judgment. Based on age and maturity, the girl was not capable of understanding the consequences of learning about the conviction against her father and of seeing him now.

(66) The Court of Appeal's refusal of leave to appeal is thus appropriately and substantively founded.

(67) Y municipality invites the Supreme Court to pronounce the following judgment:

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

(68) As for the contentions of the State and KS, I refer to the reproductions in the Supreme Court judgment HR-2020-661-S paragraphs 47 to 54. The State has not requested any judgment, while KS has requested that the Supreme Court dismiss the appeal.

(69) After the Court of Appeal's decisions, the European Court of Human Rights has handed down several new judgments. Apart from that, no new substantive information has emerged since the hearing in the Court of Appeal.

My opinion

(70) The appeals to the Supreme Court concern, as I have already mentioned, the Court of Appeal's decisions not to grant leave to appeal in the cases regarding care order and contact rights for the mother and denial of access for the father.

Procedural starting points

(71) According to section 36-10 subsection 3 of the Dispute Act, an appeal against the District Court's review of a decision by the County Social Welfare Board may only be heard upon the consent of the Court of Appeal. Subsection 3 reads:

> **"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."**

(72) Hence, the Court of Appeal may only grant leave to appeal if at least one of these statutory conditions is met.

(73) As for the question concerning the Court of Appeal's examination of the District Court's judgment and the requirements of reasoning, I confine myself to referring to what is stated in HR-2020-661-S handed down earlier today. The same applies to what is stated therein about the Supreme Court's examination of the Court of Appeal's decision. Paragraph 61 reads:

> **"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."**

(74) I add that the Supreme Court by this examination – in addition to the condition in section 36-10 subsection 3 (b) – is not to consider information emerged after the Court of Appeal's proceedings, see HR-2020-661-S paragraphs 65 and 66.

(75) As special feature – both in that case and in the case at hand – is that the contentions before the Supreme Court are largely motivated by the Grand Chamber judgment *Strand Lobben and Others v. Norway*, handed down 10 September 2019 after the Court of Appeal's decisions. The following is set out in HR-2020-661-S paragraph 62:

> **"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 Norway's case-law must be changed accordingly, is a different question to which I will return. Apart from 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."**

(76) In the following, I will therefore also refer to judgments from the European Court of Human Rights handed down after the Court of Appeal's decisions.

Should the child's opinion be heard?

(77) The municipality has submitted that the child's opinion must be heard in connection with the Supreme Court proceedings.

(78) It follows from Article 4 subsection 1 of the Constitution that children have a right to be heard in questions concerning themselves. Article 104 subsection 1 is based on Article 12 of the Convention on the Rights of the Child, stating that the child shall be provided the opportunity to be heard in any proceedings affecting the child. The provision must be read in context with Article 3 on the best interests of the child, see the Supreme Court judgment HR-2019-2301-A paragraph 76 et seq.

(79) In matters concerning child welfare, it also follows from section 6-3 of the Child Welfare Act that children "must be informed and given an opportunity to state his or her opinion before a decision is made in a case affecting him or her." According to its wording, the provision is absolute. However, in HR-2019-2301-A the Supreme Court found nonetheless that exceptions can be made if hearing the child would not be justifiable. This is not the situation in the case at hand.

(80) The question in this case is whether the provision in Article 4 of the Constitution and section 6-3 of the Child Welfare Act are applicable when the Supreme Court, as in a case like this, is to examine the Court of Appeal's refusal to grant leave to appeal.

(81) The mother contends that there is no basis for distinguishing between types of rulings, and that the child's right to be heard is more far-reaching under Article 4 of the Constitution than under the Child Welfare Act. Furthermore, she contends that it is only possible to make general exceptions where the child is not capable of understanding what the case concerns, which in her opinion is not the case here. The municipality has expressed the same, while the father finds that the child is not to be heard in cases like this.

(82) In this context, I note that the constitutionalisation of children's rights did not entail any change to the substantive contents of applicable law, see HR-2019-2301-A paragraph 65 with further references to preparatory works. I also disagree that one may not distinguish between various types of cases.

(83) A case like the one at hand, where the Supreme Court is only to examine the Court of Appeal's procedure, must as a main rule be decided based on the factual circumstances at the time of the Court of Appeal's ruling. When making such an assessment, the child's statement to the District Court will be included in the basis for decision-making. On the other hand, the child's statement to the Supreme Court would constitute new information that may normally not be part of the Supreme Court's basis for decision-making.

(84) There is usually also a small lapse of time from when the Court of Appeal decides whether to grant leave to appeal to when the Supreme Court considers a possible appeal. Thus, a new statement is rarely required. In the cases where new information nonetheless has emerged after the Court of Appeal's decision that in itself suggests that the case should be reheard, the condition for granting leave in section 36-10 subsection 3 (b) of the Dispute Act will be met, see HR-2020-661-S paragraph 67. The fact that the child has changed its opinion on the question of access may constitute such new information under the circumstances. However, subsection 3 (b) has not been invoked in the case at hand.

(85) I can also not see that the child could have any qualified opinion on the legal issues the Supreme Court is to consider when assessing whether the conditions for granting leave to appeal are met.

(86) In my view, the relevant provisions on the child's right to be heard must be seen in the light of this. Against this background, I have concluded that the child is not to be heard in connection with the Supreme Court's review of the Court of Appeal's decision to refuse leave to appeal under section 36-10 subsection 3 of the Dispute Act.

General legal starting points

(87) The mother and the father contend that the Court of Appeal should have granted leave to appeal in their respective cases, as there are serious flaws in the District Court's judgments and procedure, see section 36-10 subsection 3 (c) of the Dispute Act. In this regard, they contend that the procedure is incompatible with Article 8 of the Convention, which 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."**

(88) The measures under the Child Welfare Act we are dealing with – care order and limited contact rights – undoubtedly constitute an interference with the child's and the parents' right to respect for family life. Article 8 is thus applicable.

(89) It is clear that the two first conditions in Article 8 (2) are met – that the measure must be in accordance with the law and pursue a legitimate aim. The dispute revolves around the third condition – whether the measure is *necessary in a democratic society*. In reaching this decision, one must make a proportionality assessment striking a balance between the protected individual rights on the one hand and the legitimate societal needs justifying the measure on the other, see for instance the Supreme Court judgment Rt-2015-110 paragraph 60 and HR-2020-661-S paragraphs 75–78.

The mother's appeal

The care order – legal starting points

(90) The relevant criteria for a care order are set out in section 4-12 subsection 1 (a) and 2 of the Child Welfare Act:

> **"A care order may be issued**
>
> **(a) if there are serious deficiencies in the daily care the child receives, or serious deficiencies in terms of the personal contact and security needed according to its age, needs and development,…**
>
> **An order may only be made under the first paragraph when necessary due to the child's current situation. Hence, such an order may not be made if satisfactory conditions can be created for the child by assistance measures under section 4-4 or by measures under section 4-10 or section 4-11."**

(91) Interference based on the substantive conditions in section 4-12 of the Child Welfare Act must be compatible with the requirements of the Court's case-law "in very exceptional circumstances", see HR-2020-661-S paragraph 96. It is also emphasised that the States have a wide margin of appreciation in connection with care orders, but that it is not unfettered. Particular importance must be attached to the best interests of the child, which are of paramount both under section 4-1 of the Child Welfare Act and under Article 8 of the Convention, see paragraph 95 with a further reference to *Strand Lobben* paragraph 204.

(92) When it comes to the balancing that according to the necessity requirement in Article 8 (2) of the Convention and Norwegian law must be struck between the interests of the child and those

of the parents in connection with care orders, I confine myself to referring to the account given in HR-2020-661-S.

(93) In the case at hand, the main question is whether the care order is based on a satisfactory basis for the decision and with adequate grounds. The procedural guarantees and requirements of an adequate factual basis are also considered in the mentioned case, see paragraph 149 et seq. and the summary in paragraph 171. I reiterate some key points only:

(94) It is set out in section 7-3 of the Child Welfare Act that the County Board shall ensure that the evidence submitted provides an *adequate factual basis for decision-making*. A similar duty applies in cases where the parties right of disposition is limited for reasons of public policy, as the case is with matters governed by the Child Welfare Act, see sections 21-3 and 11-4 of the Dispute Act. With a legal basis in section 25-2 subsection 2 of the Dispute Act, the court may appoint an expert if one of the parties so wishes or upon its own initiative if this is necessary to ensure an adequate factual basis for decision-making. Section 19-6 of the Dispute Act contains requirements to the court's grounds for the judgment.

(95) In several cases, the European Court of Human Rights has stressed the importance of having an adequate basis for decision-making. If one of the parents claims to have gone through changes that have improved his or her caring, this must be assessed on a sufficiently broad and updated basis, see HR-2020-661-S paragraph 158 with further references to the Court's judgment 7 August 1996 in *Johansen v. Norway* paragraph 83*, Strand Lobben* paragraph 220, and the Court's judgment 17 December 2019 in *A.S. v. Norway* paragraph 67.

(96) It follows from case-law from the Court 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 HR-2020-661-S paragraph 161. In paragraph 162, it is stated 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 due 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."**

(97) The Court generally also lays down requirements for the *reasoning* in child welfare cases, see for instance *Strand Lobben* paragraphs 220, 223 and 224. All weighty arguments must be presented and justified, and a fair balance must be struck between conflicting interests. It must be clear from the ruling that it is based on a thorough assessment.

(98) The mother contends that in cases regarding a care order under section 4-12 (a) and (d) of the Child Welfare Act, independent expert statements regarding the mother and child must as a main rule be obtained.

(99) The Court's case-law does not support this. Whether or not an expert should be appointed in these cases depends on an individual assessment where the crucial point is whether the case may be decided on adequate grounds without such appointment. In making this assessment relevant factors include whether an expert report has previously been ordered, the time elapsed and whether there have been changes to the parents' situation and caring skills, see *Strand Lobben* paragraphs 213 and 220–223 with further references. Moreover, this corresponds well with section 25-2 subsection 2 of the Dispute Act. Any professional

evaluations emerging through other channels than the appointment of an expert will also be significant.

(100) The mother further contends as a general legal principle that the County Board and the District Court in a care order case cannot disregard evidence presented by the private party without or with limited justification.

(101) In my view, this is too generally formulated. To which extent a through reasoning should be required depends on the totality of evidence and on the relevance and force of the evidence presented.

The care order – individual assessment

(102) I will now consider whether there are serious flaws in the District Court's basis for its decision, grounds and balancing of interests in the care order process. I will first give a more detailed account of the proceedings.

(103) The County Board's care order of 13 November 2018 was based among other things on a previous expert report of 20 May 2017 prepared by a psychiatrist, who had been appointed by the child welfare services.

(104) Prior to the hearing before the County Board, the mother had asked for a new expert evaluation. She mentioned that the Child Expert Commission had made many comments to the report, that the basis for concluding was inadequate, and that the Commission had asked the principal to obtain a supplementary report.

(105) No supplementary report was ordered, but the psychiatrist gave a statement during the oral hearing before the County Board. In addition, 13 witnesses testified, including a supervisor with a professional background, an educational supervisor at the girl's kindergarten and the contact teacher at the girl's school. Furthermore, a lot of documentary evidence was presented, including journals and reports from the assistance measures that had been implemented.

(106) In this regard, I mention that the child welfare services had followed the mother and child closely during the whole time. Before the turn of the year 2012/2013, the child welfare services in the mother's first home municipality in Z notified the child welfare services in her home municipality. The latter had their first meeting with the mother early December 2012. The girl was then one year and two months old. The journal notes show that the child welfare services afterwards followed the mother and child closely. The first examination report was ready already on 1 March 2013, and states that the child welfare services "consider it necessary to provide the girl with assistance measures". The mother was found to have "limited capacity to deal with practical tasks and to receive guidance", but she was found "guidable".

(107) The County Board concluded that the child "is a very vulnerable girl who shows several signs of uneven development (*skjevutvikling*) and has severe problems both socially and emotionally", and that she has a special need of care that demands a lot from her care providers.

(108) The County Board found that it had been "clearly substantiated" that there were serious

shortcomings in the emotional care she received from her mother. The conclusion was that the care situation could be improved by assistance measures. The girl had had a worrying development despite years of such measures being implemented. Among other things, the mother had received guidance up to 20 hours per months, including participation in a parenting guidance program adjusted to parents with a cognitive functioning disorder (PYC), the daughter had been in a respite home every three weeks, and cooperation meetings had been held. The supervisor, who had assisted the family, had explained that the mother was hard to supervise. The mother had not expressed any need of help and did not understand the child welfare services' concern.

(109) When the mother brought the care order to the District Court, she mentioned once more the necessity of a new expert evaluation of her caring skills. During the planning meeting prior to the main hearing, the judge addressed this issue. The following is set out in the court record:

> **"This was discussed. With reference to the fact that the case has been scheduled and will be clarified through witness statements during the main hearing, [the mother's Counsel] wanted to revert to the issue after a discussing it more thoroughly with the mother. The judge stated that an appointment would easily entail a postponement of a scheduled hearing."**

(110) After this, the mother's counsel did not repeat the request for appointment of a new expert. Hence, no expert was appointed in the connection with the District Court's proceedings.

(111) After an extensive hearing of witnesses – to which I will return – the District Court agreed in all material respects with the County Board's findings, including the child's "special needs of care after having endured hardships for years due to the mother's absent caring skills".

(112) In the appeal to the Court of Appeal, the mother contended once more that it was a procedural error not to appoint an expert to further examine the cause of the girl's problems, and that the District Court seemed to have completely ignored the witnesses called from her side.

(113) In its decision, the majority of the Court of Appeal found that the District Court's judgment was firmly rooted in the facts, and that the District Court had made a broad and thorough evaluation. The following is set forth in the majority's grounds:

> **"In the majority's view, the case was adequately clarified at the time of the District Court's decision. The District Court's judgment reflects a present-time assessment of the facts of the case, based on recent and older information, including information as to which assistance measures have been tried through the years. In addition, it was clear at the time of the judgment that the girl had to move from her then foster home, as it had become too demanding to take care of her there. The District Court has included this factor in its balancing of interests."**

(114) On the other hand, the Court of Appeal's minority found that an expert should have been appointed to evaluate the mother's caring skills, the causes of the girl's problems and the assistance measures that could have been implemented.

(115) Before the Supreme Court, the mother repeats that her rights under Article 8 of the Convention were violated due to the District Court's inadequate basis for its decision. She contends in particular that the District Court should have ordered an expert statement about her and the child, and that it should not have rejected her own presentation of evidence with no or very limited justification. She further contends that the ruling was not sufficiently

reasoned.

(116) I will first consider the question whether the District Court had an adequate *basis for decision-making*.

(117) A number of central witnesses with professional backgrounds and experience with children testified before the District Court, including the educational supervisor at the girl's kindergarten, her contact teacher and a family therapist in the child welfare services. The family therapist had – together with a colleague – been responsible for the parenting guidance in the home 28 times of 2 to 3 hours each time for about a year until the County Board issued the care order. It is crucial that the child welfare services, as I have already mentioned, had regularly followed the mother and the child's development since 2012. The witness from the child welfare services expressed that the child had developed in an increasingly negative direction.

(118) In addition, the District Court received statements from one of the care providers in the visiting home (*besøkshjem*) and from the foster mother. Here, I reiterate that the foster family had terminated the agreement, so there was no reason to disregard her statement because it could be influenced by a wish to keep the child. The situation was different from that described in *A.S.* paragraph 69 in multiple ways.

(119) In addition, it is crucial that the District Court included an expert lay judge who was a specialist in psychology.

(120) I also reiterate that the mother's counsel did not repeat the request for a new expert appointment. Admittedly, this is a case where the right of disposition of the parties is limited, which means that the court has an independent responsibility for clarification of the case – including appointing an expert. However, the conduct of the mother's counsel indicates that he had concluded that the case was sufficiently clarified.

(121) Against this background, I find that it was appropriate to decide the case without appointing an expert. The District Court based itself on specific observations by various professionals who had followed the child and the family closely for years, and had, as I see it, a sufficient, updated and broad basis for decision-making to evaluate the child's challenges and the mother's caring skills.

(122) I will now turn to the District Court's *reasoning*.

(123) When it comes to the District Court's description of the mother's witnesses, the judgment states:

> **"During the proceedings, several witnesses from the mother's side have been called who have explained that they have not reacted to the mother's caring skills or [the child]'s conduct while playing with other children. The court cannot see that this presentation of evidence changes the court's assessments and conclusion."**

(124) The District Court also mentioned that these witnesses had expressed that the mother needed no help, and that they could not understand why the child welfare services had interfered.

(125) Whether it constituted a flaw that the testimonies of the mother's witnesses are barely mentioned, must be seen in light of the total evidence presented. The District Court's findings

were – as I have just accounted for – based on witness statements from several experts who in various roles and during a long period of time had followed the child's situation and negative development and the mother's lack of parenting skills. The fact that the mother's witnesses did not see the necessity of assistance measures and why the child welfare services interfered, could then not change the very basis for decision-making and the District Court's conclusion.

(126) I mention that our case, also on this point, differs from the judgment *A.S*, see paragraphs 66 and 67. There, the mother had referred to improved conditions relating to her caring skills and presented psychiatrist and psychologist reports. This is principally why the European Court of Human Rights was critical towards the District Court's rejection of all evidence in favour of the mother with limited or no explanation.

(127) Against this background, I cannot see – considering the status of the case – that the District Court's brief reason for disregarding the statements from the mother's witnesses was error.

(128) A central part of the District Court's reasoning concerned the child's vulnerability and challenges. In this regard, the judgment states the following:

> **"The court thus finds that [the child] shows clear signs of uneven development, and that she has large social and emotional challenges. [The child] has considerable behavioural problems and struggles with regulation and concentration difficulties. In addition to worrying symptoms like wetting and pooping herself, she is uncritical towards strangers. She has severe difficulties with her interaction with fellow pupils and teachers. This has become worse. [The child] appears to be an under-stimulated girl who has been exposed to poor development care over time. Reference is also made to [the child]'s talk with her spokesperson on 9 August 2018 and [the child]'s description of her everyday life. Even if it should be concluded in a subsequent examination that [the child] has ADHD, the court finds that her conduct clearly expresses serious uneven development due to neglect. The court assumes that [the child] is a girl with special care needs, which demands a lot from her care persons. The court agrees with the County Board that [the child] has a special need of safety, stability and predictability, as well as regulation and development support. It is necessary that her care persons are calm, stable adults who are able to see her needs of care and to safeguard them. This is also crucial if it should turn out that [the child] after the examination by BUP [Children and Adolescents' Psychiatric Outpatient Services] suffers from neuro-psychological disturbances that will make the care for her even more challenging and demanding."**

(129) Thus, the District Court was convinced that the child had serious problems. It mentions among other things that she appeared "under-stimulated", that her conduct clearly "expressed a serious uneven development due to neglect", and that she had a "special need of safety, stability and predictability as well as regulation and development support".

(130) When it comes to the District Court's assessment of the mother's caring skills, it is stated in the judgment that one had continuously considered terminating measures in the home as the family therapists did not see any signs of the intended effect, and no changes were observed before the case was heard by the County Board. About the therapist's statement, the following is set out in the judgment:

> **"The court also refers to the statement by the family therapist …., who together with a colleague was responsible for PYC [Parenting Young Children] guidance. She has explained that the intention was to work with specific goals in a very concrete manner. Before home visits were initiated, the mother received guidance through role-play and dialogue play, among other things. She observed that the mother, during dialogue play, with the grandmother present, had difficulties understanding the task, that she had difficulties stating**

> **her opinions and that she changed her mind if the grandmother said anything …**
>
> **The mother appeared unpredictable and could suddenly lose her temper so that the [family therapist] saw that [the child] became upset. [The family therapist] has further explained that she saw the chaos in the home, with unpredictability, inconsistency and that the mother did not see when [the child] became upset and needed comfort. [The child] appeared like a girl with an enormous need to be seen, which she was not. The mother appeared like a person surrounded by much chaos, who was restless and kept losing focus…"**

(131) Here, the District Court clearly expresses the shortcomings in the mother's caring skills. Read in context with the description in the judgment of the child's obvious needs of safety, stability, predictability, calm and care providers who are able to see her needs, the significance the mother's lack of caring skills for the child is also clearly stated.

(132) After an overall assessment, I have concluded that the District Court's judgment is founded on a broad, updated and adequate basis for decision-making. There are no significant shortcomings in the reasoning. Nor can I see that any errors have been made at an earlier stage of the care order case that may have affected the District Court's judgment. The conditions in section 36-10 subsection 3 (c) of the Dispute Act are thus not met.

Contact rights – legal starting points

(133) Children and parents are as a main rule entitled to access to each other, see section 4-19 of the Child Welfare Act. When a care order has been issued, the County Board must consider the extent of access, but may also decide not to grant any access at all.

(134) It follows from section 4-1 of the Child Welfare Act that "[w]hen applying the provisions of this chapter, decisive importance shall be attached to finding measures which are in the child's best interests". The provision gives instructions with regard to the application of section 4-19, see HR-2020-662-S paragraph 116:

> **"Hence, in order to determine the extent of access, the best interests of the child are crucial. As a starting point, it is best for the child to have contact with its parents that strengthens and develops the bond between them."**

(135) The County Board and the courts fix a minimum of contact rights, which the child welfare services have a duty to evaluate on a regular basis, see section 4-16 of the Child Welfare Act. The child welfare services may also decide that contact should be arranged in a more flexible manner if this is compatible with the County Board's care order or the judgment. In addition, the parents may request a reconsideration of the contact rights 12 months after the case was heard by the District Court, see section 4-19 final subsection of the Child Welfare Act.

(136) When determining the extent of access, the starting point must be that a care order is to be considered a temporary measure, and at the parents will have the child returned to them as soon as the circumstances permit, see section 4-16 last sentence of the Child Welfare Act.

(137) The aim of reunification has been emphasised in a number of rulings from both the Supreme Court and the European Court of Human Rights, and it implies that contact rights must be set to maintain this objective. It lays down requirements for the frequency and quality of the contact sessions, see HR-2020-661-S paragraphs 143 to 145. In the cases where reunification with the parents is still the goal, the extent of access must thus be determined to ensure that the bonds between the parents and their child may be strengthened and developed, see HR-

2020-662-S paragraph 128 and HR-2020-661-S paragraphs 131 to 134.

(138) In Rt-2012-1832 paragraph 34, it is set out that the contact must "safeguard the consideration of creating and maintaining the child's knowledge to and understanding of its biological origin". However, such a limitation of the purpose of the contact may only take place if the goal of family reunification is abandoned, see HR-2020-662-S paragraph 128 and the Court's judgment 19 November 2019 *K.O. and V.M. v Norway* paragraph 69. This is not the issue here. I will revert to which conditions apply in those cases when considering the father's case.

(139) The extent of the access must be determined based on the individual circumstances in the case, see HR-2020-662-S paragraphs 125–127 and 132 and HR-2020-661-S paragraph 125.

(140) As Justice Falkanger in the first-mentioned case also has accounted for, neither Norwegian case-law nor the Court's case-law suggests a minimum level of access. However, the goal of lifting a care order requires that the contact rights granted are as extensive as possible without setting aside the best interests of the child, see HR-2020-662-S paragraphs 133–135.

(141) In paragraphs 137 and 138, he summarises the legal starting points for determination of the extent of access as follows:

> **"The extent of access must be determined individually in each case. In the assessment, the best interests of the child are the primary consideration. At the outset, it is best for the child to live with its parents. The purpose of the contact must therefore be to facilitate family reunification. Moreover, contact has an intrinsic value regardless of the prospects of family reunification, but must not expose the child to undue hardship.**
>
> **Only when exceptional and strong reasons are present, the aim of family reunification may be abandoned, and on those grounds, the parents' contact rights may be strongly limited or completely removed."**

(142) Hence, the authorities may not facilitate access that may expose the child to undue hardship.

Contact rights – individual assessment

(143) The District Court set the number of visits to two hours six times per year under supervision.

(144) When fixing the contact rights, the District Court took as its starting point the biological principle and the right of the parents and the child to have access to each other. With reference to Rt-2012-1832, it assumed that the foster care would be long-term. The consideration of establishing a safe and good relationship to the foster home and to create and maintain the child's knowledge and understanding of its biological origin, was stressed. At the same time, the District Court highlighted the necessity of an individual assessment in each case.

(145) Based on case-law from the European Court of Human Rights, I find that the District Court in this case has determined the extent of access on too narrow grounds. It amplifies the likelihood of a long-term foster care rather than the temporary nature of the care order. As I have accounted for, the goal must be to have the child returned to her parents as soon as the circumstances permit. Contact rights must thus be fixed to safeguard this objective, see HR-2020-662-S paragraph 125. This entails certain requirements of the frequency and the quality of the contact sessions. As mentioned, the aim of family reunification may only be abandoned

when exceptional and strong reasons are present.

(146) Nonetheless, this objective does not imply that contact rights may be granted to such an extent that it may harm the child. The consideration of the child's need of stability to establish itself in its new care base may then – if frequent contact becomes unreasonably burdensome – entail a stricter contact regime, at least, like in the case at hand, at an initial stage in the process.

(147) Regarding the individual assessment of the extent of contact, the following is set forth in the District Court's judgment:

> **"The court assumes that [the girl] is facing considerable challenges with regard to settling in a new foster home. Although [the girl] is still in the foster home and in a respite home where she thrives, it is important that [the girl] be given the calm and possibility to settle in her new foster home and accept that that is where she will be living from now on. [The girl] needs stability in her life after having lived for years under great distress due to her mother's lack of caring skills. The court assumes that the child welfare services, when the time is right, allows the mother to have longer contact sessions than two hours to enable activities at [the girl]'s choice during their time together."**

(148) The reasoning shows that the District Court took as its starting point – and attributed particular importance to – the special circumstances in the child's current situation. The child was to be placed in emergency foster care while waiting for a new foster home, she was facing severe problems with regard to settling in a new foster home, and she needed calm and stability in her new care base after having suffered hardships for many years because of the mother's lack of caring skills. Here, I reiterate the District Court's account of the first family's termination of the foster home agreement as caring for the child had become too demanding and that the child's problems had become worse. Furthermore, the District Court refers to the extensive assistance measures that had been tried for years.

(149) The District Court also assumes that "that the child welfare services, when the time is right, allows the mother to have longer contact sessions than two hours to enable activities at [the girl]'s choice during their time together". This substantiates that the District Court fixed a minimum amount of contact that would increase once the situation had stabilised. I note that the statement regarding an increased number of hours does not preclude an increase of the number of contact sessions per year.

(150) These are relevant considerations when determining the extent of access. The consideration of the best interests of the child was dominant. The District Court emphasised fixing contact rights that would not subject the child to "undue hardship".

(151) I cannot see that the District Court's narrow starting point has affected its more thorough assessment. As set out in the District Court's reasoning, the aim of family reunification was in fact never abandoned. The District Court clearly expressed that the contact would be extended after a transitional phase.

(152) The judgment read in context shows that the District Court has made its individual assessment with the biological principle as a starting point. With an extensive, updated and balanced factual basis for decision-making, including expert evaluations, it has placed decisive weight on the child's severe difficulties, uneven development and need of stability and calm to settle in a new foster home after once more – shortly after the care order – being forced to adjust to

a new care base. The District Court emphasised that it concerns a girl who during most of her life has been subjected to hardships and who has had a negative development over time.

(153) Although it is irrelevant to the outcome of the case, I note that the girl after moving to a new foster home – in addition to physical contact sessions in line with the District Court's judgment – has had telephone contact with her mother every Sunday. The foster mother has sporadic contact with the mother by SMS, and she sometimes sends photos of the girl. In addition, the girl has had one meeting with her grandmother and great-grandmother.

(154) Against this background, I cannot see that the District Court's basis for decision-making, the overall reasoning or balancing of interests is incompatible with the requirements laid down in internal Norwegian law and Article 8 of the Convention. In my opinion, the judgment is therefore not encumbered with such flaws that the Court of Appeal should have heard the case, see section 36-10 subsection 3 (c) of the Dispute Act.

Section 36-10 subsection 3 (a)

(155) The mother has contended that the new judgments from the European Court of Human Rights raise issues of significance beyond the scope of the current case, which means that the Court of Appeal should have granted leave to appeal under section 36-10 subsection 3 (a) of the Dispute Act. In my opinion however, the issues of principle in recent case-law from the Court that are relevant to our case have been clarified by the grand chamber's hearing, see HR-2020-661-S paragraph 203.

(156) Consequently, the mother's appeal should be dismissed.

The father's appeal

Contact rights – legal starting points

(157) As it has appeared, the mother was given sole parental authority under the Children Act through Ø District Court's judgment 29 March 2014, and the father was denied access. After this judgment, the father had no contact with the mother and the child. Now, in the care order case, the father has demanded access.

(158) I have previously accounted for the general legal starting points and evaluation criteria applicable for the determination of extent of access.

(159) As mentioned, the aim of family reunification is mentioned repeatedly in the Supreme Court's rulings as well as in the Court's case-law. At the outset, contact rights must be fixed to maintain this aim, see HR-2020-661-S paragraph 120 et seq and HR-2020-662-S paragraph 127. However, reunification is not the aim in the father's case. If the child is to be returned, it will be to the mother alone.

(160) Issuing a care order requires, as mentioned, "very exceptional circumstances", and the States have wide margin of appreciation. When it comes to limitations that – additional to the care order – effectively prevent access and entail a risk that the family bonds are effectively curtailed, a narrower margin of appreciation applies. I refer to HR-2020-661-S paragraphs 96, 99 and 100. In Norwegian case-law, it is assumed that "exceptional and strong reasons" are required to refuse access, see Rt-2014-976 paragraph 36 and HR-2017-2015-A paragraph 56.

However, these rulings refer to somewhat different criteria. Since it neither has been argued nor is relevant to the case at hand, I will not address this further.

(161) In light of the father's lack of contact with the child, it must also be borne in mind that the European Court of Human Rights in various ways has expressed that the protection under Article 8 of the Convention is not absolute, and that non-existing or weak family ties are less protected than an established family life. This is illustrated by the Court's judgment 19 September 2000 *Gnahoré v. France* paragraph 60 dealing with care orders. In that case the boy had been placed in foster care at the age of four, and the father and the son had had very little contact for nearly eight years. And the judgment 28 October 1998 *Söderbäck v. Sweden* regarding adoption, sets out in paragraph 32 that the contact between the father and child had been "infrequent and limited in character and when the adoption was granted he had not seen her for quite some time". No violation was found in these cases. I also mention that in the Court's judgment 26 April 2018 *Mohamed Hasan v. Norway* regarding adoption, where no violation was found either, it is stressed that where social ties between a parent and his or her children have been very limited, this must have implications for the degree of protection under of the Convention, see paragraph 161 with further references.

(162) When it concerns access more specifically, it is assumed in the Court's judgment 27 June 2000 *Nuutinen v. Finland* that the obligation to take measures to facilitate meetings between a parent and his or her child is not absolute, especially where the two are still strangers to one another, see paragraph 128.

(163) The lack of or weak contact is also emphasised in a number of Supreme Court rulings on interference with family life, see for instance HR-2017-2015-A paragraph 59 and HR-2019-1272-A paragraphs 79 and 105.

(164) However, meetings between parents and their child should not held with the sole purpose of facilitating a return of the child. Even if the aim of reunification is abandoned, contact will – unless it exposes the child to undue hardship – have an intrinsic value that must be taken into account when determining the extent of access, see HR-2020-662-S paragraph 135 with a further reference to the Court's judgment 17 December 2019 in the case *Abdi Ibrahim v. Norway* paragraph 57, where the following is stressed:

> **"... regardless of the applicant's stand on continued foster care in the course of the adoption proceedings – and of whether the domestic authorities at that time might have been justified in concluding that the foster care placement, if X were not adopted, would be long-term – she and her son still had the right to respect for their family life. Accordingly, although the applicant did not apply for family reunification to the domestic authorities, those authorities were nonetheless under the positive duty to take measures to facilitate the applicant's and X's continued enjoyment of a family life, at the minimum by maintaining a relationship by means of regular contact in so far as reasonably feasible and compatible [to] X's best interests."**

(165) I reiterate that when assessing whether Article 8 has been violated, one must also consider whether the procedure as a whole has been appropriate.

Contact rights – individual assessment

(166) With reference to recent case-law from the Court, the father contends that the ruling in the contact rights issue lacks an adequate factual basis. Furthermore, he has stressed that the District Court has not struck a fair balance between the conflicting interests, and that the

requirements of a stricter scrutiny are not met. The father also argues that the District Court failed to assess his competence in contact situations and to the inadequate grounds given with regard to whether it would harm the child to meet her father. I will assess these issues jointly starting with the District Court's reasoning.

(167) When assessing the grounds, I start with the fact the father had neither parental responsibilities nor access to his daughter when he in 2018 – in connection with the care order – claimed contact rights. The girl had no connection with her father, and she had not been in contact with him since she was four months old. Today, she is approximately eight years old. Consequently, the father's right to respect to family life enjoys less protection under Article 8 of the Convention 8 than if the interference had been made into established family life.

(168) With reference to the requirement of exceptional and strong reasons to refuse access, the District Court taken the correct legal starting point, and it found after an individual assessment that this requirement was met. The majority found that for the time being it was in the child's best interests that she had no contact with her father.

(169) The fact that we are dealing with a particularly vulnerable child, is in my opinion clearly described. The following is set out in the statement by the municipality's party representative, a child welfare consultant who had followed the girl since 2012, quoted in the District Court's judgment:

> **"… [the child] lacks social skills, is hard to regulate and does not adhere to boundaries. She has an oppositional and aggressive behaviour with tantrums, is inclined to run off, create chaos and close her ears to correction. She seeks conflicts and makes hurtful remarks to others. She is highly uncritical and may be attention-seeking, intense and clingy towards strangers. She lacks boundaries and shyness when it comes to her own body, and she tends to wet and poop herself and walk around with it without telling anyone or seeming to bother, which has created difficulties in social settings, and she has been forced to start using nappies. At school, she performs at the lower end of the scale. She has not previously been examined due to the unstable care situation, but she has now been referred to PPT [the Educational-Psychological Service] and BUP [Children and Adolescents' Psychiatric Outpatient Services] for examination.**
>
> **… the reason why her first foster home terminated the agreement was that the situation had become untenable for the other children in the home because [the child] demanded so much attention and space. She was very intense and never satisfied, which was difficult for the other children.**
>
> **When she moved from the foster home to emergency foster care from 1 April, she was very hurt and depressed and it has been hard for her, as opposed to when she moved to the foster home where she had no visible reactions."**

(170) In my opinion, the District Court has also sufficiently assessed why access is not in the child best interests today, and has struck a fair balance between the various interests. As it appears from what I have just quoted from the District Court's judgment, the moving to the emergency foster home – after the first foster home had terminated the agreement – must have been difficult for her. According to the District Court, being forced to adjust to a new care base while at the same time being introduced to the biological father, "weaken her ability to bond with a new home which in the long run may lead to more relocations with the presumed unfortunate effect that would have on her development and adjustment."

(171) The District Court's conclusion was consequently that the girl was "very vulnerable … with a special need of care and signs of uneven development". The District Court therefore found

that she was still "in urgent need of a stable care situation with calm, predictability and safe routines".

(172) However, the intrinsic value of maintaining contact with one's biological origin is also given weight. It is set out that it concerns a temporary measure where contact may be established in the future, but that the child for the time being needs calm to settle in her new foster home. The court also found it inadvisable to inform the child about the criminal conviction against the father before she is old enough to understand what it entails. The majority referred to the "significant risk of damaging effects" for her and the relationship with her father, if contact was to be initiated and she learnt to know him before learning about the conviction. The following is stated in the majority's reasoning:

> **"As the majority of the court sees it, of greatest concern is the description of [the child's] uncritical behaviour and lack of boundaries for her own body, and this will cause problems if she is to have access to her father, even under guidance and supervision. The father is convicted of serious and excessive (*grenseoverskridende*) acts against children who are not much older than [the girl], and the majority of the court finds that there is a risk that situations may occur during contact sessions that will be negative to [the girl] and difficult to handle for those present."**

(173) As the District Court assessed the risk of harm if the contact with her father was to be initiated now, I cannot see that it was an error that the girl's wish for contact was not discussed more thoroughly.

(174) Due to the situation described here, the District Court found that the father's competence in contact situations could not be decisive. As a consequence, I cannot see that it was an error that this was not further assessed and included in the basis for decision-making. It concerns a temporary postponement of contact until the girl has settled in her new home and reached an age where it is appropriate and advisable to inform her about the father's criminal conviction. Thus, the non-mentioning of measures was also not a flaw.

(175) My conclusion is that the District Court has made a sufficiently broad assessment. From the assessment, it appears what the child's vulnerability consists of, why the father's competence in contact situations is currently irrelevant, and why contact for the time being will harm the child. Among the factors stressed is that the relationship between the father and his child may be harmed if contact is initiated now.

(176) I will now consider whether the District Court had an adequate basis for decision-making.

(177) Since the father's competence in contact situations is currently not relevant, it was also not a flaw in the District Court's judgment that no expert was appointed to evaluate it.

(178) The central witness in the District Court was – as I have mentioned – a child welfare consultant who had followed the child since 2012. She had a professional background within child welfare and must have had extensive knowledge about the child's vulnerability and challenges. In addition, the child's spokesperson testified. The District Court included one lay judge – an expert in psychology – who was one of the two judges constituting the majority. I also mention that both the County Board and the District Court in the judgment from 2014 reached the same result as the District Court's majority in the case at hand. I attach further importance to fact that both the County Board and the District Court was composed with expertise also in 2014.

(179) Against this background, the District Court had an adequate and updated basis for decision-making.

(180) The father also contends that he has not been sufficiently involved in his own process, and that this, after an overall assessment, amounts to a violation of Article 8. The basic requirements for a right as a party and the right to be heard have not, in his opinion, been sufficiently maintained.

(181) The European Court of Human Rights considers whether the process "has been conducted such as to secure that the views and interests of the natural parents are made known to and duly taken into account by the authorities …", see *Strand Lobben* paragraph 212 with further references. It is further set out that the parents must have been "involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests and have been able to present their case …".

(182) Hence, the Court lays down a requirement that the parents must have had every opportunity to maintain their interests in the decision making process. Often, it is not the individual factors that are crucial, but an overall assessment of whether there is a sufficient basis to secure that the parents' opinions and interests are duly considered, see HR-2020-661-S paragraph 161.

(183) The mother's and the father's respective cases have been heard simultaneously. The father has not had rights as a party in the mother's case, one of the reasons being that the mother's personal data are protected by privacy. In an order of 28 February 2019, the District Court found that the father's request for an expert should be rejected. The order contains a cross-reference to the mother's case regarding the care order, as it mentions that light could be shed on the girl's situation in that case, and that a judgment in the mother's case would be handed down before the District Court's hearing of the father's case.

(184) In my view, this cross-reference was unfortunate. However, I cannot see that the order, which was issued during the preparatory phase, has affected the outcome of the case. First, I refer to my conclusion that there was no need for an expert to evaluate the father's competence in contact situations since it could not make any difference due to the daughter's vulnerability and need of calm to settle in her new care base. In addition, the father had full rights as a party in his own court proceedings and was fully involved therein.

(185) When deciding the contact rights issue, the District Court was not composed of the same judges in the father's case as in the mother's case regarding the care order and contact rights. Parts of the judgment in the mother's case in the District Court were presented in the father's case, but this only included the court's assessment of contact rights for the mother and the conclusion of the judgment. Hence, it concerned information that was necessary for the court to evaluate contact with the father in context with the contact visits that had previously been decided for the mother. The child's situation was heard separately in the father's case. I refer among other things to the testimonies of a child welfare consultant and the child's spokesperson during the main hearing.

(186) Against this background, my conclusion is that neither the ruling nor the procedure of the District Court is seriously flawed, see section 36-10 subsection 3 (c) of the Dispute Act.

(187) As for the contention that the condition in section 3 (a) of the provision is met, I confine

myself to referring to what I have already said in this regard.

(188) The father's appeal, too, should thus be dismissed.

Conclusion

(189) I vote for the following

O R D E R :

Case no. 00-000001SIV-HRET, A v. Y municipality, B and KS (third-party intervener), appeal against a decision:

The appeal is dismissed.

Case no. 00-000002SIV-HRET, B v. Y municipality and KS (third-party intervener), appeal against a decision:

The appeal is dismissed.

(190) Justice **Matningsdal:** I agree with Justice Normann in all material respects and with her conclusion.

(191) Justice **Møse:** Likewise.

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

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

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

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

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

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

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

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

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

O R D E R :

Case no. 00-000001SIV-HRET, A v. Y municipality, B and KS (third-party intervener),

appeal against a decision:

The appeal is dismissed.

Case no. 00-000002SIV-HRET, B v. Y municipality and KS (third-party intervener), appeal against a decision:

The appeal is dismissed.