SUPREME COURT OF NORWAY

J U D G M E N T

given on 27 April 2022 by a division of the Supreme Court composed of

Justice Bergljot Webster
Justice Aage Thor Falkanger
Justice Ingvald Falch
Justice Kine Steinsvik
Justice Knut Erik Sæther

HR-2022-847-A, (case no. 21-146181SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 6 August 2021

A	(Counsel Mette Yvonne Larsen)
v.	
B	(Counsel Anders Westeng)

(1) Justice **Falch:**

Issues and background

(2) The case concerns whether a previous father of a child is entitled to joint parental responsibility, residence at his place and contact with the child after it has been established that he is not the child's biological father. The case also raises the question of whether Norwegian courts have jurisdiction to hear the case.

(3) A and B (the child's mother) met in Guatemala in 2012. A is a Norwegian national, while B is a Guatemalan national. They married in June 2013 and travelled to Norway.

(4) On 00.00.2014, B gave birth to a daughter, C, in Guatemala. C has Down's syndrome and was born with a heart disease for which she had surgery in Norway in July 2014.

(5) In December 2014, B took C with her back to Guatemala. A followed after in February 2015. In March 2015, he took C with him to Norway. The relationship between B and A had then ended, and A did not return to Guatemala. B came to Norway in August 2015.

(6) On 2 October 2015, B filed a request for C's return under the Child Abduction Act, cf. the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. Oslo District Court [then Oslo *byfogdembete*] dismissed the request on 4 December 2015. The Court found that C had had habitual residence in Norway since A brought her here in March 2015. On 17 March 2016, B's appeal was dismissed by Borgarting Court of Appeal.

(7) In the autumn of 2016, B announced that A is probably not C's biological father after which a lengthy legal process followed. On 17 December 2019, based on DNA tests of B, A and the child, Oslo District Court ruled that A is not C's biological father. No other man has been confirmed to be her father. The judgment became final by the Supreme Court's Appeals Selection Committee's order of 21 July 2020 in case HR-2020-1497-U.

(8) On 5 December 2018, while the paternity case was pending, B brought an action in Oslo District Court claiming sole parental responsibility for C, that C should have permanent residence with her, and that A should have such contact with C as the Court deemed fit. In May 2019, the parties agreed to suspend the case until a final judgment was handed down in the paternity case. At the same time, the parties agreed on a temporary arrangement under which C was to live partly with A and partly with B, with registered residence with A.

(9) When the paternity case was finally decided, the case regarding parental responsibility, residence and contact was resumed. The District Court appointed an expert, and the main hearing was held in December 2020. Oslo District Court handed down a judgment and an order on 5 February 2021:

> "Conclusion of the judgment:
>
> 1. B is to have sole parental responsibility for C.
>
> 2. C is to have permanent residence with B.

3. A is to have contact with C from Wednesday to Friday in even-numbered weeks, and from Thursday to Monday in odd numbers weeks. C is to be accompanied to and picked up from kindergarten.

4. Each party carries its own costs.

Conclusion of the order:

1. A's request for a temporary ruling is successful on the issue regarding contact with C (item 3 of the judgment's conclusion). Otherwise, the request is dismissed.

2. Each party carries its own costs."

(10) Both A and B appealed to the Court of Appeal. A's appeal challenged the parental responsibility and permanent residence, while B's appeal challenged the contact rights. During the preparations for the appeal, it emerged that B, in January 2021, had travelled with C to Guatemala and that a notification of permanent relocation had been sent on 25 May 2021.

(11) On 18 June 2021, A applied to the Norwegian Directorate for Children, Youth and Family Affairs (Bufdir) for assistance in having the child returned to Norway. Bufdir rejected the application on 10 August 2021 on the grounds that A is not the child's father.

(12) Borgarting Court of Appeal handed down a judgment and an order on 6 August 2021:

"Conclusion of the judgment:

1. A's appeal against item 1 (parental responsibility) and item 2 (permanent residence) of the District Court's conclusion is dismissed.

2. A is entitled to physical contact with C, born 00.00.2014, in Guatemala or wherever C might be resident, twice a year for two weeks at a time. The parties must agree on the times within 1 February each year. A is to cover the costs of this contact, including all travel and accommodation costs.

   In addition, A is entitled to contact C by telephone and other electronic communication once a week up to 30 minutes each time.

3. The parties cover their own costs in the Court of Appeal.

4. No changes are made to the District Court's costs ruling.

Conclusion of the order:

1. A is granted temporary contact in line with item 2 of the conclusion of the judgment. Otherwise, the appeal against the District Court's order is dismissed.

2. The parties cover their own costs in the Court of Appeal.

3. No changes are made to the District Court's costs ruling.

(13) The Court of Appeal found that Norwegian courts have jurisdiction to hear the case, even if the child lives in Guatemala. The Court of Appeal also found that there is no legal basis in the Children Act for granting A parental responsibility, permanent residence or contact rights with the child. The Court of Appeal awarded him temporary contact rights with legal basis in Article 8 of the European Convention on Human Rights (ECHR).

(14) A has appealed against the judgment and the order to the Supreme Court. The appeal against the judgment challenges the application of the law and the determination of parental responsibility, permanent residence and contact rights. The Supreme Court's Appeals Selection Committee granted leave to appeal on 21 October 2021. On the same day, leave to appeal against the order was refused.

(15) The Supreme Court has appointed psychology specialist Aina Frydenlund as an expert witness. She has also been appointed in the previous instances. Ms. Frydenlund submitted a report on 28 February 2022 and testified in the Supreme Court.

(16) The hearing was held on 15 and 16 March 2022. After that, the Supreme Court found it necessary to resume the hearing regarding whether Norwegian courts have jurisdiction. This took place on 1 April 2022, see section 9-17 subsection 2 of the Dispute Act.

(17) After B moved with C to Guatemala in January 2021, A has had weekly contact with C by videolink, but no physical contact. Otherwise, the circumstances of the case are mainly similar to those presented in the Court of Appeal.

The parties' contentions

(18) The appellant – *A* – contends:

(19) The question of Norwegian *jurisdiction* is regulated by section 82 subsection 1 of the Children Act. The Hague Convention 1996 is not applicable, as Guatemala is not a party to it. The child had habitual residence in Norway when the mother brought an action against A in December 2018, and jurisdiction is not lost during the course of the proceedings, see section 34 subsection 1 of the Courts of Justice Act. Moreover, the mother's relocation with the child to Guatemala was illegal child abduction, which means that jurisdiction is not in any case transferred to Guatemala. Such a change of jurisdiction is also prevented by Norway's human rights obligations.

(20) As for *parental responsibility*, A's parental responsibility was not lost when it was finally established that he is not the child's biological father. Moreover, an established family life exists between A and the child, and is protected under Article 8 of the ECHR. A removal of parental responsibility thus amounts to an interference with family life. In the event that A's parental responsibility is considered lost under the Children Act, the State and the courts have a positive obligation under Article 8 of the ECHR to allow him a share of it. It is in the child's best interests that the parental responsibility is shared between A and B.

(21) As for *permanent residence*, it is in C's best interests that she lives with A, as A's contact with her will otherwise not be followed up by the mother. Residence with A will ensure that the child's special needs of care are adequately fulfilled, and afford her the best overall parental contact.

(22) To the alternative issue of *contact* between A and the child, it is contended that the extent determined in the Court of Appeal's judgment is far from sufficient to protect A's right to family life. Such limited contact rights are not in the child's best interests.

(23) A asks the Supreme Court to rule as follows:

> "Principally:
> 1. A and B are to have joint parental responsibility for C.
>
> 2. C is to have permanent residence with A.
>
> 3. C is to have contact with her mother as the Court deems fit.
>
> In the alternative:
> 1. A and B are to have joint parental responsibility for C.
>
> 2. C is to have permanent residence with her mother.
>
> 3. C is to have contact with A at a minimum of 6 times per year. All holiday must be taken during school holidays, the family's trips to Scandinavia and during public holidays. Expenses for contact are to be determined according to applicable rules in Norway.
>
> 4. C is to have telephone contact/video contact with A every week.
>
> In the next alternative:
> 1. C is to have contact with A at a minimum of 6 times per year. The holiday must be taken in school holidays, the family's trips to Scandinavia and during public holidays. Costs of such contact are to be determined according to applicable rules in Norway.
>
> 2. C is to have telephone contact/video contact with A every week.
>
> In all events:
> A is awarded costs in all instances."

(24) The respondent – *B* – contends:

(25) A number of factors suggest that Norwegian *jurisdiction* was lost when C's habitual residence changed to Guatemala. This is supported in the preparatory works and is the general rule under the Hague Convention 1996. Under any circumstances, no child abduction has taken place, nor is Norwegian jurisdiction supported by human rights. However, it is possible for the Supreme Court to hear the issue of contact rights under the rules on emergency venue.

(26) As for the *substantive* issues, the Court of Appeal's judgment is correct.

(27) The Children Act does not allow for granting A *parental responsibility* and *permanent residence*, as he is not the child's father. Nor does Article 8 of the ECHR impose any duty on the State to do so. In any case, it is not in the child's best interests that A takes part in the parental responsibility and/or is awarded permanent residence. The child is happy with her mother in Guatemala, where she is well integrated. Moving the child away from her biological mother will also violate B's right to family life.

(28) It is not disputed that the social relations between A and the child constitutes family life protected in Article 8 of the ECHR. However, this does not extend beyond allowing A contact rights, as the Court of Appeal has done. B has not appealed against the determination of contact, which balances the conflicting considerations well.

(29) B asks the Supreme Court to rule as follows:

> "1. Principally: The appeal is dismissed.
>
> 2. In the alternative: Contact is to be determined as the Supreme Court deems fit."
>
> 3. In both cases: A is liable for the public authorities' costs in in the District Court, Court of Appeal and the Supreme Court."

My opinion

Jurisdiction and choice of law

Jurisdiction

(30) The question of whether Norwegian courts have the authority – jurisdiction – to hear the case, is regulated by section 82 of the Children Act, which reads:

> "Cases regarding parental responsibility, international relocation with the child, custody or contact rights may be brought before a Norwegian court if the child is habitually resident in Norway. This also applies in cases that shall be dealt with by the County Governor pursuant to section 55.
>
> A case regarding an interim decision may be dealt with by a Norwegian court in all cases where the child is present in Norway.
>
> The provisions of the first and second paragraphs shall not apply unless otherwise provided by a treaty with another state."

(31) As Guatemala is not a party to the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, it is not applicable. Also, Norway has not entered into other relevant agreements with Guatemala.

(32) Jurisdiction issues are therefore regulated by section 82 subsection 1 first sentence of the Children Act, stating that cases "can be brought before a Norwegian court if the child is habitually resident in Norway". In other words, the child's residence at the date of the action is decisive.

(33) When B, on 5 December 2018, brought an action for parental responsibility, permanent residence for and contact with C, the child undoubtedly had "habitual residence" in Norway. She had then lived continuously in Norway, together with A at his address in Oslo, since their arrival from Guatemala in March 2015.

(34) The question is therefore what significance should be attached to the fact that the child's habitual residence has been *changed after* the action was brought. C travelled to Guatemala in

January 2021 and has had habitual residence there since the spring of 2021. The significance of such a change is not directly regulated by section 82 subsection 1 first sentence of the Children Act. However, in my opinion, the answer lies in section 34 subsection 1 of the Courts of Justice Act, which reads:

> "When a case has been legally brought before a court of justice, this court maintains, unless otherwise determined, judicial authority in the case, even in in the event of subsequent changes that would have made the case inadmissible."

(35) Here, it is set out that if a Norwegian court has judicial authority at the time of the action, it "maintains" such authority for as long as the case is pending. This includes cases where Norwegian jurisdiction changes while the case is pending. In Bøhn, Commentary to section 34 of the Courts of Justice Act, Juridika, updated as of 6 September 2021, it is stated that judicial authority means "general authority to rule, see Recommendation 1912 page 12". The Supreme Court ruling in Rt-2011-1285 paragraph 23 is furthermore based on this interpretation of the provision. In Norwegian Official Report 2020: 14 New Children Act, the following is set out on page 339:

> "In Norwegian law, the issue of jurisdiction is assessed at the time the case is brought. If Norwegian courts have jurisdiction at that point in time, Norwegian courts remain competent, see section 34 of the Courts of Justice Act."

(36) The appellate court will then also have jurisdiction. Its competence stems from the lower court that has made the ruling appealed against.

(37) However, section 34 subsection 1 of the Courts of Justice Act makes reservation for situations where "something else is determined". As mentioned, I cannot see that section 82 of the Children Act decides otherwise, nor can I see that its preparatory works presupposes any other solution:

(38) Section 82 of the Children Act was amended with effect from 2016, when the Hague Convention 1996 was implemented into Norwegian law. Previously, the parents' residence had partly been decisive. The Ministry stated the following in Proposition to the Storting LS (2014–2015) item 8.2.4.1:

> "The Hague Convention 1996 necessitates amendments to section 82 of the Children Act as to when a case on parental responsibility, permanent residence or contact can be heard in Norway. The general rule under the Convention is that cases are heard where the child is habitually resident. The Ministry proposes that 'habitual residence' is introduced/continued as a general (ordinary) basis for jurisdiction in such cases."

(39) More or less the same is expressed in the Proposition's special remarks to section 82:

> "Amendments to section 82 of the Children Act are necessary to ratify the Hague Convention 1996. The Hague Convention 1996 sets out that rulings under the Convention must be made where the child is habitually resident. This implies that the bases for jurisdiction in section 82, previously subsection 1 (a), (where the defendant is resident) and (c) (where parental responsibility, residence and contact have previously been determined in Norway) must lapse for cases regulated by the Convention, and that the defendant's residence correspondingly must lapse as a basis for jurisdiction in subsection

> 2. To strengthen the child perspective in the legislation and to simplify the rules on jurisdiction, the amendments are also made for cases not regulated by the Convention."

(40) In my opinion, these statements must be interpreted as they are written: The criterion for jurisdiction is the child's habitual residence, also in cases where the Hague Convention 1996 is not applicable. The Convention's exceptions from this rule are not included in the Children Act. They are thus not applicable outside of the Convention's area of application.

(41) As I read the preparatory works, the purpose was not to make jurisdiction dependent on the child's habitual residence *at all times*, although the Convention is based on such a principle. If that was the case, the wording "can be brought before" a Norwegian court in section 82 subsection 1 should have been different. Nor can I see that the preparatory works suggest that section 34 subsection 1 of the Courts of Justice Act must be set aside. The issue is not addressed.

(42) However, I agree with B that hearing a parental dispute is challenging when the child is located abroad. If the child, in addition, is located outside the areas of the application of the Hague Conventions 1980 and 1996, it may be particularly difficult to obtain an adequate decision-making basis, typically regarding the child's current situation. This may indicate that Norwegian courts should not have jurisdiction to hear cases where the child is resident outside of Norway.

(43) However, this consideration must be balanced against the unfortunate effect of giving one of the parties the opportunity to prevent the hearing of a lawfully instituted parental dispute by simply taking the child abroad. This consideration is particularly weighty if the departure must be characterised as child abduction and the child is taken to a country that is not party to any of the mentioned Hague Conventions. Also, if the departure takes place during the appeal hearing, the termination of the proceedings will probably not be the only consequence. It is likely that if so, also the judgment from the lower court must be repealed, even if it has been handed down on a solid decision-making basis.

(44) In my opinion, it is not obvious how these conflicting considerations should be balanced in cases where the child has moved abroad while the case is pending. As I see it, there is no basis in section 82 subsection 1 of the Children Act for such balancing in the individual case.

(45) Therefore, emphasis must in my opinion be placed on the wording of the provision considered in context with section 34 subsection 1 first sentence of the Courts of Justice Act: Because the child's habitual residence was in Norway at the time the action was brought, Norwegian courts have jurisdiction to continue the hearing until a final ruling is made. Nothing else is determined.

(46) I therefore conclude that the Supreme Court has jurisdiction to hear the appeal.

Applicable law

(47) When Norwegian courts have jurisdiction to hear the case, the case must be "decided in accordance with Norwegian law", see section 84 of the Children Act.

(48) This implies that all Norwegian Acts are applicable, including the ECHR. The ECHR applies as Norwegian law according to section 2 of the Human Rights Act. This is not changed by the fact that the child lives in Guatemala.

The significance of paternity under the Children Act

(49) Chapter 2 of the Children Act regulates who shall be "[t]he child's parents". The parents are "the mother" under section 2 and "the father" or "the co-mother" under section 3. From section 3 subsection 1, it follows that "the man to whom the mother is married at the time of the child's birth shall be regarded as the father of the child".

(50) A was married to B when C was born on 00.00.2014. According to the Children Act, he was therefore her father from her birth.

(51) Section 6 cf. section 9 of the Children Act contains rules on "[c]ontestation of paternity pursuant to section 3". On 17 December 2019, Oslo District Court handed down a judgment in the paternity case, stating that "A is not C's father". The judgment became final on 21 July 2020 and it cannot, according to section 8, be challenged in other cases. This implies that that, in the case at hand, it is to be trusted that A is *no longer* C's father – and thus not her parent.

(52) The rules on parental responsibility and on the child's permanent residence are found in chapter 5 of the Children Act, and rules on contact rights are found in chapter 6. All these rules confer responsibility, rights and duties on *the parents*. For example, section 34 subsection 1 sets out that "parents who are married" shall have joint parental responsibility. Subsection 2 reads:

> "Parents who separate or divorce may agree to have joint parental responsibility or that one of them shall have sole parental responsibility. Until an agreement or decision on parental responsibility has been made, the parents have joint responsibility."

(53) It follows from what I have said that this provision no longer regulates A's relationship with C. The reason is that he is no longer her father, and thus not one of her "parents". The Children Act has no rules under which the courts may award him parental responsibility again.

(54) Correspondingly, there is no legal basis in the Children Act for deciding that C is to reside with A, see section 36, or for granting A contact rights, see section 42.

(55) It is true that section 45 and sections 64–64 d of the Children Act allow for granting contact rights and parental responsibility to persons who are not the child's parents. However, this requires that one or both of the parents are dead. As this is not the situation in the case at hand, I will not elaborate further on these rules.

(56) I mention nonetheless that Norwegian Official Report 2009: 5, Paternity and other maternity, proposed on page 118 to authorise the courts to determine contact rights "for a man who has been the child's legal father, but where the paternity has later been changed". However, the Ministry did not consider it "appropriate" to follow up the proposal in the subsequent Proposition to the Storting 105 L (2012–2013), see page 8.

(57) The consequence is that A's claims for parental responsibility, permanent residence and contact cannot succeed under the Children Act.

(58) I add that section 56 of the Children Act gives "parents" a right to bring an action – and then necessarily against the other parent. In cases like the present, I find that the rule should be supplemented by section 1-3 of the Dispute Act. Anyone claiming to have such rights to the child as those regulated by the Children Act, typically under the ECHR to which I will shortly return, must have the right to institute proceedings to seek clarification.

(59) B brought the action when A was still the child's father under the rules of the Children Act. Since A has maintained his claims after learning that he is not the father, there is no reason to terminate the appeal proceedings and rule the case inadmissible without hearing it on its merits. This has not been contended.

Previous father's rights under Article 8 of the ECHR

Is Article 8 applicable?

(60) Article 8 of the ECHR 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."

(61) Case law from the European Court of Human Rights (the ECtHR) shows that family life with children may be established in such a way that it is protected under Article 8 (1), also for persons other than the biological parents. The following is set out in the ECtHR's judgment of 9 April 2019 *V.D. and Others v. Russia*:

> "90. The Court reiterates that the notion of 'family life' under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* 'family' ties where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy (see …). The existence or non-existence of 'family life' for the purpose of Article 8 is essentially a question of fact depending on the real existence in practice of close personal ties (see …).
>
> 91. The Court has found in previous cases that the relationship between a foster family and a foster child who had lived together for many months had amounted to family life within the meaning of Article 8 § 1, despite the lack of a biological relationship between them. …"

(62) The facts in the ECtHR judgment of 16 July 2015 *Nazarenko v. Russia* resemble those in our case. There, too, a man had lost his parental status after it had been established that he was not

the child's father. The ECtHR found, in paragraph 58, that "their relationship amounts to family life within the meaning of Article 8 § 1".

(63) In the case at hand, the parties agree that the relationship between C and A constitutes family life within the meaning of Article 8 of the ECHR.

(64) C was born while A was married to B, and A raised her like his own daughter until B moved with her to Guatemala in January 2021. Then, C was nearly seven years old and had lived with A for large parts of her life. After C's departure, A still had regular contact with her by videolink. C and A therefore have "close personal ties", see the ECtHR's wording.

(65) Moreover, it is clear that also the relationship between C and B constitutes family life within the meaning of Article 8 of the ECHR. B has always been, and will continue to be, C's mother. Moreover, the two have had extensive contact throughout C's life. During the two latest years, B has also had sole parental responsibility for C.

The balancing of interests

(66) In the decision that concluded the paternity case, HR-2020-1497-U, the Supreme Court's Appeals Selection Committee agreed that Article 8 of the ECHR "cannot be interpreted to lay down a requirement that paternity must be upheld on false biological grounds". As a consequence, A's rights under Article 8 of the ECHR must be considered in the present case, where he has claimed parental responsibility, residence and contact rights.

(67) The fact that A has lost all his previous positions and rights to the child may be considered an *interference* with his right to family life with the child. In that case, the lawfulness of the interference must be considered under Article 8 (2).

(68) This is how the ECtHR carried out the assessment in the mentioned judgment *V.D. and Others v. Russia* paragraph 110, where the authorities' return of a foster child to its biological parents was considered an interference with the foster mother's right to a family life with the child. The question was thus whether the State had breached its *negative* obligation in Article 8 (2) to desist from interference. However, as I understand, the ECtHR considered the foster mother's contact rights under Article 8 (1). Here, the ECtHR pointed out that Article 8 also contains a *positive* obligation for the States to secure respect for family life, see paragraph 125.

(69) Also in the mentioned *Nazarenko v. Russia*, which only dealt with the previous father's right to contact with the child, the ECtHR considered the case under Article 8 (1), see paragraphs 60–62. However, the following is expressed in paragraph 63:

> "In the context of both the negative and the positive obligations, a fair balance has to be struck between the competing interests of the individual and the community as a whole; in both contexts the State enjoys a certain margin of appreciation (see …). Article 8 requires that the domestic authorities strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, primarily importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents (see …)."

(70) If *our case*, in whole or in part, were to be assessed under Article 8 (2), the interference with family life would need a basis in domestic law. The interference with A's right to a family life with the child undoubtedly has a legal basis in the Children Act, as I have demonstrated. However, if he is granted rights to the child, this may be perceived as an interference with B's right to a family life with the child. Here, A and B have competing interests. As mentioned, the Children Act does not provide a legal basis for restricting B's right to family life in accordance with A's claims. It confers no rights on A, as the previous father, of either parental responsibility, residence or contact.

(71) This implies that the requirement of a legal basis in Article 8 (2) of the ECHR may be an obstacle to interfere with B's right, with the result at A's claim cannot succeed under that provision. Furthermore, the dispute is not a consequence of an official act, but of A and B separating. Since the child is now living with B, who has sole parental responsibility under the Children Act, the question is whether that situation is to change. To me, it is therefore natural to assess all of A's claims under Article 8 (1), and ask whether the State's positive obligation to respect his right to family life with the child has been breached. Article 8 (1) does not lay down a particular requirement of a legal basis.

(72) However, whether the individual assessment is to be made under Article 8 (1) or (2) is hardly of any practical importance. As I have just quoted from *Nazarenko v. Russia,* a fair balance must nonetheless be struck between the competing interests. In doing so, *the best interests of the child* are paramount. Also Article 104 subsection 2 of the Constitution establishes that the best interests of the child shall be a fundamental consideration.

(73) I cannot rule out that the courts in certain cases may rule that it is in the best interests of the child to live with a previous father. Correspondingly, situations may occur where a previous father should be granted "parental responsibility". But I am not aware of any examples in ECtHR case law of such rights being conferred under Article 8.

(74) In paragraph 114 in *V.D. and Others v. Russia,* the ECtHR also stresses the significance of "natural parents". In child welfare cases, such as that case, the State has a special obligation to facilitate reunification with the biological parents.

(75) Norwegian legislation, with certain exceptions that I will not discuss here, is based on the biological principle when determining paternity. It is in the capacity of father that a man has responsibilities, rights and obligations towards the child. This implies that it is only relevant to grant a previous father rights to the child under Article 8 of the ECHR if a different solution would amount to a violation of that provision.

The individual assessments

Factual circumstances – the expert's assessment

(76) Whether A should be granted the rights he claims must be determined in the light of the situation at the time of the ruling. That is how ordinary parental disputes are resolved, see HR-2020-1843-A paragraph 34 with further references. I cannot see that the solution can be any different in a case like this.

(77) C has just turned eight years old, and the expert finds her to be an "energetic and mostly happy and social girl". She attends a private school in Guatemala with able-bodied children,

with adjusted curricula and teaching. She lives together with her mother – B – B's fiancé and their two common children, who are very young. B has family nearby, and according to information provided, C has frequent contact particularly with her maternal grandmother and an aunt.

(78) Due to C's disability, the expert has not asked her opinion on the issues that the Supreme Court is now considering. The expert states that C does not have the capacity to account for her views.

(79) The following is set out in the expert's report to the District Court, which was prepared in April 2019:

> "[a Norwegian] child welfare services have concluded that both parties provide proper care and that there are no concerns regarding their caring skills. There is nothing in my interaction with the parents or others related to this process that might make me view this any differently".

(80) This is repeated in the expert's report to the Supreme Court, which also expresses the following:

> "It is my opinion that both parties' care base and boundaries appear sufficient when it comes to the safeguarding of C's fundamental and special needs. This is subject to the provisio that information presented in this round is correct.
>
> My impression is that they both have obvious resources and a good network.
>
> In this context, I have not observed C together with the parties. From previous observations of interaction between C and the parties, a lot of good interaction has appeared. The parties have a demonstrated playfulness, ability for presence, attention and adequate responses when C shows initiative, has questions and asks for help."

(81) A has stable and regular employment in Oslo, where he lives together with his partner and their common children.

(82) According to the expert, C is attached to both B and A:

> "Normally, there will be a form of hierarchy when it comes to with whom the child feels safer and seeks when it feels insecure. This hierarchy may take a natural turn during a child's growth due to external circumstances, the child's needs and development and the adults' physical and emotional presence.
>
> I assume that A during periods of C's childhood has been 'at the top of the hierarchy' and that currently, it is B that C perceives to be the more available and reliable parent."

(83) The expert's failure to procure complete up-to-date and trustworthy information regarding C's current situation in Guatemala reduces the quality of the decision-making basis. Indeed, the expert has had contact with C and the parties since 2019, and during the Supreme Court proceedings, she has had video meetings with C, B and her live-in partner. However, the expert has not obtained direct access to C's physician and school in Guatemala, nor been able to visit C's home environment or to observe C together with either B or A at present.

Although the expert's work has not given rise to any concern, this adds some uncertainty to the assessments to be carried out.

(84) Due to C's disability and possible consequential harm from Down's syndrome, she has a strong need for follow-up. In that regard, A has been particularly worried about the medical and pedagogical services available to C in Guatemala. The Court of Appeal expresses:

> "The evidence presented in this regard has been limited. However, the Court of Appeal relies on the mother's statement that C is under medical supervision by a paediatrician, that she spends two hours with a special needs teacher three times per week and the fact that she will be attending a school that offers adjusted teaching for children with Down's syndrome. The Court of Appeal also trusts that C has a special insurance for children with such diagnosis. Although the follow-up will probably not match that in Norway, the Court of Appeal does not consider it substantiated that it will be limited to such an extent that granting sole parental responsibility to B would not be in the child's best interest."

(85) The Supreme Court has been presented with two recent reports on C's school attendance in Guatemala, which describe an adequate level of functioning. Hence, no other assessment is required than that of the Court of Appeal.

Parental responsibility and permanent residence

(86) The expert finds that it will be best for C to remain *resident* with B within the structures established for her in Guatemala. The expert points out in particular that B is now probably C's closest care person, that C needs stability and calm, and that C has already gone through several relocations and changes to her life and caring situation. Moreover, what C would return to in Norway would be quite different from what she left.

(87) A has stressed that the regard for the best possible total parent contact implies that C should live with him. The reason is the concern that B will not facilitate contact between him and C, which in any case will be difficult to implement in Guatemala.

(88) In my view, this consideration is not a strong one in this case. One aspect is that the travelling distance is detrimental to C's contact with the party with whom she does not live, regardless of where she lives. Another aspect is that the regard for the best possible total parental contact loses relevance in a situation like this, where A is not the child's father within the meaning of the Children Act, compared to how this is otherwise emphasised.

(89) When balancing the parties' interests in under Article 8 of the ECHR, I find, unless the best interests of the child clearly indicate otherwise, that the threshold must be high for ordering the relocation of a child to a person who is not the parent within the meaning of the law, even if that person has previously been the father.

(90) C's residence is therefore to remain with B.

(91) The same assessments are largely applicable to the ruling on *parental responsibility*, in which A has demanded to take part together with B. In my opinion, the threshold is also high for granting A joint parental responsibility.

(92) It should be noted, in addition to what I have already pointed out, that B and A have been in a continuous conflict over C since they separated in 2015. This does not form a good basis for such constructive cooperation as joint parental responsibility in practice requires. Furthermore, the physical distance between the parties indicates that joint parental responsibility is not practically possible.

(93) B is therefore to have sole parental responsibility for C.

Contact

(94) I find, on the other hand, that there is a solid basis for granting A a right to have contact with C. Furthermore, B has not appealed against the Court of Appeal's determination of contact rights, to which she is positive according to her counsel. I therefore find no reason to discuss whether it matters in the assessment under Article 8 (1) of the ECHR that contact is to be determined in a state not party to the Convention.

(95) As part of this assessment, I reference what the ECtHR emphasises in paragraph 60 of the mentioned *Nazarenko v. Russia*. There, it is expressed that in cases where a family tie protected by Article 8 exists, "the State must in principle act in a manner calculated to enable that tie to be maintained".

(96) As already described, A was C's psychological father from she was born and at least until she moved to Guatemala. The expert maintains that C "presumably will profit from maintaining contact with A and his family". However, the expert states that this must take place in a manner "that is not burdensome to any of the parties, for instance with the assistance of C's maternal grandmother and aunt."

(97) I support this assessment. To me, the decisive factor is that it most likely is in C's best interest to maintain good contact with A. Such contact will also give C a chance to preserve memories of her childhood in Norway.

(98) The Court of Appeal determined the contact in the form of daytime contact for two weeks twice a year, and in the form of weekly telephone or video contact. The reasoning is partially practical due to the travelling distance, and partially relating to what is advisable in C's situation, considering her diagnosis.

(99) A has requested extended contact rights, so that he can have C stay overnight on visits to Norway. In the light of the expert's assessment, I find that such extensive contact will not be in C's best interests considering the current situation. In my opinion, a right of contact in line with the Court of Appeal's ruling gives a good and adequate basis for C and A to preserve their family ties.

(100) In their pleadings, the parties have not elaborated on whether minor adjustments or specifications should be made to the contact regime determined by the Court of Appeal. Hence, there is no reason for me to do so.

Conclusion and costs

(101) Against this background, I find that the appeal must be dismissed.

(102) B has claimed compensation for costs in all instances. The case has raised several issues of principle that needed clarification. Also in the light of this being a dispute about a child to whom both parents have family ties, I find that there are weighty reasons for exempting A from liability for B's costs in all instances, see section 20-2 subsection 3 of the Dispute Act. The parties have both been granted free legal aid in the Supreme Court.

(103) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. Costs in the Supreme Court are not awarded.

(104) Justice **Steinsvik:**

Dissent

(105) I have arrived at a different conclusion on the issue of jurisdiction.

(106) In my view, Norwegian jurisdiction was lost when C established *habitual residence* in Guatemala, after moving there with her mother in the spring of 2021. I base this on an interpretation of section 82 subsection 1 first sentence of the Children Act, which following the amendment in 2016 only provides *one basis for jurisdiction,* namely the child's habitual residence. This basis for jurisdiction, as I read the preparatory works to the amendment, must be interpreted in accordance with Article 5 of the Hague Convention 1996, stating that when a child's habitual residence is established in another Contracting State, this State has jurisdiction. In other words, jurisdiction follows the child's habitual residence, see Article 5 (2). As I will discuss later, this solution is asserted also for cases involving states that are not party to the Hague Convention 1996.

(107) The factual situation in January 2021, when C left Norway with her mother, was that it had been finally established that A was not C's biological father. I share Justice Falch's view that A consequently no longer had parental responsibility for C under the Children Act. A's claim in the pending parental dispute that the mother be prohibited from travelling under section 41 of the Children Act, was therefore also dismissed. A could not stop B from returning to Guatemala, and the relocation of the child did not involve illegal abduction.

(108) Section 82 subsection 1 first sentence of the Children Act reads:

> "Cases regarding parental responsibility, international relocation with the child, custody or contact rights may be brought before a Norwegian court if the child is habitually resident in Norway."

(109) In his interpretation, Justice Falch places decisive emphasis on the wording "may be brought" and on the fact that C had habitual residence in Norway when the action was brought. Referencing section 34 of the Courts of Justice Act, he further concludes that Norwegian courts maintained jurisdiction, even if C, before the hearing in the Court of Appeal, moved to Guatemala where she has since had habitual residence. I agree that the wording in section 82

of the Children Act and section 34 of the Courts of Justice Act, considered in isolation, supports such a conclusion.

(110) I have nonetheless concluded that the issue of *continuing jurisdiction* in this case is not regulated by section 34 of the Courts of Justice Act, but must be resolved by an interpretation of section 82 of the Children Act. In my view, this provision exhaustively regulates Norwegian courts' jurisdiction in parental disputes under the Children Act.

(111) As discussed by Justice Falch, the jurisdiction rule in section 82 of the Children Act was amended upon the implementation of the Hague Convention 1996. In Proposition to the Storting 102 LS (2014–2015) item 3.3 on jurisdiction, the Ministry presents the general rule in Article 5 of the Hague Convention, stating that "[t]he judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property" and that "[j]urisdiction follows the child if the child relocates to another Contracting State, see Article 5 (2)". The Ministry then clarifies that the term habitual residence "is the most important connecting factor in modern international children law, and is a central term in all modern Hague Conventions".

(112) As for the content of the term "habitual residence", which is not specifically defined in the Hague Convention itself, I reference the Supreme Court ruling HR-2022-207-A paragraph 51–53. The basis for jurisdiction aims at selecting the State best suited to safeguard the child's best interests and protect the child, and at avoiding competing jurisdictions.

(113) In the case at hand, it is clear that C established habitual residence in Guatemala when moving there in the spring of 2021, which is not disputed between the parties. Within the Convention's area of application, I find that it follows directly from Article 5 (2) of the Hague Convention that jurisdiction is transferred to the authorities of the State in which the new habitual residence is established. In other words, Article 5 requires that jurisdiction is present at the time a decision is to be made for the protection of the child, i.e. *at the time of the ruling*. Here, the Convention deviates from the solution in section 34 of the Courts of Justice Act. Prior to the Hague Convention 1996, it was also discussed whether a rule should be included on continuing jurisdiction in the case of a change of habitual residence after the commencement of proceedings, but proposals in this regard were rejected, see the explanatory report to the Hague Convention, the Lagarde Report, paragraphs 42–44. Within the Convention's area of application, the solution is therefore clear. However, there are a few exceptions, to which I will return.

(114) The Hague Convention 1996 does not regulate cases where a child with habitual residence in a Contracting State establishes a new habitual residence in a *non-Contracting State*. In such cases, the jurisdiction issue must therefore be resolved under domestic law, and the Convention does not prevent national procedural rules on continuing jurisdiction.

(115) However, the solution in section 82 of the Children Act implies – as I read the preparatory works – that the solution prescribed in Article 5 of the Hague Convention 1996 was also made into domestic Norwegian law with effect for all cases involving more than one country. I cannot read from the Proposition why the basis for jurisdiction in section 83 – "habitually resident" – should have a different content inside and outside of the Convention's area of application. On the contrary, I read the proposition to express that the Ministry knowingly pursued full harmonisation.

(116) First, I mention the Ministry's discussion of necessary amendments to the Children Act as a result of the implementation of the Hague Convention. According to Proposition to the Storting 102 LS (2014–2015) item 8.2.2, the Ministry proposed in the discussion document, as one of several options, that "the child's residence will be the single basis for jurisdiction in cases resolved under the Hague Convention 1996", and the Ministry also found "that the child's residence should form the basis for jurisdiction in all cases, not only those resolved under the Convention". No objections were made during the consultation round, and according to the special remark to section 82, reproduced by Justice Falch, the amendment was given application also outside of the Convention "to strengthen the child perspective in the legislation and to simplify rules on jurisdiction".

(117) As for the content of section 82 subsection 1, the following is stated in the remark:

> "The general rule on jurisdiction follows from the requirement in subsection 1 that the child must be 'habitually resident'. Please see comments to section 8 of the Act relating to the Hague Convention 1996."

(118) The mentioned remarks to section 8 of the Act relating to the Hague Convention 1996 clarifies that "the term 'habitual home' is to be interpreted in the same way as the term 'habitual residence' in the Hague Convention 1996".

(119) I read this to mean that the connecting factor "habitual residence" has been made the basis for jurisdiction also under domestic law, and that its content is intended to be the same for cases inside and outside of the Hague Convention's area of application. Furthermore, the content must be interpreted in accordance with the Hague Convention. When the child's habitual residence at the time a decision involving the child is to be made determines jurisdiction under the Hague Convention, this must, in my view, also apply on a general basis under section 82 of the Children Act. The principle that jurisdiction *follows the child's residence,* is a key element in the basis for jurisdiction – "habitual residence" – and important to fulfil the Convention's objective that decisions involving a child should be made in the State best suited to assess what is best for the child and to safeguard its interests. As mentioned, the consideration of "strengthening the child perspective" was presented as an overall objective in Proposition to the Storting 102 LS (2014–2015).

(120) What raises certain doubt is that section 82 of the Children Act – in cases outside of the Convention's area of application – does not regulate situations where the Convention deviates from the general rule in Article 5. For instance, the mechanisms of the Convention for transfer of jurisdiction and Article 14 on continuity are not available. The omission to discuss such issues in more detail represents a flaw in the Proposition.

(121) On one hand, this may suggest continuing jurisdiction for Norwegian courts, when jurisdiction was present at the time of the action. On the other hand, the consideration of the State best suited to assess what in the child's best interests in parental disputes, carries much weight. The court is to determine the issues of parental responsibility, permanent residence and contact rights based on what is in the child's best interests at the time of the ruling, and ensure that up-to-date information regarding the child's situation is available. The child's right to be heard is a central factor here. Where the child has its habitual residence in a country that is not a party to the Hague Convention, the possibility of ensuring an up-to-date and adequate decision-making basis will depend on chance.

(122) Justice Falch has stated that these considerations must be balanced against the unfortunate effects of giving one of the parties the possibility to prevent the hearing of a lawful action by taking the child abroad. I generally agree that such considerations are also significant under the circumstances. However, I find that the weight of this consideration is radically reduced by the protection conferred by the rules of the Children Act on the prohibition to travel abroad, notification etc., as well as the rules on child abduction. In this case, it is the loss of A's paternity that renders these rules inapplicable. In cases involving wrongful removal of the child, I assume moreover that domestic Norwegian law mainly corresponds to the exception in Article 7 of the Convention, stating that the child's habitual residence in such situations cannot be freely changed.

(123) Against this background, I conclude – with some doubt – that Norwegian jurisdiction was lost before the Court of Appeal's hearing of the case. I therefore find that the Court of Appeal's and the District Court's judgments should be set aside and the case struck out.

(124) As I represent the minority in the jurisdiction issue, I am obliged to take part in the deliberations in the case, see section 19-3 subsection 3 third sentence of the Dispute Act. Here, I agree with Justice Falch in all material respects and with his conclusion.

(125) Justice **Falkanger:**

Dissent

(126) I too find that the Court of Appeal did not have jurisdiction to hear the appeal, and that the Supreme Court thus does not have judicial authority to hand down a judgment. Like Justice Steinsvik, I find that Norwegian jurisdiction was lost when B and C moved to Guatemala during the spring of 2021. However, unlike her, I do not base my conclusion on the Children Act, but rather on the fact that the principle in section 34 of the Courts of Justice Act on continuing jurisdiction cannot give a basis for Norwegian judicial authority[FAT1].

(127) Like Justice Falch, I find it clear that the District Court had jurisdiction to hear the case under section 82 subsection 1 of the Children Act, according to which a case may be brought in Norway if the child is habitually resident here. However, the issue of the Court of Appeal's jurisdiction to hear the appeal is not resolved by section 82 subsection 1 – which merely states that the case "may be brought" where the child lives – but must be rooted in other sources of law.

(128) I agree with Justice Falch that section 34 of the Courts of Justice Act generally allows for continuing jurisdiction. When a case has been correctly brought at a venue, that venue will apply also in an appeal, regardless of where any new case between the parties should have been brought. But as emphasised in Norwegian Official Report 2001: 32 Volume B, page 69, the ordinary venue rules are primarily "formulated to indicate where in Norway it would be appropriate to bring an action". As far I can see, this also applies to the said section 34.

(129) I nonetheless agree that section 34 in principle must apply in cases where parties relocate abroad. The provision ensures foreseeability and implies that the parties cannot escape the facts of the case or complicate processes by relocating after an action has been brought. These considerations naturally also manifest themselves when the parties relocate abroad. However, as our case illustrates, the facts of this type of cases may abate the force of these

considerations, and considerations in disfavour of Norwegian jurisdiction may then be so strong that the principle must be abandoned.

(130) In my opinion, that is the situation in the case at hand. It clearly differs from ordinary parental disputes, as it was finally established in the paternity case – decided before our case was appealed to the Court of Appeal – that A is not the child's biological father. As Justice Falch argues, the effect of the judgment in the paternity case was that B, from that moment, was the only known parent to the child, and that she thus had sole parental responsibility.

(131) B was therefore in the right when she chose to relocate with the child to Guatemala. The requirement in section 40 of the Children Act that both parents must consent to the child relocating abroad, no longer applied. A's request under section 41 that B be prohibited from travelling abroad with C, was dismissed by the court. The requirements in section 42 a of notification and mediation before relocating were also not applicable. It was hardly the legislature's intent when adopting section 34 of the Courts of Justice Act that Norwegian jurisdiction should continue in such a situation. Also, the brief statements in Norwegian Official Report 2020: 14 New Children Act, as reproduced by Justice Falch, are not likely to cover such factual circumstances as we are dealing with here.

(132) After C's relocation to Guatemala, the case has become less connected to Norway in several respects. This has multiple effects.

(133) One aspect is that it will be difficult in practice to enforce a judgment in favour of A. However, this in itself does not preclude Norwegian jurisdiction. The same applies to practical issues related to which rules, from now on, should govern possible shared parental responsibility and contact rights for A.

(134) In my view, however, a weighty argument against Norwegian jurisdiction is that it will be very difficult for a Norwegian court to achieve the key objective of the Children Act – what is best for the child. I point out the large difficulties in obtaining satisfactory clarification of the case. Parental responsibility and contact rights must be determined based on the situation at the time of the judgment. By far most of the evidence and relevant factual circumstances are now – after the appeal to the Court of Appeal was filed – in Guatemala, and Norwegian courts have a limited basis for examining them. Admittedly, B has – to some extent – offered to contribute to such clarification, chiefly by talking to the expert by videolink. However, she is not willing to let the expert speak with employees at C's school or health station. If she had wanted to, B could in practice have desisted from any form of cooperation with Norwegian courts and the participants involved.

(135) In cases concerning the best interests of the child, Norwegian jurisdiction in a situation such as ours seems inexpedient. The case should instead be referred to the courts of the country with the best basis for assessing what is best for the child. In our case, that is undoubtedly Guatemala.

(136) I consider it likely that B, in one way or another, may bring an action in Guatemala claiming that A is not to have contact with C. In that case, I assume that Guatemalan legal rules will be applied. It is highly unlikely that a Guatemalan court would refuse to hear a case because it belongs in Norway. The consideration of avoiding conflicting jurisdictions then suggests that Norwegian courts do not have judicial authority. This applies to this situation in particular,

which is much more connected to Guatemala than to Norway. The fact that the case was lawfully brought in Norway, cannot be decisive as the case stands.

(137) As far as I understand, such considerations are indeed what form the basis for the general rule in Article 5 (1) of the Hague Convention 1996 that jurisdiction always follows the child's habitual residence. Guatemala is not a party to this Convention, but the factors are nonetheless relevant in our case. As emphasised by Justice Steinsvik, the basis for jurisdiction in the Hague Convention 1996 aims at selecting the State best suited to safeguard the best interests of the child and protect the child, and at avoiding competing jurisdictions.

(138) As mentioned, the Children Act contains a requirement of consent for relocation with the child abroad if the parents have joint parental responsibility, see section 40. If one of the parents has contact rights, the Act also requires prior notification and mediation, see section 42 a. If these rules are breached, the special considerations behind section 34 of the Courts of Justice Act strongly manifest themselves. If B by relocating to Guatemala had breached these rules, the jurisdiction issue would have been different. In such a situation, Norwegian courts would have had jurisdiction even if Guatemala had been party to the Hague Convention 1996, see its Article 7. Clearly, nothing else can apply when the country is not party to the Convention.

(139) A contends that it would amount to a violation of the ECHR if Norwegian courts were to lose their jurisdiction due to the moving of C's habitual residence. However, I cannot see that a solution completely in line with the system of the Hague Convention 1996 would have such an effect.

(140) Against this background, I conclude that Norwegian jurisdiction was lost when the case was appealed to the Court of Appeal. The Court of Appeal's and the District Court's judgments must therefore be set aside, and the case struck out.

(141) Since I am outvoted on the issue of jurisdiction, I am obliged to take part in the deliberations in the case, see section 19-3 subsection 3 third sentence of the Dispute Act. Here, I agree with Justice Falch in all material respects and with his conclusion.

(142) Justice **Sæther:** I agree with Justice Falch in all material respects and with his conclusion.

(143) Justice **Webster:** Likewise.

(144) The Supreme Court gave the following

J U D G M E N T :

1. The appeal is dismissed.

2. Costs in the Supreme Court are not awarded.