



SUPREME COURT OF NORWAY

On 30 January 2015, the Supreme Court delivered the following judgment in

HR-2015-00209-A, (case no. 2014/1631), civil case, appeal against judgment.

X local authorities

(Counsel Sverre Larhammer - qualifying test case)

v.

A

B

(Counsel Venil Katharine Thiis - qualifying test case)

GROUND S F O R T H E J U D G M E N T :

- (1) Justice **Ringnes**: The case concerns the question of deprivation of parental responsibility and consent to adoption pursuant to section 4-20 of the Child Welfare Act. It raises, inter alia, the question of whether the threshold for adoption has changed after the legislation in 2010 opened up for contact visits with the biological parents.
- (2) C is born on --.-- 2008. His parents are A and B. A is from Y. Today, the boy is six and a half years old.
- (3) On 5 December 2008 - when he was two and a half months old - he was taken into public care, as an emergency measure, because both parents were mentally ill and unable to take care of him. In January 2009, the parents gave their consent to the placement of their son in an emergency home.
- (4) After staying in another emergency home for two weeks, he was placed with D and E, who would now like to adopt him. Interrupted only by a four week stay with his

biological mother at the Centre for Parents and Children in Z in the spring of 2009, he has since lived with family D/E. While the boy was at the emergency home, he had fairly extensive contact with his biological parents. In the period from his emergency placement at the beginning of December and up to the end of 2008, he spent a total of eight and a half hours with one or both parents. In the period from January to April 2009 - up to his stay at the centre - there were contact visits three times a week, lasting from three to five hours. From May to December 2009, there were monthly contact visits lasting two hours.

- (5) The purpose of the stay at the Centre for Parents and Children was to facilitate the return of the child to his parents. However, the stay had to be discontinued, due to adverse development in the child and deficiencies in maternal care.
- (6) In connection with the administrative decision to discontinue the stay at the centre, on 12 May 2009, the head of the Child Welfare Services made a new administrative decision to place the boy in an emergency home. The parents appealed the administrative decision to the County Social Welfare Board, which, on 29 May 2009, decided to dismiss the appeal.
- (7) On 23 June 2009, the local authorities filed a case with the County Social Welfare Board requesting the issue of a care order and placement in a foster home, cf. section 4-12 (a) of the Child Welfare Act. The County Social Welfare Board appointed psychologist Arvid Solli as expert to assess, inter alia, the mother's ability to provide care. In an administrative decision of 23 October 2009, the County Social Welfare Board allowed the request and determined contact visits with the parents to twice a year for two hours at a time. It was also decided that the Child Welfare Services were entitled to provide supervision during the contact visits.
- (8) The parents brought the case before Romsdal District Court, which in a judgment delivered 9 March 2010 affirmed the County Social Welfare Board's decision. The court's assessment was that the deficiencies in the biological parents' ability to provide care were of such a nature and scope that it could not be assumed that the boy could be returned to his parents' care in the foreseeable future.
- (9) In January 2012, the parents filed a petition with the County Social Welfare Board requesting that the boy be returned into their care. The local authorities filed a petition for deprivation of parental responsibility and consent to adoption and authorisation of contact visits.
- (10) On 8 June 2012, the County Social Welfares Board made an administrative decision with the following conclusion:
 - "1. The request for return of C, born --.--08 is not allowed, cf. section 4-21 (1) second sentence of the Child Welfare Act.
 2. A and B are deprived of parental responsibility for C, born --.--08, cf. section 4-20 (1) of the Child Welfare Act.
 3. The County Social Welfare Board authorises that D and E may adopt C, cf. section 4-20 (2) and (3) of the Child Welfare Act.
 4. A and B are entitled to contact visits with C twice a year for four hours at time, cf. section 4-20 a) (1) of the Child Welfare Act."

- (11) The decision of the County Social Welfare Board stated that the boy had established the same emotional ties with his foster parents as he would have done if he had been one of their biological children. He was fully integrated and included in the nuclear and extended family. The County Social Welfare Board believed that adoption would be important for the boy's sense of belonging to the family as he became older and understood more of his situation.
- (12) The parents instituted legal proceedings before Romsdal District Court. The primary claim was that the child care order on the boy should be revoked and that he should be returned to his parents. The alternative claim was that the local authorities' request for deprivation of parental responsibility and adoption was revoked and that contact visits are determined at the court's discretion.
- (13) The District Court appointed a specialist in clinical psychology, Laila Eriksen Østbø, as expert.
- (14) Romsdal District Court, which was constituted with an expert lay judge and a lay judge from the permanent panel, delivered a unanimous judgment on 19 June 2013 with the following conclusion of judgment:

"The County Social Welfare Board's decision of 8 June 2012 in case 12/018 is upheld as regards items 1, 2 and 3. A and B are entitled to have contact visits with C twice a year for two hours at a time."

- (15) The court, inter alia, placed emphasis on the fact that the boy is vulnerable and has a need for security and an orderly care situation. The court also pointed out the "fundamental ties that appear to exist" between the boy and his foster parents.
- (16) The parents appealed to Frostating Court of Appeal.
- (17) The Court of Appeal was also composed of an expert lay judge and a lay judge from the non-permanent panel. Following the submission of evidence, the Court of Appeal decided to appoint an expert and to postpone the further hearings. The expert, psychology specialist Elin Bjøru concluded the following in her report:

"The expert considers a return of the child to the parents to be out of the question based on the ties C has with his foster home, which imply that it is highly likely that the child will suffer serious developmental harm if he is moved."

Both adoption and continued placement in a foster home have advantages and disadvantages, which have been explained and which should be taken into consideration in the decision."

- (18) On 19 June 2014, Frostating Court of Appeal delivered a unanimous judgment with the following conclusion:

- "1. The appeal as regards the request to revoke the care order for C, born ---.2008, is dismissed.**
- 2. A and B are not deprived of parental responsibility for their son C.**
- 3. No consent is given for the adoption of C.**

4. A and B shall be entitled to contact visits with C four times a year. The visits shall last three-3-hours. The Child Welfare Services are allowed to supervise the contact visits."

- (19) X local authorities have appealed to the Supreme Court against the application of law and the assessment of evidence as regards deprivation of parental responsibility and adoption. The scope of contact visits and any visitation rights if adoption is not permitted are not topics for the Supreme Court.
- (20) During the appeal hearing for the Supreme Court, video recordings were shown from several contact visits between the boy and his biological parents. Psychologist Trude Hoff provided comments to the video on behalf of the parents.
- (21) ,The facts of case is essentially the same as presented to the Court of Appeal.
- (22) The appellant - *X local authorities* - have mainly argued:
- (23) The question of return has not been appealed, and it must be assumed that the second alternative in section 4-20 (3) (a) has been met. There is consensus that the conditions in (c) and (d) have been met. The salient point is therefore whether adoption would be in the best interests of the child.
- (24) The threshold for adoption has been lowered after 2007, when the last Supreme Court judgment on forced adoption was delivered, cf. special statements in Proposition no. 69 (2008-2009) to the Norwegian Odelsting, pages 33-34. Moreover, the right to contact visits has been included in section 4-20 a) of the Child Welfare Act. This means that adoption will more easily be in the best interests of the child than previously, because the child will be able to maintain contact with its biological parents after adoption.
- (25) The new provisions in the Norwegian Constitution do not imply any new constraints, but confirm the importance of the child's best interests, cf. section 104 of the Norwegian Constitution.
- (26) In the view of the local authorities, adoption is in the best interests of the child.
- (27) X local authorities have submitted the following claim:

"Romsdal District Court's judgment of 19 June 2013 in case 12-126359TVI-ROMS, is upheld."
- (28) The respondents - *A and B* - have mainly argued:
- (29) It is accepted that return of the child cannot take place today. However, it is too early to say whether this will be a permanent situation, because the relationship between the biological parents and the child may develop positively, while the circumstances in the foster family made develop adversely. Therefore, in the future, the situation may be that the conditions in section 4-20 (a) are not met.
- (30) The threshold for adoption has not been lowered. The conditions of the law have not been changed, and the case law of the European Court of Human Rights

(ECtHR) will constitute the same constraints for adoption as before. The statements in Proposition no. 69 (2008 - 2009) to the Norwegian Odelsting only indicate that the practice by the local authorities is to be changed by increasing the number of cases to be considered for adoption.

- (31) In the assessment it is otherwise of significance that the European Convention on Human Rights (ECHR), Article 8 was violated by the original care order. The case was not investigated properly and alternative measures were not tested. The parents' party rights were not adequately protected, inter alia, because the mother had significant language problems and at the time was also not well. The Norwegian State has also violated ECHR by not working for reunification. This is because the Child Welfare Services decided prematurely that the care order would be permanent and therefore did not employ sufficient resources with a view to a reuniting the parents and the child.
- (32) There are no specific, general or individual circumstances that make adoption in the best interests of the child. The Court of Appeal's assessment in connection with this is correct. The boy will be taken good care of by his foster parents even if they are not allowed to adopt him. His ethnic background is also a strong argument for not authorising adoption. The fact that the parents have used remedies to ensure return of their child cannot be held against them in the assessment of adoption. The parents still have parental responsibility and they are then entitled and obliged to take the necessary steps to ensure the best interests of the child. They are concerned that the foster home has not managed to make the boy feel secure, and they believe that they can give him the security he still has not found.
- (33) A and B have submitted the following claim:

"The appeal is dismissed."

- (34) *My view of the case*
- (35) I have concluded that the appeal is successful.
- (36) The case concerns adoption against the parents' will and the question is whether the boy - who is now six and a half years old - should remain in a foster home, or whether the foster parents should be able to adopt him with the right to contact visits by the parents as determined by the District Court. Pursuant to section 36-5 (3) of the Dispute Act, the court shall review all aspects of the case, and the review shall be made on the basis of the situation at the time judgment is delivered.
- (37) The right to forced adoption is regulated by section 4-20 of the Child Welfare Act. When a decision has been made regarding deprivation of parental responsibility, consent to adoption may be granted if the conditions in sub-section 2 (a) to (d) are met.

"a) **it must be considered likely that the parents are permanently unable to provide the child with proper care or the child has formed so strong ties with the people and the environment in which he or she is living, that, based on an overall assessment, moving the child may result in serious problems for him or her and**

b) adoption would be in the child's best interests and

- c) **the adoption applicants have been foster parents for the child and have shown that they are fit to bring up the child as their own and**
- d) **the conditions for granting adoption under the Adoption Act are fulfilled."**

- (38) The main condition for adoption has been stated in (a), which states two options. Even if the parents could provide the child with proper care, adoption may still be authorised if the child has "become so attached to the people and the environment where he or she is living" that moving may result in serious problems. In addition, the conditions in clauses (b), (c) and (d) must be fulfilled. It is not disputed that the conditions in clauses (c) and (d) have been fulfilled, and I agree with this. The main question in the case is whether adoption would be in the best interests of the child, cf. clause (b). However, the best interests of the child are closely related to the attachment requirement in clause (a) and the biological parents also believe it is too early to determine whether the attachment condition has been fulfilled. I will therefore consider this condition first.
- (39) The topic of assessment is whether the child has developed such ties to the foster home and his childhood environment that serious problems would result if he is moved. The object of proof is largely the same as for the question of revoking the care order pursuant to section 4-21 (1).
- (40) I would like to point out that the evidence requirement pursuant to section 4-21 (1) is that there shall be a preponderance of evidence that the parents can provide the child with proper care. The preparatory works to the provision emphasise that this requirement of qualified preponderance of evidence was not intended to have significance for the assessment pursuant to section 4-20 (3) (a), cf. Proposition no. 69 (2008– 2009) to the Norwegian Odelsting, page 26. The assessment of the attachment requirement must then be based on which fact is more likely.
- (41) The County Social Welfare Board, the District Court and the Court of Appeal have all considered the attachment criterion when reviewing the question of return. All instances have concluded that it would cause the boy serious problems if he is moved from his foster home.
- (42) The Court of Appeal's assessment was as follows:
- "It would obviously be a great loss to C if he has to move from his foster family and the environment in which he has settled in ZÆ. His vulnerability and insecurity will probably exacerbate the problems he will experience through separation. As the Court of Appeal sees it, these will not be transient problems, but serious problems that he could struggle with for some time and which could have significant adverse consequences on his development."**
- (43) The video played during the appeal hearing before the Supreme Court, showed positive interaction between the biological parents and the boy, and that the parents communicate well with him. However, this impression is not clear-cut. In subsequent contact visits in December 2014, the relationship between the boy and his parents was strained, cf. the summary from the Child Welfare Services:
- "The Child Welfare Services experienced that the boy asked several times when he was going home. The Child Welfare Services find that the boy seeks more contact with his foster mother and that this time there is less dialogue /**

interaction with the parents. The Child Welfare Services also feel that the boy appears more irritated and tired today."

- (44) In my view, no new information has been presented that will change the conclusion from the lower courts that the condition in section 4-20 (a) has been fulfilled. It must be concluded that the boy has strong and secure ties with his foster home and foster parents. I also refer to the statement from the court-appointed expert for the Court of Appeal, psychologist Bjøru, who maintained the following:

"C has ties with his foster home which make it impossible to change his care situation without causing major consequences that will have an immediate impact on his development in not only an adverse, but directly harmful way. It will not be possible to implement measures that can prevent this."

- (45) I will now address the condition in section 4-20 (3) (b) which states that adoption must be in the best interests of the child, and discuss first what this condition implies.
- (46) A forced adoption has a strong impact on the biological parents. The emotional pain of your child being adopted is usually profound. The family ties severed by forced adoption are protected under ECHR Article 8 and section 102 of the Norwegian Constitution. Adoption is also a radical measure for children, which under the UN Convention on the Rights of the Child Article 21 may only be decided if this is in the best interests of the child. The interests of the parents take second place where crucial factors indicate adoption of the child, cf. section 104 (2) of the Norwegian Constitution and the UN Convention on the Rights of the Child, Article 3 no. 1. I refer here to ECtHR's judgment in the case *Aune v. Norway* of 28 October 2010, paragraph 66, which states, in connection with the proportionality assessment under ECHR, Article 8 no. 2, that the adoption must be based on "an overriding requirement pertaining to the child's best interests". This case is the same case that was settled by the Supreme Court in Rt. 2007, page 561. [Det skal ikke være avsnitt her. Dersom jeg endrer det i denne modusen, blir avsnittsnummereringen uriktig.]

I therefore find that the mode of expression in paragraph 51 of this Supreme Court judgment - that there must be "particularly weighty reasons for adoption" – suggests the use of the same norm.

- (47) However, the local authorities have argued that the threshold for adoption has been lowered following the Supreme Court's judgment in Rt. 2007, page 561 and, inter alia, has referred to statements in Proposition no. 69 (2008–2009) to the Norwegian Odelsting. Chapter 4 of the Proposition discusses the question of whether there should be greater use of adoption as a child protection measure, and it states the following on pages 33-34:

"Although adoption against the parents' will is a radical measure that severs all legal ties between the parents and the child, it is also very important for a child to be allowed to grow up under conditions which to the least possible extent are characterised by uncertainty as regards the future. The Ministry also points out that there is research which shows that for certain children, adoption may provide a more secure and stable upbringing than a lengthy stay in foster care. Following a comprehensive assessment, the Ministry therefore believes that it should be made easier for those children who need it to benefit from adoption as a child protection measure."

Following the hearing, the Ministry also believes that it not necessary to make an amendment to the law in order to change case law. The Ministry refers to the invasive nature of the case and that ECHR and ECtHR's case law limit the use of adoption as a child protection measure."

- (48) When the Norwegian Storting's Standing Committee on Family and Cultural Affairs discussed the bill, the Ministry's view was supported by the majority, the members of the Labour Party, Socialist Left Party, the Christian Democrats and the Centre Party, cf. Recommendation O. no. 121 (2008–2009), paragraph 2.4.
- (49) I cannot see that the quoted statements provide the basis for stating that the threshold for adoption has been lowered. The statements only express that adoption is a desired child protection measure, which should be used more often than before if there is legal authority for this, and it is assumed that the decision on adoption must be made within the framework of the applicable law and ECHR Article 8.
- (50) However, what I have quoted shows that the Ministry and the majority of the Committee have based their desire for increased use of adoption on research knowledge. General experience and knowledge of the impact of adoption have significance for the specific assessment of whether to give consent for adoption. I will come back to this.
- (51) By Act no. 18 of 4 June 2010, a new provision was added to section 4-20 of the Child Welfare Act, which concerns contact visits between the child and the biological parents after adoption - so-called open adoption. The condition for contact visits is that the prospective adoptive parents consent and that it is in the child's best interests.
- (52) In several cases, the Supreme Court has encouraged the lawmakers to introduce such authority. In Rt. 1997, page 534, the justice giving the leading judgment maintained that this "would mean that the benefits of adoption for the child must not be weighed against the benefits of the continued contact visits with the biological parents".
- (53) The reason for a provision on the right to contact visits between the adoptive child and the biological parents appears, inter alia, on page 26 of Proposition 7 L (2009–2010):

"The purpose of the proposal is to ensure the child a stable and predictable upbringing with the adoptive parents and also that the child has some contact with its roots, when this is in the child's best interests. The child may have contact safe in the knowledge that he or she will remaining living where it is, and the adoptive parents also do not need to feel that the contact challenges their position. Biological parents will be able to gain some knowledge of the child's development during his or her upbringing and know that it is in good hands. Such contact after adoption will give the child the benefits of adoption, with full legal and social integration, without the child having to completely lose contact with its biological parents, or wait until he or she reaches the age of majority before any contact may be resumed."

- (54) I also refer to the following statement on page 27:

"The Ministry points out that an adoption with contact visits would mean that the adoption will have a somewhat different character than it has today. Adoption with contact visits implies that the adoption will not result in a complete severance of ties between the child and the biological family. However, the purpose of the proposition is to ensure the child all the benefits an adoption entails, and that contact with the biological parents is an added bonus."

- (55) The Ministry stresses in the proposition that contact visits will only be relevant in a very limited number of cases, cf. inter alia page 27.

"In the view of the Ministry, adoption with contact visits will only be likely if there is a high degree of certainty that there will be no cooperation problems between the adoptive parents and the biological parents, and that there will be no disputes and new cases in the County Social Welfare Board or the courts after it has been decided to allow contact after adoption."

- (56) In the proposition, the Ministry also discusses what significance contact visits may have for the assessment of whether to authorise adoption. On page 12, the Ministry refers to Rt. 2007 page 561, and states the following:

"It is therefore clear that in certain special cases, adoption may be used as a child protection measure, without this coming in conflict with ECHR Article 8. Adoption with contact visits between the child and the biological family will represent a minor intervention in the child and the biological family's right to a family life and therefore it must be possible to use this. However, an adoption with the right to contact visits will still involve a major intervention. This means that ECHR and ECtHR's case law limit the cases where the measure may be used."

- (57) I do not find it appropriate to say that introduction of a provision for contact visits has lowered the high threshold for adoption. However, in some cases, contact visits will mean that the considerations against adoption will not have the same weight. I interpret ECtHR's judgment in the Aune case as such, cf. paragraph 78:

"Against this background, it appears that the disputed measures did not in fact prevent the applicant from continuing to have a personal relationship with A and did not result in 'cutting him off from his roots' with respect to contact with his biological mother."

- (58) The preparatory works state that the administrative decision on contact visits cannot be enforced, cf. the Proposition, page 26. It is true that the Child Welfare Act does not contain a provision for coercive fines. For me, the most important thing is that contact visits are, as mentioned earlier, only relevant in those cases where there is a great degree of certainty of there not being any cooperation problems between the adoptive parents and the biological parents. It also follows from section 4-20 (a) (2) that the Child Welfare Services shall assist with implementation of the contact visits. I also refer to the fact that the Supreme Court in Rt. 2007, page 561 and ECtHR in the Aune Case placed emphasis on the contact visits, even though these were only agreement-based.

- (59) I will now discuss the specific assessment of whether adoption is in the boy's best interests.

- (60) The situation today is that he has lived in foster care with D and E practically all his life, and he was only two and a half months old when he came there. According to the expert report from psychologist Bjørn submitted to the Court of Appeal, the boy

has weak ties to his biological parents and his secure base is his foster home. He calls his foster parents mummy and daddy. He has a close and good sibling relationship with his foster parents' biological son, who is slightly older, and with a younger girl who is also a foster child in the family, as well as with the extended family. It is evident from a memo from the Child Welfare Services of 17 October 2014 that the boy usually uses his foster parent's family name when anyone asks him what his name is.

- (61) Emphasis should be placed on these obviously strong and established ties with his foster home and this is underpinned by general knowledge, which the Supreme Court has stated must weigh heavily, cf. Rt. 2007 page 561 paragraph 50:

In our case, the expert has expressed as a general experience that foster care is not the preferred option for long-term placement of children who have come to the foster home before they have established any ties with any biological parent; in such a case adoption is best for the child's development. In my view, such a general, but nuanced experience carries significant weight. However, individual aspects, which may or may not support adoption, must nevertheless be considered against the general experiences."

- (62) I find that very young children who are placed in a foster home, as in this case, will usually have their primary connection to the foster parents, cf. also NOU 2012: 5 "Improving the protection of children's development ", page 120. As mentioned earlier, the boy currently has weak ties to his biological parents.

- (63) An additional aspect of great importance is that the boy is vulnerable and has a particular need for security, stability and a predictable situation. This has been pointed out in all assessments made of him, and today he also has a special need for security and support. The Court of Appeal points out that he has been described as an insecure child, particularly in new and unfamiliar situations. He has now started school and decisions have been made regarding special education. The Educational-Psychological Service has, in their assessment, pointed out "the need for stability, predictability and security in that he knows who will be taking care of him and who he should go to". A statement from his teacher of 6 November 2014 states that he has settled down at school, but that he has trouble concentrating and has very little self-confidence. In connection with this, I refer to a declaration from psychologist Laila Eriksen Østbø, who was the expert appointed by the District Court and who gave a statement as a party's expert witness in the Court of Appeal. She said:

"In the Court of Appeal, the undersigned maintained the assessment that adoption would be in the child's best interests. The case concerns a child with special care needs, with no ties to his biological parents and who has a special need for stability and tranquillity."

- (64) In connection with this, another aspect is that there have been disputes between the biological parents and the local authorities for most of the boy's life and that new disputes cannot be precluded in the future. I have no doubt that the parental motivation is a desire to ensure that the boy has a good upbringing with them, but the disputes about his care do not contribute to the necessary stability and tranquillity he needs.

- (65) The Court of Appeal placed decisive emphasis on the importance of maintaining the biological ties with the parents and especially his ethnic roots through his mother to Y. In my view, these considerations are taken into account through the contact visits, which the District Court has determined to be twice a year, lasting for two hours at a time. The foster parents are positive to the contact visits and there is every reason to believe that the visit arrangement will function as intended. As maintained in paragraph 78 of ECtHR's judgment in *Aune v. Norway*, which I have explained earlier, the contact visits entail that the boy will not be cut off from his roots and his ethnic origins.
- (66) The parents have argued that ECHR, Article 8 was violated by the original care order, and by the Child Welfare Services failing to facilitate a reunification.
- (67) It follows from ECtHR's case law that placing children into foster care should normally be regarded as a temporary measure, and that the general object of the measures should be reunification, cf. Kjølbros, "Den europæiske menneskerettighedskonvention – for praktikere", 3rd edition 2010 page 645.
- (68) I use this as my basis, but I still cannot agree with the parents' argumentation. The parents' objections to the care order in 2009, which inter alia, is related to the mother being inhibited, due to language problems and medication, have been dismissed by the County Social Welfare Board and the District Court. The parents had fairly frequent contact visits with the boy both before and after the stay at the Centre for Parents and Children, and the purpose of the stay at the centre was to facilitate reunification. However, it was found that the parents could not provide the boy with the necessary care. I also cannot see any grounds for criticism of the subsequent processing. The care order and the scope of contact visits were determined following expert reports. There is also no information that can give grounds to conclude that further measures should be taken for the parents.
- (69) Under any circumstances, it is the child's best interests today that are decisive when assessing whether to authorise adoption, and not whether there have been any failings in the authorities' attempt to return the child to his parents at an earlier - and passed - stage.
- (70) On this basis, I have concluded that there are particularly weighty reasons for authorising adoption and my conclusion is that the District Court's judgment is upheld.
- (71) I vote for this

JUDGMENT:

The District Court's judgment is upheld.

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|------|-------------------------|--|
| (72) | Justice Bergsjø: | I agree with the first-voting justice in all material respects and with his conclusion.. |
| (73) | Justice Bårdsen: | Likewise. |
| (74) | Justice Bull: | Likewise. |

(75) Justice Øie: Likewise.

(76) After passing of votes, the Supreme Court delivered the following

J U D G M E N T :

The District Court's judgment is upheld.

True transcript confirmed: