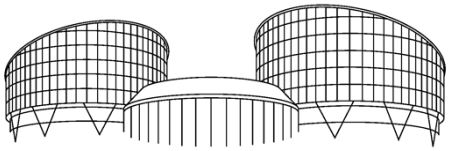

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF PEDERSEN AND OTHERS v. NORWAY

(Application no. 39710/15)

JUDGMENT

Art 8 • Respect for family life • Replacement of foster care with an adoption of the child by foster parents • Initial placement largely related to the natural parents' issues with mental health at the time • Foster care order with very limited contact rights based on assumption of long-term placement • Decision precluding any realistic possibility of eventual reunification • "Open" adoption but extremely limited post-adoption contact visits precluding development of a meaningful relationship • Authorities' failure to take measures to facilitate family reunification

STRASBOURG

10 March 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Pedersen and Others v. Norway,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Robert Spano, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Darian Pavli,
Saadet Yüksel, *judges,*
Elizabeth Baumann, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 11 February 2020,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 39710/15) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Norwegian nationals, Mrs M.R. Pedersen ("the first applicant"), Mr T. Pedersen ("the second applicant"), and their child, X ("the third applicant") ("the applicants"), on 6 August 2015.

2. The applicants were represented by Ms V.K. Thiis and Mr G. Thuan dit Dieudonné, lawyers practising in Trondheim and Strasbourg, respectively. The Norwegian Government ("the Government") were represented by Mr M. Emberland of the Attorney General's Office (Civil Matters) as their Agent, assisted by Mr H. Vaaler.

3. Mr Arnfinn Bårdsen, the judge elected in respect of Norway, was unable to sit in the case (Rule 28 of the Rules of Court). On 15 January 2020 the President of the Chamber designated Elizabeth Baumann to sit as an *ad hoc* judge in his place (Article 26 § 4 of the Convention and Rule 29 of the Rules of Court).

4. The applicants alleged that the domestic authorities' decision to deprive them of their parental responsibilities in respect of X and to authorise his adoption, and the concurrent decision on post-adoption contact rights, had constituted a breach of their right to respect for their family life under Article 8 of the Convention.

5. On 22 August 2016 the above complaint was communicated to the Government and the remainder of the application was declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court. In the Court's letters of 11 September 2019, the parties were invited to make any submissions they might wish on the possible relevance of the Grand

Chamber's judgment in the case of *Strand Lobben and Others v. Norway* ([GC], no. 37283/13) to the instant case. All parties made additional submissions further to that invitation.

6. Written submissions were received from the Government of the Czech Republic, who had been granted leave to intervene as third parties in the proceedings, in accordance with Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court.

7. The Court decided to grant the third applicant anonymity, in accordance with Rule 47 § 4 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first and second applicants were born in the Philippines in 1969 and in Norway in 1962, respectively. In September 2008, the first applicant gave birth to their son, the third applicant, X.

9. On 5 December 2008, when he was two and a half months old, X was placed in an emergency foster home because the first and second applicants were mentally ill and incapable of looking after him. There was at the time a conflict between the first and second applicant and the second applicant wanted the child welfare services to take care of X.

10. In the spring of 2009 X and the first applicant stayed for four weeks at a parent-child institution. The purpose of the stay was to facilitate the return of X to his parents. The stay had to be terminated, however, because of a negative development in X and deficiencies in the care that the first applicant had provided.

11. In connection with the centre's decision to terminate the stay, the head of the child welfare services issued a new formal decision on 12 May 2009 to place X in an emergency foster home. The parents lodged an appeal against the decision with the County Social Welfare Board (*fylkesnemnda for barnevern og sosiale saker*). They submitted, notably, that the first applicant had by then essentially overcome her mental issues, which had related primarily to depression. On 29 May 2009 the Board decided not to allow that appeal.

12. On 23 June 2009 the child welfare services applied to the Board for a care order for X. In a decision of 23 October 2009 the Board allowed the application. It was decided that X would be placed in a foster home and that the first and second applicants should have the right to two contact visits lasting two hours, two times yearly. The extent of the contact rights was set on the basis of, among other things, the assumption that the placement would most likely be long-term.

13. After an appeal by the first and second applicants, the District Court (*tingrett*) in its judgment of 9 March 2010 upheld the care order and the contact rights set by the Board. Like the Board, it found that the placement would most likely be long-term. It also took account of X's negative reactions to the contact sessions that had already been carried out, including to the one contact session that had been carried out since the Board's decision.

14. In January 2012 the first and second applicants lodged an application with the Board to have the care order lifted. The child welfare services, for their part, lodged an application for parental responsibilities to be removed, authorisation to be issued for X to be adopted and the post-adoption contact rights for the first and second applicants to be set.

15. On 8 June 2012 the Board decided to allow the child welfare services' request. Post-adoption contact was fixed at four hours, twice yearly, under supervision.

16. After an appeal by the first and second applicants, on 19 June 2013 the District Court gave judgment, largely upholding the Board's decision but setting post-adoption contact at two hours, twice yearly. The District Court had appointed an expert, a psychologist, L.O., to examine whether X had become so attached to his foster home that he could not therefore be returned to his parents; L.O. had confirmed that X had indeed become so attached. The District Court reached the same conclusion, stating, *inter alia*:

> "As regards the plaintiff's argument that the lack of attachment between [X] and the parents is due to the child welfare services' failure to comply with their duty, as set out in section 4-16 of the Child Welfare Act and Article 8 of the European Convention on Human Rights, it is pointed out that the court must decide on the attachment question and what is in [X]'s best interests today, irrespective of the history of the case. The court fully understands that this may seem harsh to the parents, who clearly love [X] and wish him to come home. But the effect on the parents is secondary to the effects on X – it is his best interests that are the fundamental consideration, and a possible lack of follow-up on the part of the child welfare services cannot take precedence over his best interests when assessing whether severing the attachment [to his foster parents] could lead to serious problems for him."

17. On 20 September 2013 the High Court (*lagmannsrett*) granted the first and second applicants leave to appeal against the District Court's judgment. It noted on that occasion that it had been unfortunate that the District Court had limited L.O.'s mandate to that of examining the issue of X's attachment to his foster home, instead of that of also examining the first and second applicants' caring skills. The High Court, composed of three professional judges, one psychologist and one lay person, first held a hearing from 4 until 6 March 2014. After hearing the parties' presentation of evidence, the High Court decided to postpone the further hearing of the case because it found it necessary to appoint an expert. A psychologist,

E.B., was appointed and delivered her report on 25 May 2014. On the issue of the first and second applicants' caring skills, the report stated, *inter alia*:

> "Conclusion:
>
> [The possibilities are] very limited [as to] what conclusions concerning the parents' caring abilities one may draw on the basis of the observations of the limited contact that has taken place.
>
> However, on the basis of the circumstances surrounding [X's] placement in care, the parents appear not to have had the possibility to demonstrate their caring skills in full, and they have, given such limited contact, had little opportunity to develop their caring skills to any particular degree.
>
> In the critical period of [X]'s first years, they were clearly unable to care for him. This they also knew themselves, and they therefore sought assistance. It is unknown whether they gradually could have become able to provide care for their son if assistance measures had been directed to a greater degree towards the home situation and a better dialogue with the parents had been entered into at an early stage.
>
> The expert does not find anything in [the first and second applicants'] background history or in their functioning today to indicate that they lack caring skills."

On the basis of X's attachment to his foster home, E.B. advised that the care order should not be lifted, as this would seriously harm his development. On that subject, the report stated, *inter alia*:

> "[X] has an attachment to his foster home that makes it impossible to change his care situation without this having major consequences in the form of his development immediately being set back in a way that is not just unfortunate, but also downright harmful. It will not be possible to implement assistance measures that can prevent this."

The expert furthermore concluded that both adoption and continued foster care had advantages and benefits that had to be taken into account.

18. The hearing then resumed on 5 June 2014. In addition to the court-appointed expert, the psychologist L.O., who had been appointed as an expert by the District Court (see paragraph 16 above), attended the hearing and gave evidence as an expert witness. The first and second applicants attended, together with their legal-aid counsel, and gave evidence. Other evidence included the testimony given by a number of witnesses.

19. In its judgment of 19 June 2014 the High Court decided that the care order had to be upheld because of X's strong attachment to his foster home. In respect of X being adopted by his foster parents, it noted that this could be beneficial to X because it would offer him increased security and stability. It considered, however, that the foster parents would continue to support X even if he were not adopted, and that the first and second applicants would not in the future be likely to use their procedural rights to have his care order and their contact rights revised in a manner that would be harmful to X. Furthermore, adoption would entail X being cut off from his parents and thereby his ties to Philippine culture, and there were no

grounds for assuming that the first and second applicants lacked caring skills. The High Court therefore concluded that it would not be correct to authorise X's adoption. The High Court noted that post-adoption contact under section 4-20a of the Child Welfare Act had been decided (see paragraph 38 below), and that adoption would thus not entail X losing all contact with his parents. Such post-adoption contact would be of a very limited extent, however, and in the High Court's view contact to a more traditional extent would be in X's best interests. It set contact rights at three-hour visits, four times yearly.

20. The child welfare services appealed to the Supreme Court against the High Court's judgment in so far as it concerned parental responsibilities and adoption. The extent of post-adoption contact visits, or contact rights if adoption was not permitted, was not made a topic for examination by the Supreme Court. The first and second applicants did not appeal against the High Court's judgment in so far as it concerned the refusal to lift the care order. During the appeal hearing before the Supreme Court, a video was shown containing footage of several contact sessions between X and the first and second applicants. The video was commented on by a psychologist, T.H., who had been engaged by the second applicant. In other respects, the case heard by the Supreme Court was essentially the same as that which had been heard by the High Court.

21. In its judgment of 30 January 2015 (*Norsk Retstidende* (*Rt.*) 2015 page 110) the Supreme Court stated that it would review all aspects of the case and that the review would take place on the basis of the situation as it stood at the time that it gave its judgment. It also stated that the main question was whether adoption would be in the child's best interests, in accordance with section 4-20 (b) of the Child Welfare Act (see paragraph 38 below). However, what was in the child's best interests was closely linked to the "attachment criterion" specified under 4-20 (a).

22. As concerned the "attachment criterion", the Supreme Court noted that the Board, the District Court and the High Court had all concluded that it would lead to serious problems for X if he were moved from the foster home. According to the Supreme Court's assessment, no new information had been presented to it that altered that conclusion. It had to be assumed that X had a deep-rooted and secure attachment to the foster home and his foster parents. The Supreme Court also referred to the statement given by the court-appointed expert before the High Court.

23. Proceeding to the condition that any adoption had to be in the child's best interests, the Supreme Court stated that a forced adoption strongly affected the biological parents. The emotional pain of having a child adopted normally ran very deep. Family ties that were severed by forced adoption were protected by Article 8 of the Convention and by the Norwegian Constitution. Adoption also constituted an invasive measure for children, and, pursuant to the UN Convention on the Rights of the Child

Article 21, could therefore only be decided upon if it was in the best interests of the child. On the other hand, under the first paragraph of Article 3 § 1 of the UN Convention on the Rights of the Child and the Norwegian Constitution, the parent's interests had to yield in cases where decisive circumstances in respect of the child indicated adoption to be the best course of action. The Supreme Court also referred to the Court's judgment in *Aune v. Norway*, no. 52502/07, 28 October 2010.

24. The Supreme Court then looked at recent parliamentary documents in order to determine whether the legislature had intended to lower the threshold for adoption. It concluded that it had not. Statements in the documents indicated, however, that adoption was a desirable child welfare measure that should be used more often if there was a legal basis for it within the bounds of applicable law and Article 8 of the Convention. The parliamentary documents showed, moreover, that the legislature's wish for a greater use of adoption was grounded in research-based knowledge. The Supreme Court considered that such general experience and knowledge of the effects of adoption were important in connection with a concrete assessment of whether authorisation should be issued for adoption.

25. The Supreme Court went on to note that in 2010 a provision had been added to the Child Welfare Act (section 4-20a), allowing contact between a child and its biological parents after adoption (what was known as "open adoption"). Contact visits were contingent on the consent of the adoption applicants (*adoptivsøkerne*) and on it being in the child's best interests (see paragraph 38 below).

26. In several previous cases, the Supreme Court had urged the legislature to introduce such a provision. In its judgment of 1 April 1997 (*Rt.* 1997 page 534), it had maintained that this "would mean that the advantages for the child of being adopted would not have to be weighed against the advantages of a continued right to access for the biological parents".

27. While the Supreme Court was not of the opinion that the introduction of legal authority for contact visits had lowered the high threshold for adoption (*terskelen for adopsjon*), it was of the view that in some cases contact visits would mean that the arguments against adoption would not carry the same weight. The Supreme Court referred to *Aune*, cited above, § 78.

28. Proceeding to a concrete assessment of whether adoption was in X's best interests, the Supreme Court noted that the situation at the time of its judgment was that he had lived virtually his whole life in the foster home, and had been only two and a half months old when he had been taken there. According to the expert assessment conducted by E.B., the psychologist, in the High Court's view (see paragraph 17 above), he had a minimal attachment to his biological parents, and his secure base was his foster home. He called his foster parents "mummy" and "daddy". He had a close

and good relationship with the foster parents' biological son, who was a little older, with a younger girl who was also a foster child in the family, and with the extended family. It was clear from a memorandum from the child welfare services dated 17 October 2014 that X usually used his foster parents' surname when anyone asked what he was called.

29. The Supreme Court considered that that obviously strong and deeply-rooted attachment to the foster home should be strongly emphasized and that its view was supported by general knowledge regarding such situations. It noted that the primary attachment of very young children who had been placed in a foster home, as in the present case, was often to the foster parents. That consideration was supported by a White Paper on the protection of children's development (NOU 2012:5: Better protection of children's development (*Bedre beskyttelse av barns utvikling*)). At the time of the Supreme Court's judgment, X had a minimal attachment to the applicants.

30. Another factor that in the Supreme Court's view carried strong weight was that X was vulnerable and had a special need for security, stability and a predictable life situation. That factor had been emphasised in all the assessments of him that had been carried out, and, at the time of the Supreme Court's judgment too, he was a child with a special need for security and support. The High Court had referred to the fact that he was described as an insecure child, particularly in new and unfamiliar situations. He had started school by the time that the Supreme Court was considering its judgment, and it had been decided that he should have a special-needs education. The Educational and Psychological Counselling Service (*pedagogisk-psykologisk tjeneste* – PPT) had referred to "the need for an overview and predictability, the security of knowing who will look after him and who he should go to". It was clear from a statement by X's contact teacher (*kontaktlærer*) dated 6 November 2014 that he had settled in at school, but that he had problems concentrating and low self-confidence. Within this context, the Supreme Court also referred to a statement by L.O., the psychologist appointed as an expert witness by the District Court (see paragraph 16 above), who had also testified as an expert witness before the High Court (see paragraph 18 above). She had stated:

> "In the High Court, the undersigned maintained the assessment that adoption would be in the child's best interests. This concerns a child with special-care needs, no attachment to the biological parents, and a special need for stability and calm."

31. The Supreme Court also considered that, within this context, it was an important factor (*et moment*) that, for virtually the whole of X's life, there had been disputes between his biological parents (the first and second applicants) and the municipality, and that new disputes could not be ruled out in future. The Supreme Court did not doubt that the first and second applicants' were motivated by a wish to ensure a good upbringing for X

with them, but emphasised that disputes about care did not contribute to providing the necessary stability and calm for him.

32. The High Court had given decisive weight to the importance of maintaining X's ties with his biological parents, and particularly his ethnic ties to the Philippines through the first applicant. In the Supreme Court's view, those considerations were safeguarded through the contact visits, which the District Court had set at twice a year, each with a duration of two hours. The foster parents had taken a positive attitude to the contact visits, and there was every reason to believe that the visiting arrangement would work as intended. As had been stated by the European Court of Human Rights in the *Aune* case (see *Aune,* cited above, § 78), the contact visits meant that X would not be cut off from his roots and his ethnic background.

33. The first and second applicants had argued that Article 8 of the Convention had been violated by the original care order, and by the child welfare services' not doing more to facilitate reunification. It followed from case-law of the European Court of Human Rights that taking a child into care should normally be seen as a temporary measure, and that the overall purpose of child welfare measures should be reunification.

34. The Supreme Court stated in response that it based its view on the desirability of achieving family reunification, but that it could nonetheless not agree with the first and second applicants' argument. Their objections to the care order in 2009 – which, among other things, had related to the first applicant having been hampered by language problems and medication – had been rejected by the Board and the District Court. The first and second applicants had had relatively frequent contact sessions with X both before and after the stay at the parent-child institution (see paragraph 10 above), and the purpose of the stay at the institution had been to facilitate reunification. It had turned out, however, that the first and second applicants had been incapable of providing X with the necessary care. Nor could the Supreme Court see that the subsequent treatment could be criticised: the care order and the extent of contact had been stipulated after assessments had been made by experts. Nor was there any information that could give reason to conclude that further measures should have been taken to assist the first and second applicants.

35. In any event, it was X's best interests at the time of the Supreme Court's judgment that was the decisive factor when assessing whether authorisation for adoption should be issued, and not whether there might have been shortcomings in the authorities' efforts to return the child to his parents at an earlier and (at the time that the Supreme Court examined the case) past, stage.

36. On the basis of the above, the Supreme Court reached the conclusion that there were especially strong reasons for issuing an authorisation for adoption, and the District Court's judgment was accordingly upheld.

II. RELEVANT LAW AND PRACTICE

37. Articles 102 and 104 of the Norwegian Constitution of 17 May 1814 (*Grunnloven*), as revised in May 2014, read as follows:

Article 102

"Everyone has the right to the respect of their privacy and family life, their home and their communication. Search of private homes shall not be made except in criminal cases. The authorities of the state shall ensure the protection of personal integrity."

Article 104

"Children have the right to respect for their human dignity. They have the right to be heard in questions that concern them, and due weight shall be attached to their views in accordance with their age and development.

For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration.

Children have the right to protection of their personal integrity. The authorities of the State shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family."

It follows from the Supreme Court's case-law – for instance its judgment of 29 January 2015 (Rt. 2015 page 93, paragraphs 57 and 67) – that the above provisions are to be interpreted and applied in the light of their international law models, which include the Convention and the case-law of the European Court of Human Rights.

38. The relevant sections of the Child Welfare Act of 17 July 1992 (*barnevernloven*) read:

Section 4-20 Deprivation of parental responsibility. Adoption

"If the county social welfare board has made a care order in respect of a child, the county social welfare board may also decide that the parents shall be deprived of all parental responsibility. If, as a result of the parents being deprived of parental responsibility, the child is left without a guardian, the county social welfare board shall as soon as possible take steps to have a new guardian appointed for the child.

When an order has been made depriving parents of parental responsibility, the county social welfare board may give its consent for [their] child to be adopted by persons other than the parents.

Consent may be given if

(a) it must be regarded as probable that the parents will be permanently unable to provide the child with proper care or the child has become so attached to persons and the environment in which he or she is living that, on the basis of an overall assessment, removing the child may lead to serious problems for him or her, and

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

(c) the adoption applicants have been the child's foster parents and have shown themselves fit to bring up the child as their own, and

(d) the conditions for granting an adoption under the Adoption Act are satisfied.

When the county social welfare board consents to adoption, the Ministry shall issue the adoption order."

Section 4-20a. Contact visits between the child and his or her biological parents after adoption

"When the county social welfare board issues an adoption order under section 4-20, it shall, if any of the parties have requested it, at the same time consider whether there shall be contact visits between the child and his or her biological parents after the adoption has been carried out. If limited contact visits after adoption in such cases are in the child's best interests, and the adoption applicants consent to such contact, the county social welfare board shall make an order for such contact. In such a case, the county social welfare board must at the same time determine the extent of that contact.

...

An order regarding contact visits may only be reviewed if special reasons justify doing so. Special reasons may include the child's opposition to contact or the biological parents' failure to comply with the contact order. ..."

39. Other relevant material relating to domestic and international law is referred to in the Court's recent judgment in the case of *Strand Lobben and Others v. Norway* [GC], no. 37283/13, §§ 122-139, 10 September 2019, to which reference is made.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

40. The applicants complained under Article 8 of the Convention that their right to respect for their family life had been infringed through the domestic authorities' decisions to deprive the first and second applicants of their parental responsibility for X, to allow the adoption of X and to restrict the applicants' subsequent contact. They furthermore alleged that the domestic authorities had failed to try to reunite the family and that the domestic procedure had been unfair since they had not been sufficiently involved in the process

41. Article 8 of the Convention 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."

42. The Government contested that argument.

A. Admissibility

43. The Government submitted that the application in so far as it concerned the third applicant, X, was incompatible *ratione personae* with Article 8 of the Convention and should therefore be declared inadmissible, in accordance with Article 35 §§ 3 (a) and 4. They took note of the majority's view in the case of *Strand Lobben and Others v. Norway* ([GC], no. 37283/13, §§ 154-159, 10 September 2019), but maintained that there was in the instant case a conflict of interest between X and his biological parents.

44. The applicants argued that it would be in line with the Court's case-law to accept the first and second applicants lodging the complaint on behalf of X and emphasised that X's interests would otherwise not be brought to the Court's attention.

45. The Court recently examined an identical objection from the respondent Government in the case of *Strand Lobben and Others*, cited above, §§ 154-159), and concluded that that objection had to be dismissed. The Court's considerations in that judgment in its view also apply to the instant case.

46. Accordingly, the Court dismisses the Government's objection regarding the third applicant. It furthermore notes that none of the complaints are manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

47. The applicants maintained that the domestic authorities had not advanced relevant and sufficient reasons for the decision to deprive the first and second applicants of their parental responsibility for X, to allow X's foster parents to adopt him, and to allow the first and second applicants only limited contact. The first and second applicants argued that the circumstances in question had not been exceptional.

48. The applicants had been in a vulnerable situation after X's birth and the authorities had not made serious and sustained efforts to facilitate the reuniting of X with his biological parents. The authorities had not given

sufficient consideration to additional measures of support as an alternative to separating X from his parents.

49. The authorities had never instituted sound and regular contact between the first two applicants and X in order for them to reconnect with and strengthen their ties to him.

50. The applicants were of the view that the facts of the instant case disclosed a "pattern" similar to that in the case of *Strand Lobben and Others*, cited above.

(b) The Government

51. The Government argued that the measures taken in the case, while far-reaching, had been clearly supported by relevant and sufficient reasons.

52. The decision-making process had been fair and had afforded due respect to the applicants' rights. The measures complained of had been considered by the domestic authorities to be in the best interests of X.

53. The use of adoption as a child welfare measure had been the result of the express will of a majority of the Norwegian Parliament. That majority had over the last decade repeatedly stated that adoptions by foster parents should be used more frequently in cases where a child faced a long-term placement away from the biological parents. Parliament had based this decision on contemporary research into both child psychology and the developmental outcomes of children growing up in public care.

54. With respect to the Court's judgment in the case of *Strand Lobben and Others*, cited above, the Government particularly stressed that the legal basis for the impugned adoption decision in that case had differed from that in the present case. In the present case it had solely been X's attachment to his foster home that had made adoption necessary. For the same reason, the fact that there had been repeated legal proceedings between the biological parents and the local authorities was an aspect of some relevance to the instant case (see, in contrast, *Strand Lobben and Others*, cited above, §§ 212 and 223).

55. Moreover, adoption had in the instant case been decided on the basis of updated information, including two new separate expert reports. Furthermore, the Supreme Court had given a substantiated assessment of X's vulnerability and carried out a broad balancing of the conflicting views and interests at stake. Nor was the Court's consideration that the domestic authorities in the case of *Strand Lobben and Others* had not seriously contemplated any possibility of the child's reunification with his biological family (§ 220) transferrable to the instant case, in so far as the first and second applicants had not appealed against the decision not to lift the care order for X and their caring skills had not been a matter before the Supreme Court. Lastly, the Government emphasised that if the Court were to find that it has jurisdiction to decide that the domestic authorities had not fulfilled their positive obligations under Article 8 of the Convention during the

period preceding the adoption proceedings, a finding to that effect would not signify that the adoption entailed a violation of that provision.

2. Third party submissions

56. The Czech Government (who were granted leave to intervene as third parties in the proceedings) focused mainly on the approach of the respective authorities after the placement of children in foster care, since immediate active work with biological families after the placement of children in care – as well as the frequency of contact between children and their biological parents – appeared to be crucial factors in maintaining original family ties. They also commented on the deprivation of parental responsibility and on adoptions carried out without the consent of the respective biological parents.

57. The Czech Government stressed that the principle of the best interests of children was not designed to be a "trump card", noting that the rights of biological parents had to be duly taken into account. They also stated that as a matter of fact, foster parents often did not want a child to keep in touch with his or her biological family as it could create an obstacle to the future adoption of that child. If a small child was taken into public care and very limited contact rights were granted, it was obvious that no attachment would be established between that child and his or her biological parents. Hence, it was a vicious circle. Contact rights amounting to just a few hours a year could not pursue the aim of reuniting the family in question. Such a state of affairs not only jeopardised the proper development of the biological parent's ties with the child but also set in motion a process that was likely to prove to be irreversible, thereby putting the biological parents at a significant disadvantage in any contest with prospective adopters for the custody of the child. Moreover, foster parents were entitled to give their opinion on the revocation of a care order, a right that was heavily detrimental to the biological parents. In order for any effort to reunite a family to be serious, contact would have to occur several times a week and increase in time up to the frequency of daily visits.

58. As to adoption, the Czech Government submitted that the crucial question was whether adoption (and possible subsequent restrictions or a ban on visiting rights) in cases where the biological parents wanted to participate in bringing up their child and to exercise visiting rights, were in compliance with Article 8 of the Convention. They stressed that there was no right to adoption for parents looking for children; rather, the prime objective of adoption should be to give a child a family and not to give a family a child.

3. The Court's assessment

59. It is not for the Court to examine whether X's foster care should have been discontinued, but solely to examine the decision to replace the foster care arrangement with an adoption – including the withdrawal of parental responsibilities in respect of X for that purpose – and the decision on post-adoption contact visits. The parties agreed that those measures had amounted to an interference in the applicants' right to respect for their family life, that they had been in accordance with the law – namely the 1992 Child Welfare Act (see paragraph 38 above) – and had pursued the legitimate aims of protecting X's "health or morals" and his "rights". The Court does not see that this can be called into question and will examine whether the measures were necessary in a democratic society under Article 8 § 2 of the Convention.

(a) General principles

60. The general principles applicable to cases involving child welfare measures, including measures such as those at issue in the present case, are well-established in the Court's case-law, and were recently extensively set out in the case of *Strand Lobben and Others v. Norway* [GC], no. 37283/13, §§ 202-213, 10 September 2019, to which reference is made. For the purpose of the present analysis, the Court reiterates that regard to family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Article 8 of the Convention. Accordingly, in the case of imposition of public care restricting family life, a positive duty lies on the authorities to take measures to facilitate family reunification as soon as reasonably feasible. Moreover, any measure implementing such temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child. The positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child. The ties between members of a family, and the prospect of their successful reunification will perforce be weakened if impediments are placed in the way their having easy and regular access to each other (ibid., §§ 205 and 208).

61. Furthermore, the Court recalls that in instances where the respective interests of a child and those of the parents come into conflict, Article 8 requires that the domestic authorities should strike a fair balance between those interests and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents. Moreover,

family ties may only be severed in "very exceptional circumstances" (ibid., §§ 206 and 207).

62. The Court also reiterates that the margin of appreciation to be accorded to the competent national authorities will vary in light of the nature of the issues and the seriousness of the interests at stake, such as, on the one hand, the importance of protecting a child in a situation which is assessed as seriously threatening his or her health or development and, on the other hand, the aim to reunite the family as soon as circumstances permit. The Court thus recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. A "stricter scrutiny" is called for in any further limitations, such as restrictions placed by the authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed (ibid., § 211).

(b) Application of those principles to the instant case

63. The Court initially observes that the case was heard first by the County Social Welfare Board and thereafter by three judicial instances. The proceedings were overall extensive, and included at several instances the hearing of numerous witnesses and the parents in person. Both the District Court and the High Court appointed experts, although the High Court was of the view that the expert appointed by the District Court had been given too limited a mandate (see paragraph 17 above). Moreover, the benches of both the District Court and the High Court, as well that of the Board, included a psychologist and a lay person, in addition to legal professionals (see paragraph 17 above, as concerns the High Court). The parents were also provided with legal-aid counsel, were active in the proceedings and had every opportunity to present their case. At the same time, the Court notes that the Supreme Court reversed the High Court's unanimous judgment to the effect that authorisation for X's adoption should not be issued without the Supreme Court having had the same benefit of direct contact with all persons involved as had had those hearing the case at lower instances.

64. Proceeding to the merits, the Court takes note of the factors on which the Supreme Court relied when consenting to X's adoption – in particular the need to secure X's position in the foster home environment, his age and maturity, his lack of social ties to the first and second applicants, his having lived nearly all his life with his foster parents (regarding them as his own parents), the foster parents' suitability to be his carers, and the damage that removing him from his foster home environment would entail (see, in particular, paragraphs 22 and 28-32 above) – and considers that they were relevant factors, according to the Court's case-law (see, for instance, *Johansen v. Norway* (dec.),

no. 12750/02, 10 October 2002, and *Aune v. Norway*, no. 52502/07, §§ 76-78, 28 October 2010). The Supreme Court's conclusions were supported by L.O., the psychologist who had been appointed as an expert by the District Court (see paragraph 30 above).

65. The Court also bears in mind that decisive weight cannot always be attached to the fact that a parent has recovered his or her capacity to assume care (see, for example, *Rieme v. Sweden*, 22 April 1992, §§ 70-71, Series A no. 226-B; *Olsson v. Sweden (no. 2)*, 27 November 1992, §§ 87-88, Series A no. 250; *Hokkanen v. Finland*, 23 September 1994, §§ 63-64, Series A no. 299-A; and *Johansen*, cited above). Moreover, in the instant case, X clearly enjoyed "family life" with his foster parents at the time that the decision to authorise his adoption was made, and it was accordingly not the adoption decision that set in motion the bonding of the child with the adoptive parents; rather, that decision consolidated and formalised existing ties (see, for example, *Chepelev v. Russia*, no. 58077/00, § 29, 26 July 2007). In addition, the Court reiterates that it has previously refrained from attempting to untangle the opposing considerations inherent in questions concerning whether adoption or long-term foster care may be in the best interests of a child in a specific case (see, in particular, *P., C. and S. v. the United Kingdom*, no. 56547/00, § 136, ECHR 2002-VI).

66. The Court's task is not limited, however, to scrutinising solely the reasons advanced by the Supreme Court for upholding the District Court´s authorisation of adoption. Whilst, in the absence of any complaint by the applicants regarding the initial placement order and the decision of the domestic authorities not to lift the care order, the Court cannot examine and rule on these issues separately (see paragraph 59 above), it must nevertheless assess the case and the proceedings as a whole (see *Strand Lobben and Others*, cited above, §§ 203 and 212).

67. In that regard, the Court notes that the proceedings complained of began in 2012, when the first and second applicants applied to have the care order lifted (see paragraph 14 above). In order to consider those proceedings correctly, the Court has to put them into their context, which inevitably means to some extent having regard to the related proceedings concerning public care and contact restrictions (ibid., § 148). In doing so, the Court observes that X's initial placement in care was to a large part related to the first and second applicants' issues with mental health at the time in question (see paragraph 9 above). Notwithstanding that circumstantial justification for the care order, the Board and the District Court both proceeded on the assumption that the placement would be long-term (see paragraphs 12 and 13 above). When the Board issued the care order on 23 October 2009, it, referred to, *inter alia*, the likely long-term nature of the foster care and set the first and second applicants' contact rights at only two visits yearly, each time for two hours (see paragraph 12 above). That decision was upheld by

the District Court. In the meantime, only one visit was carried out (see paragraph 13 above).

68. The Court emphasises that to the extent that these decisions implied that the authorities had given up reunification of the child and the natural parents as the ultimate goal, the conclusion that placement must be considered to be long-term should only have been drawn after careful consideration and also taking account of the authorities' positive duty to take measures to facilitate family reunion. However, in this case the decision to impose a very strict visiting regime cemented the situation at the very outset, making it highly probably that the child would become attached to the foster parents and alienated from the natural parents, thus precluding any realistic possibility of eventual reunification. Indeed, this is precisely what happened in the present case. In this respect, the Court recalls that where the authorities are responsible for a situation of family breakdown because they have failed in their obligation to take measures to facilitate family reunification, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child (see *Strand Lobben and Others*, cited above, § 208).

69. Furthermore, the above decisions taken in 2009 and 2010 laid out the arrangements that were in force when the first and second applicants lodged their claim to have the care order lifted; as a result of those arrangements, when the domestic authorities were called upon to decide on the first and second applicants' claim in the course of the proceedings complained of, they had scarce experience from which to draw conclusions in respect of their caring skills (ibid., § 221). That issue was not expressly raised by the District Court, which itself failed to include any assessment of the first and second applicants' caring skills in the mandate given to the expert that it appointed (see paragraphs 16-17 above). It was, however, aptly illustrated by the report by the expert appointed by the High Court: that expert expressly stated in her report that the first and second applicants had been allowed neither to fully demonstrate nor to develop their caring skills to any particular degree (see paragraph 17 above). At the time of the impugned proceedings, there was thus in the Court's view already a risk that the family would not be reunited, even though there had been improvements in the first and second applicants' situation, and that expert found nothing to indicate that they lacked caring skills (ibid.). Nonetheless, instead of attempting to find measures that could counter that risk – and in a situation where the first and second applicants had effectively consented to uphold the *status quo* by not appealing against the High Court's judgment in respect of the refusal to lift the care order – the domestic authorities, by way of the Supreme Court's judgment, ultimately decided to increase it by authorising X's adoption and setting only limited post-adoption contact visits. In those circumstances, the Court does not find it decisive that the Supreme Court's judgment on adoption was not based on an assessment of

the first and second applicants' caring skills, but on X's attachment to his foster home only.

70. The Court also notes that in the present case the adoption was "open" in the sense that contact visits were maintained even after the adoption (see paragraph 32 above). However, while the Supreme Court gave decisive weight to the importance of maintaining X's ties with his biological parents, the purpose of those visits was only to ensure that he would not be cut off from his roots and his ethnic background. The Court considers that while maintenance of contact between an adopted child and his or her biological parents, in a situation where there are clearly no prospects of reunification, may be a relevant factor in ensuring continuing respect for family life (see *Aune*, cited above, § 78), the extremely limited nature of the contact arrangements in the present case – two hours twice a year – rendered them incapable even of allowing the development of a meaningful relationship.

71. In the light of the above, the Court considers that in the proceedings through which the adoption of X was ultimately authorised, insufficient importance was attached to the aim that a placement in care be temporary and the family be reunited, and that insufficient regard was paid to the positive duty to take measures to facilitate family reunification as soon as reasonably feasible. That being the case, and taking additional account of the very limited contact arrangements set by the Supreme Court, the Court does not find the "open" character of the adoption to be decisive.

72. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

74. The first and second applicants claimed 100,000 euros (EUR), and the third applicant EUR 50,000 in respect of non-pecuniary damage.

75. The Government stated in response that, in the event that the Court should find a violation of Article 8 of the Convention, they preferred to leave to the Court's discretion the decision on the amount in respect of the first and second applicants. In respect of the third applicant, they preferred to leave to the Court's discretion both the decision on whether he should be entitled to just satisfaction and, if so, the amount thereof.

76. The Court considers that the first and second applicants must have suffered non-pecuniary damage through distress, in view of the violation found above. It awards them jointly EUR 35,000 in respect of that damage. With regard to X, the Court considers that a finding of a violation amounts to sufficient just satisfaction.

B. Costs and expenses

77. The first and second applicants also claimed, at first, a total of EUR 22,000 – for the costs and expenses incurred before the Court in respect of their engagement of two lawyers, whose fees amounted to EUR 18,500, and one psychologist, who had delivered a report for the price of EUR 3,300. They since added EUR 2,500 to the lawyers' fees due to additional observations made by them subsequent to the Court's judgment in the case of *Strand Lobben and Others,* cited above (see paragraph 5 above).

78. The Government maintained that the legal fees were excessive and that the expenses in respect of the psychologist had been unnecessary and, in any event, excessive.

79. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award a sum of EUR 9,500 for the proceedings before the Court.

C. Default interest

80. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the third applicant;

4. *Holds*

(a) that the respondent State is to pay the first and second applicants jointly, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Norwegian kroner (NOK) at the rate applicable at the date of settlement:

(i) EUR 35,000 (thirty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 9,500 (nine thousand five hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 March 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President