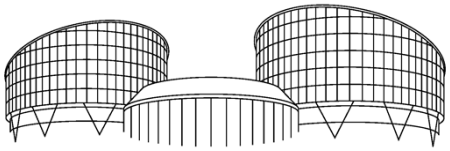

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF HERNEHULT v. NORWAY

(Application no. 14652/16)

JUDGMENT

Art 8 • Respect for family life • Long-term placement of applicant's children in foster care and limited contact rights • Insufficiencies in the domestic care procedures calling into question the proper justification for placement into care• Decision strengthening children's attachment to their foster home • Authorities' failure to make efforts to keep the family together and to consider possibility of 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 Hernehult 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, ad hoc *judge,*

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. 14652/16) 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 a Swedish national, Mr Dan Mikael Hernehult ("the applicant"), on 10 March 2016.

2. The applicant was represented by Mr D. Tønseth, a lawyer practising in Oslo. The Norwegian Government ("the Government") were represented by Mr M. Emberland of the Attorney General's Office (Civil Matters) as their Agent, with Ms A.S. Egeland as associate.

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).

4. The applicant alleged that the domestic authorities, in taking two of his children into care and refusing to authorise their return, had violated his right to respect for his family life under Article 8 of the Convention.

5. On 13 October 2016 the Government were given notice of the complaint concerning Article 8 of the Convention and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court. In a letter dated 18 October 2016 the Government of Sweden were notified of the application and invited to inform the Court by 10 January 2017 if they wished to exercise their right to intervene pursuant to Article 36 § 1 of the Convention and Rule 44 of the Rules of Court. On 4 November 2016 the Government of Sweden informed the Court that they did not want to exercise their right to intervene. 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. The Government made additional submissions further to that invitation.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1961 and, together with his wife, a Romanian national, has three children, all boys: A, born in 2000, B, born in 2005, and C, born in 2007.

7. The family moved to Norway in 2013, and on 4 November that year the child welfare service issued emergency care orders for all three children in accordance with section 4-6 of the Child Welfare Act (see paragraph 43 below). The child welfare service had made enquiries into the family's situation following reports by health personnel, the school health services and the social insurance services, and considered there to be serious concerns in respect of A's health in particular, and the applicant's and his wife's care for all three children in general. The children were deemed to have lived in isolation and to suffer from lack of social stimuli and from pathologisation. They were placed in emergency foster homes the same day – B and C in the same home. On 4 December 2013 an interim decision was made fixing contact between the applicant and his wife and the three children at twice a month for an hour each time, and under the supervision of the child welfare service, in accordance with the third paragraph of section 4-6.

8. The applicant and his wife appealed against the decisions. On 4 December 2013 the County Social Welfare Board (*fylkesnemnda for barnevern og sosiale saker*), represented by the chair of the Board, dismissed the appeals. That decision was not brought before the relevant District Court (*tingrett*) for review.

9. On 16 December 2013 the child welfare service applied to the Board: for care orders to be issued for the three children; for the children to be placed in foster homes, the whereabouts of which should not be disclosed to the parents; for the applicant and his wife to be deprived of their parental responsibilities; and for the fixing of supervised contact between the parents and the children. The applicant and his wife submitted a notice of intention to defend on 7 February 2014. A hearing of the Board was held on 10, 13 and 14 February 2014.

10. On 24 February 2014 the Board unanimously decided that all three children should be placed in care, and fixed the parents' contact rights,

allowing them to have contact four times a year, each time for one and a half hours. The child welfare service was authorised to supervise the contact sessions. The Board rejected the child-welfare service's request that the applicant's and his wife's parental responsibilities for the children be removed, and the request that the whereabouts of the foster homes not be disclosed to them.

11. In respect of A, the Board relied in particular on his mother's preoccupation with his suffering from Ehler Danlos syndrome (EDS). It stated that the question of whether or not he had this disease was not decisive. Nor did it question in any way that he had experienced major somatic complaints and significant anxiety about his own health. A had however difficulty concentrating on anything other than EDS, and he held in that context a number of beliefs that originated with his mother. Those included beliefs that he could die from the disease and that he could not go to school or outdoors if he found it cold. He had only very limited or no social interaction and had been unable to name any friends. All in all, his life was almost totally centred around his experience of pain and health complaints, which he believed stemmed from EDS; it was centred around his dependence on vital precautionary measures, particularly in the form of protection, rest and passivity. His level of functioning was significantly lower than would be expected owing to EDS. The Board stated that A's condition made him "a heavily disabled child".

12. As to B and C, the Board observed that in the foster home they had both been assessed as having an unusual relationship to illness and pain. Both had difficulties with language and pronunciation and had needed training in eating routines, bathroom routines and dressing. At school they had shown poor social-interaction skills, particularly in relation to their peers. B also had academic shortcomings. The applicant and his wife had on different occasions stated that both boys had symptoms of EDS and that they should be assessed for it. At the same time, good interaction with the applicant had been observed in both boys and they had been described as kind and nice, adaptable and undemanding.

13. Turning to the applicant's and his wife's abilities in respect of care, viewed against the children's care needs, the Board stated that the decisive and very serious issue was their focus on illness and infirmity. This manifested itself primarily in respect of the applicant's wife in her relationship with A. She had inflicted psychosomatic problems on him and significant anxiety about his own life and future, regardless of whether he had EDS or not. The applicant was assessed as less outgoing and dominant than his wife. The Board found that he had the ability to provide practical care, and that he interacted and played well with B and C. However, both B and C had been described before the Board as having been clearly marked by a lack of stimulation, training and practical experience and the applicant had also focused on illness in relation to all three children. Before the Board

he had said that he had an open mind about whether A had EDS. Yet, in other contexts he had clearly expressed his view that he had seen symptoms of the syndrome and wanted B and C to be assessed for the disease. In any event, for the Board the key factor was that the applicant was incapable of seeing what a burden the family's way of life and his wife were placing on A directly, and on B and C indirectly. The applicant was incapable of creating change or setting boundaries in this connection.

14. Following an overall assessment, the Board arrived at the conclusion that there had been serious neglect: the parents were incapable of providing the stability, structure, personal contact and security that the children needed, given their age and development. In respect of A, the Board emphasised that he showed clearly abnormal psychological development and needed treatment. The applicant and his wife had not had the necessary insight into his needs and had not managed to give him adequate help and developmental support. The Board added that A had suffered material harm and found it highly probable that similar material harm would be caused to B's and C's development or health if their care situation remained unchanged.

15. In respect of assistance measures in the home, the Board assessed that it was not possible to create a satisfactory care situation by implementing such measures. The applicant and his wife distrusted the assisting services and any medical assessments that deviated from their own. They also lacked insight into their own practice of providing care and the consequences this had for the children. On this basis, the Board assessed that it would not be possible to create a satisfactory care situation for the children by implementing assistance measures in the home. In conclusion, the criteria in section 4-12 of the Child Welfare Act for taking the children into care had been met (see paragraph 43 below).

16. Proceeding to the question of contact rights, the Board took into account the grounds for the care order, notably the applicant's and his wife's inability to understand and satisfy their children's emotional needs and their lack of insight. On the basis of the facts at that time, the Board believed that the placements in care would last for a prolonged period. Following an overall assessment, it concluded that exceptional and strong reasons did not exist that could lead to a total denial of contact. In respect of supervision, the Board stated that the supervisor should play an active role and facilitate managed contact between A and his parents; a Scandinavian language had to be spoken.

17. On 21 March 2014, the applicant and his wife brought the case before the District Court, which heard the matter on 13 and 16 June 2014. B and C were still placed together in an emergency foster home at that point, while A had been placed in an institution, because his emergency foster carers had found having him too demanding.

18. On 3 July 2014 the District Court upheld the Board's decision to issue care orders for all three children. It gave the applicant and his wife the right to have contact with A twice a year for one and a half hours each time, and the right to have contact with B and C four times a year for one and a half hours each time.

19. As to A, the District Court stated that it was possible that the question of whether he had EDS had been better elucidated before it than before the Board. Whether or not he suffered from that disease was not important to its decision, however. The judges' conversation with A (*dommersamtalen*) had given the District Court the strong impression that the Board's description of him as a child in need of help was correct. It had also given the strong impression that the child welfare service was right in stating that he was preoccupied with the issue of illness, and that his entire life centred around this question. This had had very serious consequences in the form of impaired functionality caused by psychologically abnormal development that had prevented him from developing his potential, or "making the best of his situation".

20. As to B and C, the District Court observed that prior to their being taken into care, they had been described as having been affected by a lack of stimulation, training and practical experience. Around the time of the interim care order of 4 and 5 November 2013, the applicant had expressed the view, among other things, that they displayed at least as many symptoms of EDS as A, if not more. In contrast, the children had functioned well in the emergency foster home. Neither illness nor pains had been an issue since they had been taken into care. They had not been absent from school due to illness. They had also shown progress in relation to their personal hygiene and learning to dress themselves. The District Court found that, in order to prevent further abnormal development, it was also in B's and C's best interests that their care orders be upheld. It therefore confirmed the Board's decision. Moreover, there were no grounds for changing the decision of the Board on contact rights in respect of them.

21. On 12 August 2014 the applicant and his wife appealed against the District Court's judgment in its entirety.

22. On 26 January 2015 the High Court (*lagmannsrett*) appointed a psychologist, K.K., as an expert to assess the case. She submitted a written report on 31 May 2015, which concluded that all three children had significant care and assistance needs. According to the expert, the parents could not meet these needs, partly due to what had most likely been unsatisfactory care which had contributed to the boys' considerable functional and developmental difficulties, and partly because the parents did not show insight into the boys' problems, insisting instead that these were exclusively caused by the presumed somatic illness and by the placement in care itself. For the same reasons, the expert considered that potential assistance measures in the home were not feasible. In her view, contact

between the parents and the children should also be very infrequent and managed and controlled as much as possible.

23. In her assessment of A, the expert stated that there had been serious cause for concern about a lack of boundaries, social stimulation, routines and pathologisation (*sykeliggjøring*) over different periods, and this had culminated in 2013 after the move to Norway, in connection with A's deteriorating condition and functioning at school. She further stated that when he had been placed in care, A had been described as a boy with considerable motor difficulties, anxiety about the consequences of the illness and pain, dependence on his mother and his mother's understanding of reality, and rigidity in relation to routines and behavioural patterns underpinned by the parents. When assessed by the expert, he had still lacked the skills, knowledge and preferences normally seen in boys of his age and, based on the situation at the time, she considered that he would not be able to manage by himself in society in the way expected of a boy of his age for a long time. In the expert's view, A should undergo as soon as possible a thorough assessment to determine whether he had a serious child psychiatric disorder. This would entail having a care situation in which the main care providers cooperated in the assessment, followed up the professional recommendations that were made, and established a relationship with A that made it possible for him to trust them, while at the same time challenging him to cope with and explore the world around him.

24. In respect of B, the expert stated that in his case, also, there was a lot of information that gave cause for concern and elements that could not be regarded as a normal reaction to being taken into care and placed in a foster home. This applied to B's "physical reactions in emotionally challenging situations, his language difficulties, his inability in relation to self-achievement and self-assertion, and his lack of understanding of social codes". In the expert's view, B's difficulties, as with A, were primarily connected to his previous care situation and early relationships. They could also be related to biological or genetic factors, in which case they were amplified. As a result, B needed a predictable care situation that facilitated further positive development, and treatment of the developmental difficulties described above. His care providers would have to cooperate with health personnel, accept guidance and follow up the advice given, so that his development would be ensured as far as possible.

25. Turning to C, the expert stated that he was the youngest and had spent the shortest time in the care of his parents. "Possibly as a result of this", he appeared to be the child with the fewest symptoms of the three, and his symptoms differed from those of his brothers. He appeared to be the one who functioned "closest to the normal range, despite having difficulties in relation to language and conceptual understanding, as well as emotional regulation, although he seems to be more prone to being uninhibited than withdrawn [(*selv om også han har vanskeligheter i forhold til språk- og*

begrepsapparat, samt emosjonell regulering – om enn mer ut- enn innag[]erende)]". It was possible that some of his behavioural problems were less related to his care situation and more to the uncertainty about the duration of the placement and where he would live in the future. With regard to his future care needs, like his brothers, he was seen as needing a stable and predictable care situation where his development was supported within a framework of cooperation with an ordinary school and the health services. It would be particularly important for him to have reassurance about where he would live and who was to care for him.

26. In respect of the applicant and his wife, the expert stated that they probably did not meet the criteria for Munchausen's syndrome by proxy diagnosis. There was, however, much to indicate that, by focusing on and amplifying the children's more or less serious health problems, and by caring for their children in a relatively isolated family system, they had not provided sufficient developmental support and had contributed significantly to the children's reduced level of functioning. The expert added that it could not be ruled out that there were other factors that had contributed to development in the same direction, factors which, because of the circumstances, it had not been possible to uncover. In her assessment, no information was available at the time that indicated that the applicant and his wife had sufficient ability in terms of providing care to satisfy their children's special material, emotional, cognitive and psychosocial needs.

27. On 11 June 2015 the Commission on Child Welfare Experts (*Barnesakkyndig kommisjon*) stated that it had no remarks to make on the expert's report.

28. The appeal hearing was held from 16 to 18 June 2015, with the High Court's bench composed of three professional judges, one psychologist and one lay person, pursuant to section 36-10 of the Dispute Act (see paragraph 45 below). The applicant and his wife, assisted by counsel, gave evidence. The child welfare service was represented by counsel and one representative. Eleven witnesses were heard, including two medical experts and A. A court-appointed representative (*talsperson*) for the children – who had had conversations with the children and had prepared a written report on 8 May 2015 – also gave evidence; so did the expert, K.K., who testified after the presentation of the other evidence, elaborating on her written report, and maintaining her conclusion in the case with the same certitude.

29. B and C were placed together in a foster home at that time. B went to the foster home in July 2014 and C in September that year, while A remained at the institution (see paragraph 17 above).

30. In its unanimous judgment of 2 July 2015 the High Court reiterated at the outset that a decision to issue a care order entailed a child being removed from his or her parents and others taking over his or her care on behalf of the child welfare service, without the parents thereby being deprived of parental responsibilities. This was a highly invasive measure,

both for the parents and the child; in principle, parents should care for their children themselves in accordance with "the biological principle". Care orders could accordingly only be issued when "necessary", based on the child's situation at the time, and should not be issued if satisfactory conditions could be created by assistance measures. Decisive weight should be attached to finding measures in the children's best interests, and the circumstances at the time of the judgment would be decisive. The best interests of the children had to be a "fundamental consideration" pursuant to the Norwegian Constitution.

31. The High Court went on to note that, in principle, a decision by the County Social Welfare Board should be assessed pursuant to the conditions for issuing a care order in section 4-12 of the Child Welfare Act – even if children had been placed in care – and not as a case where a care order was being revoked under section 4-21 (see paragraph 43 below). However, if the conditions for issuing a care order set out in section 4-12 had not been met, or it was deemed that there was a doubt under the second sentence of the first paragraph of section 4-21, it was necessary to consider whether the children had become so attached to the people with whom they were living and their living environment that, on the basis of an overall assessment, removing them could cause serious problems. The decisive factor would be whether returning them to the parents (*tilbakeføring*) would entail an actual risk of significant harmful effects in the long term, as stated in the case-law of the Supreme Court.

32. Proceeding to the circumstances of the instant case, the High Court reiterated that both the Board and the District Court had found that the criteria for issuing care orders had been met in respect of all three children.

33. Since the District Court's judgment, A's health issues, including EDS, had been further clarified. A discharge report from a hospital stated, *inter alia*, that for the last year he had had to use a wheelchair a lot of the time; he had a significantly lower level of functioning than the clinical findings would suggest; he displayed "several symptoms associated with different (serious) child psychiatric diagnoses"; and it was unknown whether the symptoms were a manifestation of a child psychiatric "condition and/or the result of difficult conditions growing up/a difficult life situation".

34. As to the children's views, obtained by way of their representative (see paragraph 28 above) and A's testimony, the High Court stated that A "had clearly asserted that he [had been] unhappy at the institution and thought it [had been] very unfair that he [had not been able to] move home to his family, where he [had had] a better life in all respects". With regard to B, it had emerged that he had wanted to live where he had been at the time, but that he had wanted to "see his parents sometimes". C had said that he "would [have] like[d] to move home to his parents", but that it had been "fine" if he had continued to live where he had been.

35. In its judgment – although in doubt (*under tvil*) – the High Court concluded that it had not been proved that any of the conditions for issuing a care order for a child under (a) to (d) of the first paragraph of section 4-12 of the Child Welfare Act had been satisfied. This applied to all three children in the case and had to do with the High Court finding it difficult to assess the parents' ability to provide care, since at the time they did not live with the children in question and had not done so for a prolonged period. In this context, it pointed out that no expert had been engaged to examine the care situation at the time the family lived together and that the family had lived in Sweden prior to moving to Norway, and a Swedish court had at that time concluded that there was no basis for asserting that A was suffering harm at home.

36. The High Court further stated that, while the child welfare service in 2013 had had grounds to investigate circumstances that could have constituted grounds for implementing measures at the family home (*tiltak i hjemmet*), and that had been discussed in meetings, no further assistance measures had been decided on before the emergency care order had been issued on 4 November 2013 (see paragraph 7 above). The High Court noted, moreover, that the child welfare service had previously disagreed with the parents that A had EDS and had created the suspicion that they suffered from Munchausen's syndrome by proxy, which could have had an impact on the decisions that had been made in the case and how the case had been dealt with. It went on to state that it had mainly been A's, and not B's and C's, personal circumstances that had formed the basis for the child welfare authorities' concern and investigations in 2013. From the decisions of the lower instances, it appeared that the care order for A had been primarily based on the applicant's and his wife's neglect in relation to A's personal and significant functional impairment – which the authorities had ascribed to circumstances on the part of the applicant and his wife – and that the care orders for B and C seemed to be more an effect or a consequence of this, without there being considerably more specific information about them (*uten noe vesentlig mer konkret om dem*). To the High Court it seemed, all in all, that A's health had been unusually challenging for both him and his parents. This could explain why the applicant and his wife had been very preoccupied with illness in relation to A, and also their anxiety about B and C. The lack of understanding about the illness displayed by the support services and health services could also have been very stressful.

37. The High Court stated that the court-appointed expert's considerations gave cause for serious concern about the parents' overall ability to provide care for three children with special needs. At the same time, A was in more or less the same very difficult situation as before, even after staying first in an emergency foster home and later in a youth care home. In the High Court's view, the care order for him was not necessary as satisfactory conditions could be created for him using assistance measures.

Implementation of such measures should have been attempted to a greater extent before A had been taken into care; at the time of the High Court's judgment, the parents had stated that they were both willing and able to cooperate with the support services. The High Court was of the view that, at that time, there had been a better basis for cooperation, as A's diagnoses had been clarified and everyone had been in a better position to attend to his needs relating to his health and functional impairment. The High Court also emphasised that A was very unhappy at the youth care home and that he had expressed a clear and strong wish to move back in with his parents. In the circumstances, there did not seem to be any suitable alternative other than A's living with his parents, with extensive assistance measures implemented in the home to ensure that his care needs were attended to, before the recommended psychiatric treatment or care was initiated following a more thorough assessment. All in all, this would be in A's best interests.

38. Turning to B and C, at the time ten and eight years old respectively, the High Court observed that they had lived in their joint foster home for nearly a year, and before that in the same emergency foster home. Their representative (see paragraph 28 above) had stated that in May 2015 B had thought that moving to a new foster home had been "pretty bad", but that he had been happy then. When the court-appointed expert K.K. had spoken to B and C about their lives in the foster home, they had "smiled and said that it [had been] nice" and said that they "[had done] many different things" and that "the adults [had been] kind". B's and C's special needs teacher at the school, where they had been in Year Two and Year Four respectively, had stated that she had seen that they had settled in and had felt secure and been positive. For the High Court, there was no information to the contrary or which gave reason to doubt this.

39. In the view of the High Court, moving B and C could lead to serious problems and entail a real risk of harmful effects to them in the long term. The conditions for discontinuing their foster care under section 4-21 of the Child Welfare Act had therefore not been met (see paragraph 43 below). The applicant and his wife would have the important task of caring for A, who was a teenager with special needs that demanded extensive assistance measures. The overall burden on them of providing care for all three children, each with their special needs, was thought to be too difficult and demanding for them at the time of the High Court's judgment. B and C had "significant care and assistance needs" (*store hjelpe- og omsorgsbehov*), as had been concluded and described by the court-appointed expert. Both of them had shown positive development in the foster home, including in connection with their schooling, academic and social development, and daily washing, eating and hygiene routines. Based on their age and development, the High Court found that significant weight should not be placed on B's and C's opinion in the case. Both of them were understood to be vulnerable in the circumstances, and they should not be subjected to the

real risk of significant harmful effects on their development as children and youths. Returning them to the applicant and his wife was not considered to be in their best interests at the time.

40. The High Court found that the applicant and his wife should have rights to contact with both B and C, six times a year for six hours each time under supervision. Their placement in care was expected to be long-term and the purpose of contact would be to allow them to become acquainted with their biological roots, with a view to possible subsequent attachment when they were older. The High Court also took into account that the three brothers missed each other and should be given an opportunity to maintain contact. The High Court lastly stated that, since its responsibility was to fix only the "minimum scope of contact" (*minimumssamvær*), it would be left to the child welfare service to consent to contact of a greater scope than that set out in its judgment.

41. On 15 September 2015 the Supreme Court's Committee on Leave to Appeal (*Høyesteretts ankeutvalg*) refused the applicants leave to appeal against the High Court's judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

42. 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 (*Norsk Retstidende* (*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.

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

Section 4-1. Consideration of the child's best interests.

"When applying the provisions of this chapter, decisive importance shall be attached to framing measures which are in the child's best interests. This includes attaching importance to giving the child stable and good contact with adults and continuity in the care provided.

The child shall be given the opportunity to contribute, and arrangements shall be made for conversations with the child. [A child] whom the childcare authorities have taken into care may be given the opportunity to be accompanied by a person in whom the child has particular trust. The Ministry may give further regulations regarding the contribution and the tasks and function of the person of trust."

Section 4-6. Interim orders in emergencies.

"If a child is without care because the parents are ill or for other reasons, the child welfare service shall implement such assistance as is immediately required. Such measures may not be maintained against the will of the parents.

If there is a risk that a child will suffer material harm by remaining at home, the head of the child welfare administration or the prosecuting authority may immediately make an interim care order without the consent of the parents.

In such a case, the head of the child welfare administration may also make an interim order under section 4-19.

If an order has been made under the second paragraph, an application for measures as mentioned in section 7-11 shall be sent to the County Social Welfare Board as soon as possible, and within six weeks at the latest, but within two weeks if it is a matter concerning measures under section 4-24.

If the matter is not sent to the County Social Welfare Board within the time-limits mentioned in the fourth paragraph, the order lapses."

Section 4-12 Care orders

"A care order may be issued

(a) if there are serious deficiencies in the daily care received by the child, or serious deficiencies in terms of the personal contact and security needed by a child of his or her age and development;

(b) if the parents fail to ensure that a child who is ill, disabled or in special need of assistance receives the treatment and training required;

(c) if the child has been mistreated or subjected to other serious abuse at home; or

(d) if it is highly probable that the child's health or development may be seriously harmed because the parents are unable to take adequate responsibility for the child.

An order may only be made under the first paragraph when [it is] necessary, owing to the child's current situation. Hence, such an order may not be made if satisfactory conditions can be created for the child by [the implementation of] assistance measures under section 4-4 or by measures under section 4-10 or section 4-11.

An order under the first paragraph shall be made by the County Social Welfare Board under the provisions of Chapter 7."

Section 4-21 Revocation of care orders

"The County Social Welfare Board shall revoke a care order when it is highly probable that the parents will be able to provide the child with proper care. The decision shall nonetheless not be revoked if the child has become so attached to persons [with whom he or she is living] and the environment where he or she is living that, on the basis of an overall assessment, removing the child may lead to serious problems for him or her. Before a care order is revoked, the child's foster parents shall be entitled to state their opinion.

The parties may not demand that a case concerning revocation of a care order shall be dealt with by the County Social Welfare Board if the case has been dealt with by the County Social Welfare Board or a court of law in the preceding twelve months. If a demand for revocation of the previous order or judgment was not upheld with reference to the second sentence of the first paragraph of section 4-21, new proceedings may only be demanded when documentary evidence is provided to show that significant changes have taken place in relation to the child's situation."

44. The Supreme Court has on several occasions discussed the application of section 4-21 of the Child Welfare Act in cases where the domestic courts were formally to review placement orders, not claims for revocation. In a judgment of 5 November 2004 (*Rt.* 2004 page 1683) it held that, in cases where the courts were to review a placement order for a child who had already been placed in care, it was still section 4-12 of the Child Welfare Act – which concerned placement in care – and not section 4-21 – which concerned the discontinuation of care – that formally applied. However, the Supreme Court added that the distinction between the two provisions was more theoretical than practical in nature, and in that particular case it did not draw any final conclusion as to whether the conditions for a placement order, as set out in section 4-12, had been met, yet it upheld the placement order in question because the conditions for discontinuing care, as set out in section 4-21, had not been met.

45. The fourth paragraph of section 36-10 of the Dispute Act (*tvisteloven*) of 17 June 2005 reads:

"At the oral appeal hearing in the High Court, the court shall sit with two lay judges, one of whom shall be an ordinary lay judge and the other an expert."

46. Sections 2 and 3 of the Human Rights Act (*menneskerettsloven*) of 21 May 1999 read:

Section 2

"The following Conventions shall have the force of Norwegian law in so far as they are binding for Norway:

1. The Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 of 11 May 1994 to the Convention, together with the following Protocols: ..."

Section 3

"The provisions of the Conventions and Protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

47. The applicant complained that the domestic authorities' decision to take B and C into care and not terminate their placement in care had infringed his right to respect for his family life as provided for in Article 8 of the Convention. The proceedings in respect of A were not brought before the Court. Article 8 reads as follows:

"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."

48. The Government contested that argument.

A. Admissibility

49. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

50. The applicant maintained that B and C had not become so attached to their foster home that this had hindered their return. In addition, their views, which had been rational, had not been valued, and the High Court had not considered the implications of separating them from A.

51. The child welfare service had not come up with any measures which could have helped the applicant and his wife, or their children. In addition, if the authorities had wanted to control the communication between the applicant's wife and the children, they should have ensured that a

Romanian-speaking person was present during the contact sessions, instead of prohibiting the family from speaking Romanian.

52. There were no indications that the child welfare service had contemplated a rapid transfer of any of the children, and the High Court had also assumed that their placement in care was expected to be permanent or long-lasting.

53. Under the Court's case-law, there was a need to strike a balance between the interests of the child and those of its parents. However, section 4-1 of the Child Welfare Act allowed no consideration of the interests of the parents, only the best interests of the child.

(b) The Government

54. The Government argued that the case had called for an "overall assessment", and that the question was whether a "fair balance" had been struck between the interests of the children taken into care and those of the parents. They stressed that the Court had declared that "the child's interest must come before all other considerations" (*Jovanovic v. Sweden*, no. 10592/12, § 76, 22 October 2015). Furthermore, the national authorities had operated within their "wide margin of appreciation" and were, by virtue of their proximity to the facts of the case, in general better placed to assess necessity. The Court's judgment in the case of *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019, had limited relevance to the instant case, in particular since that judgment had concerned adoption contrary to the biological parent's wishes and as there had not been procedural shortcomings similar to those identified in that case, in the domestic proceedings in the instant case.

55. The High Court had carried out a careful assessment when concluding that it had been in B's and C's best interests not to suspend the temporary care order at that time. It had relied on expert assessments and on other oral and written evidence, and had had regard to the children's statements. The proceedings in the instant case had not suffered from any shortcomings of the sort identified by the Grand Chamber in the case of *Strand Lobben and Others v. Norway* ([GC], no. 37283/13, §§ 220 and 225-26, 10 September 2019).

56. The domestic courts had been "specialised" courts within the meaning of the term used in *Paradiso and Campanelli v. Italy* ([GC], no. 25358/12, § 212, ECHR 2017 (extracts)), and they had considered the situation of B and C in minute detail.

57. No evidence had been submitted to the effect that it had not been in the best interests of B and C to remain in temporary care at that time.

2. The Court's assessment

(a) Interference with family life and legitimate aim

58. The Court observes that it is undisputed that the decision that B and C remain in care interfered with the applicant's right to respect for his family life under Article 8 of the Convention. The Court agrees that that was an interference which could only be justified under the second paragraph of that provision if it was adopted in accordance with the law, pursued a legitimate aim and was necessary in a democratic society. Moreover, the Court notes that it has not been argued that the impugned measures were not adopted in order to protect the "health or morals" and "rights" of B and C in line with the second paragraph of Article 8 of the Convention, and finds that this cannot be called into question.

(b) Lawfulness

59. The applicant has argued that the decision to keep B and C in care yet return A ran contrary to sections 4-1 and 4-21 of the Child Welfare Act, and sections 2 and 3 of the Human Rights Act (see paragraphs 43 and 46 above).

60. The Court does not find it necessary to carry out a separate examination of whether the measures ran contrary to sections 2 and 3 of the Human Rights Act, in so far as section 3 simply incorporated the Convention into domestic law. As to the provisions of the Child Welfare Act, the Court reiterates that the interpretation and application of domestic law is primarily for the national authorities (see, among many other authorities, *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 49, ECHR 2001-II). Against that background, the Court considers that the impugned decisions had a basis in national law as interpreted by the Supreme Court, including the at least partial application of section 4-21 of the Child Welfare Act in cases where the domestic courts reviewed placement orders after the children in question had already been placed in a foster home (see paragraph 44 above).

(c) Necessity

(i) General principles

61. 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], cited above, §§ 202-213, 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).

62. 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).

63. 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 of reuniting 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).

(ii) Application of those principles to the instant case

64. In the instant case, the Court finds that the procedures and the reasons advanced for the decision to keep B and C in foster care and grant the applicant the right to six contact sessions with them a year must be examined together, as it considers that the High Court's ultimate reasons for its decision were intrinsically linked to how the child welfare case had proceeded until then.

65. At the outset, the Court takes note that the High Court expressly found that the principal conditions for placement orders, pursuant to section 4-12 of the Child Welfare Act, had not been met for any of the children at the time of its judgment (see paragraphs 35 and 43 above). However, it found that, although the case did not concern revocation of a care order *sensu stricto*, domestic law provided that the provision setting out the conditions for revocation – section 4-21 – was relevant to the case (see paragraphs 31 and 44 above), which meant that B and C's attachment to their foster home became crucial to the High Court. The High Court concluded that moving them again at the time of its judgment would be harmful to them (see paragraph 39 above).

66. When it made the above decision, the High Court's bench was composed of three professional judges, one psychologist and one lay person. The High Court heard the case over two days, and the applicant was present with counsel, gave testimony and could present other evidence. Eleven witnesses were heard, including two experts, and the children were also heard. The High Court appointed an expert to examine the case, who delivered a written report and gave testimony during the hearing (see paragraphs 22 and 28 above). The Court is satisfied that the applicant was sufficiently involved in the decision-making process and fully able to present his case at that stage, and that the High Court carried out an in-depth examination of the situation at that time.

67. The Court is not convinced, however, that the same is true as regards the initial steps of the placement proceedings, for the reasons set out in the following. It notes that its examination is not directed against the emergency decision (see paragraph 7 above).

68. Firstly, the Court takes note of the High Court's consideration that when B and C had first been taken into care, their individual cases had not been the focus of the child welfare authorities dealing with the family. It stated that it had "mainly" been A's circumstances that had formed the basis for the authorities' concerns about the whole family and that the placement orders for B and C appeared to be "more an effect or a consequence of" the circumstances and assessments concerning A, "without there being considerably more specific information about" them (see paragraph 36 above).

69. Secondly, the High Court found that assistance measures had not been attempted (see paragraph 36 above). Indeed, it would appear that the applicant and his wife distrusted the assisting services (see the Board's decision, paragraph 15 above), which could have complicated the implementation of assistance measures. However, this did not constitute a hindrance to the High Court in finding that adequate assistance measures could be sufficiently implemented in order for A to be returned (see paragraph 37 above).

70. In addition, the Court notes that in their dealings with the family overall, the child welfare service had at least in part proceeded on the grounds that A did not suffer from EDS and his mother did suffer from Munchausen's syndrome by proxy (see paragraph 36 above).

71. The factors outlined above suggest that there were initial insufficiencies in the domestic care procedures, calling into question whether there was a proper justification for taking B and C into care in the first place. This conclusion is compounded by the fact that the High Court also found that the principal conditions for placing B and C in care – those provided by section 4-12 of the Child Welfare Act (see paragraph 43 above) – had not been met at the time when it gave its decision (see paragraph 35 above). That is so even though the Court is aware that, to some degree, the circumstances changed in the meantime; for example, A's illness was further clarified (see paragraph 33 above).

72. Furthermore, the High Court procedure did not rectify the initial shortcomings reiterated above. Following the initial placement order, B and C had first been placed in an emergency foster home and then moved to the foster home, where they had remained for "nearly a year", as stated by the High Court in its judgment of 2 July 2015 (see paragraph 38 above). In fact, C had moved to the foster home shortly after the District Court's judgment, while B had gone there in September 2014 (see paragraph 29 above). B's and C's settling into their foster home and not being subjected to another *de facto* change in their family situation was relevant to their best interests at the time of the High Court's judgment. However, these facts became relevant in the case as a result of care orders which, according to the High Court, had not necessarily been adequately justified in the first place, and B and C being moved to a foster home after the District Court's judgment.

73. The Court adds that the decisions of the Board and the District Court on the parents' right to have contact four times a year for one and a half hours each time (see paragraphs 10 and 18 above) did not aim to facilitate the children's return to their parents. Moreover, the decision that the family could not speak Romanian together during the contact sessions (see the information concerning the Board's decision, paragraph 16 above) would appear to have made these few sessions less likely to facilitate the children's return.

74. The Court notes in particular that the Board stated that the placement was expected to be prolonged (ibid.) and that also the High Court seems to have proceeded on these grounds (see paragraph 39 above). It is the Court's assessment that long-term foster care appears to have been assumed from rather early on in the case, whereas a conclusion that the placement must be considered to be long-term, since all subsequent measures, including the visiting regime, will flow as corollaries to this, should only be drawn after careful consideration and also taking account of the authorities' positive duty to take measures to facilitate family reunification (see, *mutatis*

mutandis, *Strand Lobben and Others*, cited above, §§ 208-209). Moreover, while, to a large extent, the High Court found that the care orders could not be overturned because of B's and C's attachment to the foster home – even though the care orders might not have been justified initially – it made a decision essentially designed to strengthen that attachment.

75. As to the procedures leading up to the High Court's judgment, the Court bears in mind that the child welfare authorities and domestic courts were faced with difficult factual assessments, including in the initial phases of the case, and does not call into question that they sought to achieve what they considered would be a balanced and reasonable decision in the light of B's and C's best interests, both when the children were first taken into care and when the District Court upheld the care orders. The Court is also wary of judging these aspects of the case with the benefit of hindsight, as the Court must primarily base its decision on the facts of the case as they were subsequently established by the High Court.

76. Nonetheless, in the light of the information that emerges from the High Court's judgment, the Court finds that the domestic authorities have not demonstrated that they made sufficiently serious and sustained efforts to keep B, C and the applicant together, when taking into account: how the High Court found that B's and C's cases had been overshadowed by the case concerning A (see paragraph 68 above); how the High Court essentially found that there was no adequate evidence of the authorities having sufficiently attempted to implement assistance measures before deciding to separate B and C from the applicant (see paragraph 69 above); and how the decisions on contact, when the permanent care order had been issued, were not designed so as to facilitate B's and C's return to their family (see paragraphs 73-74 above).

77. In the light of the circumstances of the case as a whole, the Court is of the view that the cumulative effect of the above features of the domestic authorities' dealing with the case must lead it to conclude that the authorities have not shown that they fulfilled their obligations under Article 8 of the Convention; the domestic authorities' overall interference with the applicant's right to respect for his family life with B and C did not remain within what was "necessary in a democratic society" under the second paragraph of Article 8 of the Convention.

78. Accordingly, there has been a violation of the applicant's right to respect for his family life as enshrined in the first paragraph of Article 8.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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

80. The applicant claimed 60,000 euros (EUR) in respect of non-pecuniary damage.

81. The Government did not contest that, in the event of the Court finding a violation of the applicant's right to respect for his family life under Article 8 of the Convention, the applicant had suffered non-pecuniary damage that would warrant the granting of just satisfaction. They argued, however, that the award should be set at a level below that in the case of *Strand Lobben and Others*, cited above, since the instant case concerned a temporary care order, whereas that judgment had concerned an adoption.

82. The Court considers that the applicant must have sustained non-pecuniary damage through distress, in view of the violation found above. Concurrently, it notes that it is uncertain what the situation concerning the applicant's family life with the B and C would have been had the domestic case progressed in a different manner and that the applicant had remained in contact with B and C. In the light of those considerations, the Court awards the applicant EUR 25,000 in respect of non-pecuniary damage.

B. Default interest

83. 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*

(a) that the respondent State is to pay the applicant, 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:

EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

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

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