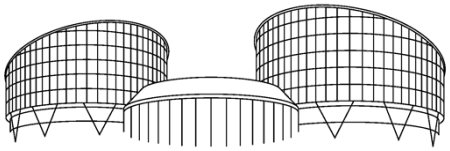

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF E.H. v. NORWAY

(Application no. 39717/19)

JUDGMENT

STRASBOURG

25 November 2021

This judgment is final but it may be subject to editorial revision.

In the case of E.H. v. Norway,

The European Court of Human Rights (Fifth Section), sitting as a Committee composed of:

Ganna Yudkivska, *President,*
Arnfinn Bårdsen,
Mattias Guyomar, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 39717/19) 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 Norwegian national, Mr E.H. ("the applicant"), on 10 July 2019;

the decision to give notice to the Norwegian Government ("the Government") of the application;

the decision not to have the applicant's name disclosed;

the parties' observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the Government's not having objected to the examination of the application by a Committee;

Having deliberated in private on 21 October 2021,

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

INTRODUCTION

1. The application concerns a complaint under Article 8 of the Convention relating to replacement of foster care with adoption in respect of the applicant's son, X.

THE FACTS

2. The applicant was born in 1994 and lives in Norway. Before the Court, he was represented by Mr A. Nylund, a lawyer practising in Bergen.

3. 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 G. Ø. Tengs, associate attorney at the same office.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND

5. The applicant is the father of X, a boy born in June 2015. B, a former partner of the applicant, is X's mother. The applicant and B were no longer in a relationship when X was born.

6. Upon a notification of concern from a midwife during B's pregnancy, about both parents' caregiving abilities, B consented to assistance measures both before and after the birth of X, including going to a parent-child centre. After the birth a social worker at the clinic where X was born also expressed serious concern about the child's care situation. In conversations between the child welfare services and B, B withdrew her consent to the planned stay at the parent-child centre, but consented to stay at the clinic for a few more days.

7. On 15 June 2015 an emergency placement decision was made and X was placed in an emergency foster home. B was given the right to meet X three times each week. The County Social Welfare Board (*fylkesnemnda for barnevern og sosiale saker)* authorised the decision on the following day.

8. B contested the emergency care order through proceedings to which the applicant was not party. On 26 June 2015, after having held a meeting, the Board upheld it. The Board found that B had extraordinary needs, requiring more or less continuous assistance. B was considered to lack understanding of issues concerning the child's safety, *inter alia* related to feeding and the physical handling of the child. The Board found that assistance in the home would not compensate for B's deficiencies, as the child's safety would not be sufficiently safeguarded during the remainder of the time when such assistants could not be present. The Board emphasised, however, that the decision was taken at an early stage and that B could improve her parenting capabilities in the future.

9. On 21 July 2015 the child welfare services submitted a request to the Board for a care order. During the time leading up to the Board's meeting about the case, the applicant had a total of five visits with X, under supervision. The applicant was party to those proceedings.

10. On 21 October 2015 the Board issued a care order in respect of X. In its decision, the Board emphasised that B was diagnosed with a mild mental retardation and an expressive language disorder. Further, she was considered as having a generally low level of functioning and a lack of ability to self-reflect, and as being unable to meet the child's care needs. The Board further found that B lacked fundamental caregiving abilities, and that the boy would be at risk of experiencing serious neglect if he stayed with her. The Board also found that assistance measures would not adequately remedy the risk of neglect.

11. With regard to contact rights, the Board found that X needed time to bond with his foster parents, and that the foster placement would likely be long-term. The purpose of contact would therefore be for X to maintain his knowledge of where he came from, and his knowledge about his biological parents. The Board further found that both parents had challenges in meeting the child's needs during contact sessions, and were in need of guidance in connection with those sessions. The applicant and B were

therefore granted the right to have contact with X – under the supervision of the child welfare services – for two hours, four times a year.

12. On 3 November 2015 B brought the Board's decision before the City Court (*tingrett*). The applicant supported the care order, but applied for more extensive contact rights.

13. On 22 December 2015 the City Court appointed a psychologist as an expert to assess B's caregiving abilities, the child's care needs, as well as both parents' capacity to carry out contact sessions with the child. In her report of 22 March 2016 the expert found that X had extraordinary care needs. He suffered from epilepsy, severe atopic eczema and had significant far-sightedness in both eyes. He was in need of regular visits to several health specialists, and would require caregivers equipped to meet his needs. The expert further found that B was incapable of meeting X's special needs, in addition to being unable to meet the child's ordinary needs. According to the report, B was immature, had weak cognitive skills and self-insight, deficiencies in the ability to reflect and mentalise, a passive attitude, and low stamina. She was considered to have a limited understanding for what it meant to have a child, and it would be very challenging for her to act as a caregiver. In conclusion, X was considered to be at risk of emotional and physical neglect if he stayed with B, and assistance measures were considered inadequate to compensate for B's caregiving deficiencies.

14. The report also assessed the applicant's abilities in relation to contact sessions. He was found to have clear limitations in cognitive skills, as well as in the ability to reflect and "mentalise". The applicant however recognised these limitations and was supportive of a public care order. He was further described as having a weak ability to interact with X, including a low tolerance for stress and frustration, causing him to become loud and hot-tempered towards X. The applicant was nevertheless described as having a positive attitude towards the child, and more able than B to receive and utilise help and guidance during contact sessions, and he was considered to have potential for improvement. The expert assessment concluded that it would be in X's best interests to remain in the foster home, but have knowledge of his natural parents, and that contact rights should be limited to three two-hour sessions with X for each biological parent yearly, under supervision.

15. On 7 April 2016 B withdrew her case before the City Court, and the decision from the County Social Welfare Board of 22 October 2015 (see paragraphs 10-11 above) accordingly became final.

II. PROCEEDINGS REGARDING REMOVAL OF PARENTAL RESPONSIBILITIES AND ADOPTION IN RESPECT OF X

16. On 15 November 2017 the child welfare services lodged an application with the County Social Welfare Board for a decision to

withdraw the applicant's and B's parental responsibilities in respect of X and authorise X's adoption by his foster parents. X was at the time two and a half years old, and had lived with his foster parents since three weeks after the initial emergency care order had been implemented shortly after his birth (see paragraph 7 above). The applicant and B opposed the application.

17. The Board, composed of one jurist qualified to act as a professional judge, one psychologist and one lay person, conducted a meeting on 3 and 5 January 2018. The applicant and B were both present together with their legal-aid counsel and gave evidence.

18. On 11 January 2018 the Board decided to withdraw the applicant's and B's parental responsibilities in respect of X and to authorise that X be adopted by his foster parents. The Board found, on the basis of the attachment which X had formed with his foster parents and the biological parents' lack of caring skills and their cognitive disabilities, that a reunion of X and his biological parents was unrealistic both in a short and a long-term perspective. The applicant and B agreed with the Board on that point. Furthermore, the Board considered that such a reunion would highly likely cause serious problems for X, an assessment with which the applicant and B also agreed. Against this background, the Board found that X would grow up in the foster home, and also that the foster parents were proven fit to raise X as their own child.

19. The main issue before the Board was therefore whether adoption would be in X's best interests. In examining that issue, it found that X's lack of attachment to his natural parents, his close attachment to his foster home, his vulnerabilities and need for a stable environment, and the contact sessions' having been challenging for him, made his interests in adoption considerable. Moreover, the Board found that future contact with his natural parents could lead to insecurity for X, and also promote further judicial procedures regarding contact rights. X was regarded as having special care needs and a particular need for a stable environment, and the Board considered that adoption would eliminate the risk that X would live in uncertainty and insecurity. Weighed against the interests that the Board deemed the applicant and B to hold, notably in the light of contact sessions having been difficult for X, the Board found that the biological parents' interests had to yield.

20. The applicant and B brought the Board's decision before the City Court for review. In that connection they argued that the City Court should appoint an expert to assess whether adoption would be in X's best interests, but did not lodge a formal request to that effect. The City Court did not deem it necessary to appoint an expert in order for it to have a sound basis for its decision (see also paragraph 24 below.)

21. The City Court, whose bench comprised one professional judge, one psychologist and one lay person, held a hearing on 25 and 26 June 2018. The applicant and B were present together with their legal-aid counsel. The

applicant gave evidence, while B was, at her own request, allowed to refrain from making an oral statement. Seven witnesses and numerous pieces of documentary evidence were also presented to the court.

22. In its judgment of 5 July 2018 the City Court upheld the Board's decision. In its reasoning it first noted that the parties agreed that the applicant and B would be permanently unable to provide their son with appropriate care, and that the adoptive parents were proven fit to raise the child as their own.

23. The City Court went on to assess the best interests of the child. In that context it noted that although adoption against the will of the parents was a far-reaching measure, it was very important for a child to grow up under conditions characterised as little as possible by uncertainty regarding the future. It further pointed to research showing that adoption for some children could provide a safer and more predictable upbringing than long-term fostering. Although general research alone could not justify adoption, the City Court noted that such research could be a crucial part of the assessment of the child's best interests.

24. In the concrete assessment, the City Court found that X, were he not adopted, would remain in the foster home for the rest of his childhood, that he had a close connection to the foster home, and that it could cause serious problems for him to be relocated. As to whether alternative solutions to adoption existed, the City Court stated that it would base its decision on general research and knowledge rather than an expert assessment, as such an assessment would not shed more light on what was best for X or how his health challenges and development would be in the future (see, also, paragraph 20 above). It found that X was an exceptionally vulnerable child, requiring special care and a stable care situation, and there was still uncertainty regarding his development, even if he had showed a development better than expected, as was reflected, *inter alia*, in a report from the child welfare services' superviser. Moreover, the City Court pointed out that X had a close connection to his foster parents and that he had no attachment to his biological parents. Furthermore, it emphasised the importance for X's development to experience a safe and positive relationship with his "psychological parents" (the foster parents), and adoption would in the City Court's view give him the safety he needed in the years to come.

25. Moreover, although the applicant had accepted that he would not be able to care for X in the future, the City Court found that there was a risk that there would be future proceedings instituted by the natural parents seeking extended contact rights unless adoption were at that time authorised. While the biological principle should be given considerable weight, the attachment between the applicant and his son was nevertheless very limited, according to the City Court. As the foster parents had not consented to post-adoption contact visits (under an "open adoption"

arrangement), that issue could not be decided. The City Court presumed, however, that the foster parents would facilitate contact between the applicant and X, should X at a later point in time so wish.

26. One of the judges in the City Court, a lay person, dissented. He stated, among other things, that he felt that the application for adoption had been based on general research and that this was insufficient to justify adoption. Furthermore, he stated that if adoption was authorised in the case before the City Court, applying the majority's reasoning would have adoption as the end result in all cases where children had been placed at an early age without having established affiliation with his or her biological parents. In the dissenting judge's view, such a drastic measure could never have been the intention of the legislator. After having also examined the individual circumstances of the case, he concluded in summary that it was not sufficiently certain that the benefits of adoption were so strong that the need to maintain the biological ties between X and his parents had to cease.

27. On 22 November 2018 the High Court (*lagmannsrett*), in a reasoned decision, refused the applicant and B leave to appeal against the City Court's judgment, finding in particular that the case did not raise issues of principal importance that would be resolved by further consideration of the case, that there were no significant weaknesses in the City Court's case processing, and that the City Court's application of the law, including its balancing of the best interests of the child, had been correct.

28. On 28 January 2019 the Supreme Court (*Høyesterett*) dismissed the applicant's and B's appeals against the High Court's decision.

RELEVANT LEGAL FRAMEWORK

29. Under section 4-12 of the 1992 Child Welfare Act (*barnevernloven*) a child may be taken into public care if there are serious deficiencies in the daily care of the child or in relation to the personal contact and security needed by the child according to his or her age and development. According to section 4-21 the parties may request the County Social Welfare Board to discontinue the public care as long as at least twelve months have passed since the Board or the courts last considered the matter. Contact rights between a child in public care and his or her parents are regulated in section 4-19, according to which the extent of contact rights is decided by the Board. By virtue of the same provision, the private parties can demand that contact rights also be reconsidered by the Board, as long as at least twelve months have passed. Under section 4-20 the Board may withdraw parental responsibilities and consent to adoption if 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 where he or she is living that removing the child may lead to serious problems for him or her.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

30. The applicant complained that the removal of his parental responsibilities in respect of X and the authorisation of X's adoption had violated his right to respect for his family life as provided in Article 8 of the Convention, which 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."

A. Admissibility

31. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

32. The applicant accepted that his son, X, would grow up in foster care, but argued that adoption was not in the child's best interests. Furthermore, the applicant argued that the adoption decision should not have been made without an updated expert assessment. He maintained that the domestic courts had relied on "general research" rather than an individual assessment of the circumstances in his case.

33. The Government argued that the decision to remove the applicant's parental responsibilities in respect of X and to authorise X's adoption by his foster parents had to be regarded as "necessary" in a democratic society within the meaning of Article 8 of the Convention. They emphasised that the applicant had not requested that X be returned to him, nor any increase in his contact rights with X, and that he had agreed to continued foster care for X. Furthermore, the Government emphasised that the applicant had agreed that all conditions for authorising adoption were present, except the assessment of whether adoption would be in X's best interests, and that the domestic courts had had a sufficient basis to conclude that this condition was fulfilled.

2. The Court's assessment

34. The Court notes that 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 extensively set out in the case of *Strand Lobben and Others v. Norway* ([GC], no. 37283/13, §§ 202-13, 10 September 2019), to which reference is made. The principles have since been reiterated and applied in, *inter alia*, the cases of *K.O. and V.M. v. Norway* (no. 64808/16, §§ 59-60, 19 November 2019); *A.S. v. Norway* (no. 60371/15, §§ 59-61, 17 December 2019); *Pedersen and Others v. Norway* (no. 39710/15, § 60-62, 10 March 2020); *Hernehult v. Norway* (no. 14652/16, § 61-63, 10 March 2020); and *M.L. v. Norway* (no. 64639/16, §§ 77-81, 22 December 2020).

35. Turning to the facts of the instant case, the Court notes that the applicant did not request that the care order be lifted in the course of the proceedings complained of, which dealt solely with the question of authorisation of adoption and withdrawal of parental responsibilities for that purpose. The Court considers that it cannot be called into question that those proceedings and the said measures adopted therein entailed an interference with the applicant's right to respect for his family life as guaranteed by Article 8 of the Convention; that the measures were in accordance with the 1992 Child Welfare Act (see paragraph 29 above); and that they pursued the legitimate aims of protecting X's "health and morals" and his "rights". Accordingly, the question is whether they were also "necessary in a democratic society" within the meaning of the second paragraph of Article 8.

36. In that context the Court notes that the proceedings complained of included extensive meetings before both the County Social Welfare Board and the City Court (see paragraphs 17 and 21 above). As to the reasons provided by the City Court in what became the final judgment on the merits, the Court notes that that court advanced a number of reasons to justify that an adoption would be in X's best interests. It emphasised in particular that the applicant and B had accepted that they would be unable to regain the care for X, that X had a very limited bond with the applicant and B and a strong connection to the adoptive parents, the attachment to whom it would cause X serious problems if severed. Moreover, the City Court relied on an assessment of X's caring needs, the situation in the foster home and what implications an adoption would otherwise have for him (see paragraphs 22-25 above).

37. The Court observes that the City Court largely focused on the general benefits of the permanency for X that an adoption would ensure him, compared to long-term fostering. At the same time it appears to the Court that at the time of the impugned proceedings the applicant's interest in avoiding adoption primarily stemmed from the final and definite nature of the measure, given that he accepted that X should remain in public care.

Since the foster parents did not wish a so-called "open adoption", an arrangement which included post-adoption contact visits (see paragraph 25 above), adoption would have as a consequence the loss for the applicant of any opportunity for future contact with his child.

38. On the topic of contact the Court observes, firstly, that there had in fact been very little contact between X and the applicant in the past. An emergency placement decision had been made in respect of X shortly after his birth and the applicant was not party to those proceedings (see paragraphs 7-8 above). In the following proceedings concerning the care order, the Board granted the applicant contact rights at only two hours, four times per year, under supervision, due to its considering that the care order would be long-term (see paragraph 11 above). In the Court's view, the sparse contact that had taken place between the first applicant and his son since he had been placed in public care, also entailed that there, at the time when adoption was decided, was limited experience from which any clear conclusions could be drawn in respect of the question of possible contact in the future (see, *mutatis mutandis*, *Strand Lobben and Others*, cited above, § 221). Moreover, as concerns the emphasis placed by the City Court on the lack of bonds between the applicant and X it cannot, in the Court's view, be overlooked that the applicant and X had not been given any real opportunity to develop any bonds (see, similarly, for example, *M.L. v. Norway*, cited above, § 91).

39. The Court also takes note that while the City Court took a number of factors into account in its assessment (see paragraphs 22-25 above), it had found it unnecessary to commission an updated expert report in the course of the adoption proceedings (see paragraphs 20 and 24 above). The only expert report concerning contact sessions dated from 2016, at a time when X was less than a year old, and it neither concluded that contact sessions with the applicant were harmful to X, nor that the applicant would be unable to improve his skills in relation to contact sessions in the future (see paragraphs 13-14 above). At the time of the impugned proceedings, X was three years old and had showed improvement in his development compared to the initial concerns (see paragraph 24 above). Also for that reason there would appear to be limitations with regard to the domestic authorities' concrete factual basis for drawing conclusions in respect of future contact between the applicant and X.

40. In connection with the City Court's assessment to the effect that it was unnecessary to commission an updated expert report, the Court observes that this was linked to its considerations concerning the importance of general research, which spoke in favour of adoption (see paragraphs 20, 23 and 24 above). However, the Court cannot but note that proceeding on the basis that adoption against the parents' wishes is generally in the child's best interests where the alternative would be long-term fostering to the degree that individual assessments of the child's

and the parents' situation become only secondary, as appears to have been the case in the proceedings complained of, is an approach that would at the outset seem prone to create tension with the proportionality requirement in the second paragraph of Article 8 of the Convention. That is so, as it would appear to systematically favour adoption, whereas adoption – being a measure that severs all family ties – according to the Court's case-law should rather be a measure resorted to only exceptionally (see, among many other authorities, *Strand Lobben and Others*, cited above, §§ 207 and 209), which necessarily implies that an individualised assessment is required. The Court observes that the dissenting opinion of the minority in the City Court was largely grounded in disagreement with the majority on that point (see paragraph 26 above).

41. In the light of the foregoing observations the Court is not convinced that the decision-making process leading to the impugned decision of 5 July 2018 was conducted so as to ensure that all views and interests of the applicant were duly taken into account. It is thus not satisfied that the said procedure was accompanied by safeguards that were commensurate with the gravity of the interference and the seriousness of the interests at stake.

42. The Court adds that it has reservations regarding the emphasis placed by the City Court on the need to pre-empt the applicant from resorting in future to legal remedies by which to have the contact rights schedule revised or file for X's return (see paragraph 25 above), particularly given the restrictions on contact that had been imposed until then. Although there might indeed be instances when repeated legal proceedings, owing to the particular circumstances of a case, may harm the child concerned and therefore be taken into account, a biological parent's exercise of judicial remedies cannot automatically count as a factor in favour of adoption (see *Strand Lobben and Others*, cited above, §§ 212 and 223). The Court notes in this regard that biological parents' procedural rights, including their right to have access to proceedings in order to have a care order lifted or restrictions on contact with their child relaxed, form an integral part of their right to respect for their family life afforded by Article 8 of the Convention.

43. In the circumstances of the instant case, 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

44. 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

45. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage.

46. The Government stated in response that the applicant's claim was in line with the Court's recent case-law.

47. The Court considers that the applicant must have suffered non-pecuniary damage in the form of distress, in view of the violation found above. It awards him EUR 25,000 in respect of that damage.

B. Costs and expenses

48. The applicant also claimed EUR 30,000 for the costs and expenses incurred before the Court.

49. The Government asked the Court to consider not to award the applicant compensation for costs and expenses as that the claim was neither documented nor detailed.

50. In accordance with Rule 60 §§ 2 and 3 of the Rules of Court, the Court rejects the claim for costs and expenses because the applicant did not submit itemised particulars of all claims, together with any relevant supporting documents.

C. Default interest

51. 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, EUR 25,000, plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Ganna Yudkivska President