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An analysis of recent ECtHR decisions against Norway.

To what extent does the Norwegian Child Welfare Act of 2021 take into account criticisms of the ECtHR?

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1 Introduction

1.1 Topic, scope and contribution

On June 14th, 2021, the Norwegian parliament adopted a new Child Welfare Act.[1] The act that it replaces is almost 30 years old, from 1992[2] – and it needed to be updated, so as to be able to deal with the contemporary societal – and therefore legal – situation.[3] During the period that the Ministry of Children and Families worked on preparing the new Child Welfare Act, the European Court of Human Rights (simply "ECtHR" hereafter) found that Norwegian authorities had, in a number of cases concerning child welfare practice, violated the right to respect for family life under Article 8 of the European Convention on Human Rights[4] (simply "ECHR" hereafter). In the preparatory works, the Ministry states explicitly that it does not take the ECtHR's decisions to be in substantial conflict with the provisions in the old Child Welfare Act, but that it does find it necessary to make some adjustments in practice.[5] In the new Child Welfare Act, as well as in its preparatory works, the Ministry does, however, provide several clarifications of such a nature that questions are raised: to what extent does the Norwegian Child Welfare Act of 2021 take into account criticisms of the ECtHR? Is the ECtHR criticism still applicable, despite the legislative changes that was made in the 2021 Act (compared to the 1992 Act)?

Since 2015, the ECtHR has communicated 43 child welfare cases against Norway. The ECtHR has so far found that the Norwegian authorities violated the right to respect for family life under Article 8 of the ECHR in 13 of those cases.[6] The ECtHR's criticism has mainly been directed at the Norwegian Child Welfare Service and Norwegian Courts' justifications for intervention on the one hand, and on the other, Norwegian authorities' failure to sufficiently endeavour for reunification of parents and child. Central to the ECtHR's criticisms was a consideration of contact rights: at an early stage, domestic authorities assumed that several care orders would be long-term, which in turn affected the determination of contact rights – in the sense that they were set low. Thus, the main aim of the contact rights was not actually reunifi-

[1] Lovvedtak nr. 173 (2020-2021). The new Child Welfare Act fully enter into force 1st of January 2023.

[2] Lov 17. juli 1992 nr. 100 om barneverntjenester (barnevernloven).

[3] Prop. 133 L (2020-2021), p. 15.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950.

[5] Prop. 133 L (2020-2021), p. 15.

[6] Per 31st of December 2021.

cation of the child with its parent, which indeed should have been the aim. In these cases, it was rather to secure the child knowledge of its biological origin.

The contribution of this thesis is twofold. Firstly, I analyse the legal and practical implications that the cases *Strand Lobben and Others v. Norway* (simply "*Strand Lobben v. Norway*" hereafter), *K.O. and V.M. v. Norway* and *A.S. v. Norway* have for Norwegian child welfare practice, and specifically contact rights. Secondly, I evaluate whether the implications of these ECtHR decisions are reflected in a relevant set of provisions in the new Child Welfare Act. Concretely, I take a closer look at § 7-2, which regulates decisions on contact rights, § 14-11 (2) e), which regulates the use of expert assessments, and § 7-4, which regulates petition for a new assessment by the County Social Welfare Board – and consider whether these provisions take into account criticisms of the ECtHR.

1.2 Method and legal sources

1.2.1 Legal sources

ECHR Article 8 protects the right to respect for family life and is the core legal source of this thesis. The ECHR has been adopted as Norwegian domestic legislation through the Human Rights Act[7] § 2. In the event of conflict between legal sources, the ECHR take precedence over other legislation, ref. the Human Rights Act § 3.

Since practice from the ECtHR is key for understanding the ECHR correctly, such practice will also be key for my interpretation of Article 8. I have chosen to analyse three out of the thirteen decisions where ECtHR has found that Norwegian authorities violated the right to respect for family life under Article 8. In *Strand Lobben v. Norway*, the ECtHR makes a thorough examination of the general principles that apply in child welfare cases. Since the decision is the first in many such child welfare cases against Norwegian authorities communicated to the ECtHR in recent years, it gives precedence to the other child welfare cases that the ECtHR considers – indeed, these cases all refer to the general principles of *Strand Lobben v. Norway*. Moving on, the decision that probably will affect Norwegian child welfare practice the most, is *K.O. and V.M v. Norway*. That is because the County Social Welfare Board regularly makes decisions concerning contact rights, and, furthermore, the extent of the right to

[7] Lov 21. mai 1999 nr. 30 om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven).

contact visits is often comparable to that which was granted in *K.O. and V.M v. Norway*. The case is, in that sense, an illustrative example of Norwegian child welfare practice *simpliciter*. Finally, in *A.S. v. Norway* the determination of contact rights is a central concern, which is also the main focus in this thesis and makes it relevant to look further into that decision.[8] *A.S. v. Norway* also makes statements about the need to anchor decisions in an updated factual basis, for instance by appointment of fresh expert assessments, which in turn may have implications for Norwegian child welfare practice and legislation.

The Convention on the Rights of the Child[9] (simply "UNCRC" hereafter) may also be relevant for the interpretation of ECHR Article 8. Even though the ECtHR is not bound by the UNCRC, it has taken the UNCRC into consideration in many cases, and especially the principle of "the best interest of the child", which follows from UNCRC art. 3 nr. 1.[10] Just as the ECHR, the UNCRC has been adopted as Norwegian domestic legislation through the Human Rights Act § 2. When it comes to the UNCRC, however, Norway has not endorsed mechanisms for reviewing alleged breaches of the Convention. Relevant child welfare cases are, therefore, reviewed within the legal regime of the ECHR – which is an important reason why this thesis focuses on practice from the ECtHR.

The Norwegian Child Welfare Act of 2021 is a central legal source, as the aim of this thesis is to consider the extent to which that act takes into account criticisms of the ECtHR. For the interpretation of the act, decisions from the Norwegian Supreme Court, the preparatory works and legal theory will be relevant legal sources. In Norwegian theory of sources of law, preparatory works of an act is important because it contributes to the interpretation and understanding of the legal text.[11] Further, practice from the Norwegian Supreme Court has significant weight because it set a precedent for later cases as well as the interpretation of a given act.[12]

[8] For the sake of the length of this thesis, other recent cases – such as Abdi Ibrahim v. Norway and M.F. v. Norway – will not be considered in this thesis.

[9] Convention on the Rights of the Child, New York 20 November 1989.

[10] See for instance Neulinger and Shuruk v. Switzerland, paragraph 73, and Sahin v. Germany, paragraph 39.

[11] Andenæs (2009), p. 42-44.

[12] Ibid., p. 82-83; 92-93.

1.2.2 Interpreting the ECHR

Upon interpreting the ECHR, one must apply a number of principles. These principles follow from the Vienna Convention on the Law of Treaties[13] (simply "VCLT" hereafter) and have also been specified and outlined by the ECtHR itself in several cases.

The VCLT Article 31-33 regulate the interpretation of international law and treaties. Norway has not ratified the VCLT, but Articles 31-33 are considered to be international customary law for interpretation of law and treaties, and the ECtHR itself is guided by those rules of interpretation.[14] The VCLT Article 31 (1) contains the main rule, which states that a treaty shall be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Thus, my starting point for interpreting the ECHR is a natural or intuitive or ordinary understanding of the treaty text's wording. However, because treaty texts, such as the ECHR, may be old, scarce and vague, a tension has emerged in the interpretation of the ECHR – and that tension emerges from the relationship between the text of the convention and changing social conditions.

In *Tyrer v. The United Kingdom*, the ECtHR stated that the ECHR is "a living instrument which […] must be interpreted in the light of present-day conditions."[15] This implies that one ought to interpret the ECHR dynamically: the rights within the framework of the convention may change in content.

The VCLT Article 31 (1) also includes an object and a purpose which ought to guide the clarification of the treaty text. For instance, in *Wemhoff v. Germany*, the ECtHR stated that it is "necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties."[16]

Furthermore, in *Saadi v. The United Kingdom* the ECtHR points to additional principles of interpretation. These are, firstly, "the effective protection of individual human rights", and

[13] The Vienna Convention on the Law of Treaties, Vienna 23 May 1969.

[14] Golder v. The United Kingdom, paragraph 29, and Demir and Baykara v. Turkey, paragraph 65.

[15] Tyrer v. The United Kingdom, paragraph 31.

[16] Wemhoff v. Germany, paragraph 8.

secondly, the promotion of "internal consistency and harmony" between the ECHR's different provisions.[17] That the rights must be *effective* means that they must be practical and not merely theoretical. The ECtHR even states that it is of "crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement."[18] The notion of *consistency* and *harmony*, of course, is central to both legal theocratization and practice: it is paramount to strive for consistency and harmony within the legal system, both in terms of wording and meaning, both within individual rules themselves, and in the relationship between these rules and the whole.

As stated above, the practice of the ECtHR is also important when interpreting the ECHR. Decisions made by the ECtHR are binding, ref. Article 46: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." How much weight that should be given to a ECtHR decision depends, however, on several factors in addition to age, such as: whether the decision is unanimous, whether it was delivered by the Grand Chamber or the Chamber, whether it is confirmed in subsequent judgements, and whether it is respected in the contradicting states.[19] The ECtHR is not *formally* bound to follow any of its previous judgments, but it is, as the ECtHR stated in *Stafford v. The United Kingdom* "in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases."[20] Having said that, the ECtHR also states that it must "have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved."[21]

Further, VCLT Article 32 states that as supplementary means of interpretation, the preparatory work can be consulted, as well as the circumstances under which the conclusions of the treaty were drawn. The preparatory work of the ECHR is, however, often characterized by

[17] Saadi v. The United Kingdom, paragraph 62.
[18] Ibid, paragraph 68.
[19] Aall (2011), p. 42.
[20] Stafford v. The United Kingdom, paragraph 68.
[21] Ibid, paragraph 68.

conflicting statements and should for that reason only exceptionally be given weight. As-Article 32 defines preparatory works as supplementary, it is more natural to use them to "*confirm* the meaning resulting from the application of article 31" (my emphasis), ref. Article 32 – that is, rather than to *derive* such meaning.

1.3 Outline

I begin by presenting the general principles which apply in child welfare cases (chapter 2). Then I analyse *Strand Lobben v. Norway*, *K.O. and V.M. v. Norway* and *A.S. v. Norway* (chapter 3), before considering the legal and practical consequences of those decisions for Norwegian Child Welfare (chapter 4). Having done that, I evaluate to what extent the Norwegian Child Welfare Act of 2021 takes into account criticisms of the ECtHR (chapter 5). Finally, I come with recommendations for aligning the act and practice more properly with the ECHR and the criticisms of the ECtHR (chapter 6).

2 General principles in child welfare cases

2.1 The European Convention on Human Rights

2.1.1 Right to respect for family life

It follows from Article 8 (1) that everyone has "the right to respect for his private and family life." The relationship between a parent and child normally constitutes a "family life" under Article 8. The same applies to a relationship that arise from a "lawful and genuine" adoption.[22] Whether other relationships constitute a family life depends on a specific assessment. ECtHR has stated that "the existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties."[23] Questions about whether there actually exists a *family life* between the parent and child have not been disputed in the cases I have analysed from the ECtHR, and I will, therefore, not go further into that issue.

Article 8 protects individuals from arbitrary interference from public authorities. Such protection is sometimes described as the state's "negative obligation" because it provides the individual the freedom *from* being arbitrarily interfered with, which – in child welfare cases – means that the state must, *ceteris paribus*, refrain from interfering in the family life of parent and child. But the state does not merely have a negative obligation, it also has a positive obligation. And the positive obligation is to secure that individual's rights and freedoms are protected. This follows from Article 1 which declares that the state shall "secure to everyone within their jurisdiction the rights and freedoms" as defined in section I of the ECHR.

In child welfare cases, however, there is a tension herein. On the one hand, the state has an obligation to secure the child and parents the right to respect for their family life. That obligation may be to not interfere with their family life, which, for instance, can be to not take the child into public care (negative obligation), or to take measures to protect their family life, which, for instance, can be to provide contact rights when a child is under public care (positive obligation). On the other hand, the state has a positive obligation to intervene when that is the right thing to do, so as to secure the child's right to private life. The positive obligation in

[22] Pini and others v. Romania, paragraph 148.

[23] K. and T. v. Finland, paragraph 150.

regard to child welfare cases also has another side, which is "the positive duty to take measures to facilitate family reunification as soon as reasonably feasible."[24]

The right to respect for private and family life is, however, not an absolute right. According to Article 8 (2) there shall be no interference by public authorities except for when such interference is "in accordance with the law" and

> necessary in a democratic society in the interest 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.

The exception's demand can be divided into three main categories: interference with family life demands (1) a sufficient legal basis, (2) a legitimate purpose, and (3) that the necessity requirement is met. The first two categories are neither controversial in Norwegian child welfare cases, nor have they been criticized in the ECtHR's decisions included in the analysis. That is because the Norwegian Child Welfare Service works under the Child Welfare Act, which provides them with a *sufficient legal basis* to interfere with the right to a family life and take measures to protect children. And because measures taken by the Child Welfare Service serve to protect the rights and freedoms of children, there is a *legitimate purpose*. I will therefore merely describe these briefly before turning more thoroughly to the necessity requirement.

Firstly, the interference must be "in accordance with the law", which means that it must have a legal basis in national law. The law must be available and predictable, so as to protect individuals from arbitrary interference. Secondly, the interference must serve a legitimate purpose, which is, as expressed in Article 8, "in the interest 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." In cases concerning child welfare, the purpose – which is to protect the child – will serve a legitimate purpose under Article 8 (2). It should be mentioned, in passing, that this notion of legitimate purpose is not entirely uncontroversial or unproblematic: the precise meaning of "protection of […] morals" can vary across different cultural and religious communities. Even though x

[24] K.A. v. Finland, paragraph 138.

might be widely regarded as immoral treatment of the child by some majority (say "x" is physical punishment), thus compelling the state to intervene with the family life of some minority community, it is not necessarily the case that x is regarded as immoral *in the minority community in question* – and that asymmetry can give rise to profound challenges.

Thirdly, the interference must be "necessary in a democratic society", which, on face value, is a strict requirement. Indeed, the ECtHR has expressed that there must be a *pressing* social need to justify intervention, and, as such, effectively declared its loyalty to a strict and narrow understanding of the necessity requirement.

The ECtHR interpretation applies a principle of proportionality to the necessity requirement: if a less intrusive measure can satisfactorily realize the purpose (i.e., the best interest of the child), then it should be chosen. This principle of proportionality, as set out in Article 8, exemplifies a pervasive principle in human rights conventions: the attempt to strike a fair balance between the interests of the society at large on the one hand, and the protection of individual rights and freedoms (of both child and parents), on the other hand.

2.1.2 The necessity requirement in child welfare cases

As already mentioned, a complex conflict of interests can arise – and indeed often does arise – in child welfare cases, between child and parents. In such instances, the necessity requirement of Article 8 (2) requires that the authorities "strike[s] a fair balance" between the parties.[25] To guide that balancing process, the ECtHR has noted that "particular importance should be attached to the best interest of the child which, depending on their nature and seriousness, may override this [i.e., the interests] of the parents."[26]

In determining whether a given interference with the right to family life under Article 8 should be regarded as "necessary in a democratic society", the ECtHR stated in *Strand Lobben v. Norway* that the relevant public authority must consider, "in the light of the case as a whole", whether "the reasons adduced to justify that measure were relevant and sufficient for the purposes of paragraph 2 of Article 8."[27] Further, the ECtHR notes that the notion of neces-

[25] Strand Lobben v. Norway, paragraph 206.
[26] Ibid.
[27] Ibid, paragraph 203.

sity "implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests."[28]

Concerning that balancing of interests in child welfare cases: in all decisions concerning children "their best interests are of paramount importance."[29] At the same time, the ECtHR has stated that "regard for 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."[30] The obligation to seek the parties' reunification is based on an assessment of proportionality: the interest – of parents and child – for reunification must be weighed against other interests of the child, such as its health and development.[31] In *Johansen v. Norway* the ECtHR refers to this as "a fair balance [which] has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child".[32] In *Johansen v. Norway*, the ECtHR evaluated that deprivations of both parental rights and contact rights were far-reaching measures which "were inconsistent with the aim of reuniting [the child and parent]."[33] The ECtHR put up a strict necessity requirement which stated that such measures "could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests."[34]

The ECtHR also notes that generally, the best interest of the child dictates "that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots". That, in turn, entails "that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family."[35] Yet, simultaneously, the ECtHR notes that it is also in the child's interest to ensure its "development in a sound environment," and that a parent cannot be entitled to

[28] Ibid.
[29] Ibid., paragraph 204.
[30] Ibid., paragraph 205.
[31] Johansen v. Norway, paragraph 78.
[32] Ibid., paragraph 78.
[33] Ibid., paragraph 78.
[34] Ibid., paragraph 78.
[35] Ibid., paragraph 207.

"harm the child's health and development."[36] It is therefore evident that the necessity requirement, and the application of the principle of proportionality, lead to quite the complex balancing of interests.

Any valid interpretation of the necessity requirement in child welfare cases must also take into account that the state has a certain margin of appreciation. That means that the ECtHR to a certain extent must – depending on the aim and seriousness of the intervention – recognise the domestic authorities assessment of a case.[37] The ECtHR recognizes that the contracting states can have reasonable disagreements on precisely how to practice legitimate intervention: the "margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake."[38] The ECtHR stresses "the importance of protecting a child in a situation which is assessed as seriously threatening his or her health or development" – as well as the "aim to reunite the family as soon as circumstances permit."[39] But the ECtHR also respects "that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care."[40] However, for the ECtHR to grant a state this margin of appreciation, a proper decision-making process must have been carried out.[41]

The substantive evaluation, especially concerning whether the takeover of care is in the best interest of the child, is challenging and presupposes proximity to the case. The ECtHR's practice focuses mainly, therefore, on the process leading up to the takeover of care and evaluates whether national authorities have proceeded in a satisfactory way.[42] Thus, the ECtHR does not usually consider whether the national authorities have substantively met the necessity requirement, but they do consider whether the decision-making process has been satisfactory.[43]

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[36] Ibid.

[37] Aall (2011), p. 144.

[38] Stand Lobben v. Norway, paragraph 211.

[39] Ibid.

[40] Ibid.

[41] Ibid., paragraph 211-212.

[42] Aall (2011), p. 213.

[43] But there are exceptions: in Olsson v. Sweeden, for instance, the court decided that the intervention was carried out in an unnecessarily intrusive manner. Reunification of child with the (biological) family was practically speaking impossible when the public authorities did not place the parties closer to one another.

In evaluating alleged violations of Article 8 of the ECHR, it is central to the ECtHR whether the Child Welfare Service made a real assessment of reunification or not. In their evaluation, the ECtHR considers how contact rights have been practiced. That is because contact rights are an important tool for reaching reunification. And in many of the cases where the ECtHR has found a breach of Article 8, it is crucial that the Child Welfare Service proceeded from a presumption that the care order will be long-term,[44] which, subsequently, led to more restricted contact rights.

[44] See for instance K.A. v. Finland, paragraph 143.

3 Practice from the European Court of Human Rights

3.1 Strand Lobben and others v. Norway

3.1.1 Facts of the case

The first applicant ("the mother") gave birth to her son ("X") in September 2008. And after doing so, she stayed at a family centre. Three weeks after giving birth, the authorities decided to place the baby in a foster home on an emergency basis – and the reason was that the mother wanted to move from the family centre. The mother found herself in a challenging situation when she got pregnant; she had no home, had a difficult relationship with X's father as well as her own family, and she experienced severe epileptic seizures.[45] During her stay at the family centre, the staff was concerned about X's health because he appeared to be crippled and did not gain weight. X was temporarily placed in a foster home and the mother was given permission to see him one and a half hours per week. The authorities proceeded with an ordinary process of care order which was upheld by the County Social Welfare Board. Contact rights between the mother and her son was then set to two hours six times per year. The decision was revoked by the City Court, but the Courts of Appeal upheld the Board's decision and reduced the number of visits to four times per year.

When X was three years old, his mother gave birth to her second child. She got married to the child's father and moved to another municipality. She appealed to the County Social Welfare Board, demanding that X be returned to her from foster home, or, alternatively, that the contact visits be increased and that the demand for supervision of the meetings be relaxed. The Child Welfare Service then raised a case to, firstly, deprive the mother of her parental responsibility for X, and secondly, authorise the foster parents to adopt him. The Child Welfare Service won the case in the Norwegian court system, authorizing the withdrawal of parental responsibility and subsequent adoption.

The mother submitted the case to the ECtHR, which, in the Chamber, did not find that the right to family life under Article 8 of the ECHR was violated. She appealed the case to the Grand Chamber which in September 2019 decided that the right to family life indeed had been violated under Article 8 of the ECHR.

[45] Strand Lobben v. Norway, paragraph 12.

The question that was raised before the ECtHR was whether the withdrawal of parental responsibility and forced adoption was "necessary in a democratic society."[46] In its judgement, the majority of 13 judges in the Grand Chamber was divided into two fractions. The majority-*majority* fraction of seven judges found a *procedural* breach of Article 8 and the majority-*minority* fraction of six judges found a *substantive* breach of Article 8. The dissenting opinion of four judges did not find any breach of Article 8. For the sake of the length of this thesis, I will focus on the arguments from which the majority-majority fraction drew its conclusion.

3.1.2 Decision from the ECtHR

The ECtHR begins by referring to the general principles that apply to cases concerning the right to respect for family life under Article 8 of the ECHR.[47] Which is a mutual right for both child and parent. Intervention with that right may only be justified if the requirements of Article 8 (2) are fulfilled. The ECtHR continues by stating that the child's best interest is of paramount importance for the interpretation of the child's right to respect for its family life.[48] At the same time the state (normally) has a positive duty to make sure that a care order is used as a temporary measure with the ultimate aim of reuniting the child with its parents.[49] The ECtHR further recognizes that the state has a certain margin of appreciation but maintains that the decision-making process must be justifiable.[50] The ECtHR also recognizes that there are cultural differences within the contracting parties, which in turn allows for different understandings of the role of the family, as well as justifications of interference by public authorities.[51] The ECtHR points out that in any case, the interest of the child will always be decisive.[52]

The ECtHR proceeds by applying these principles to the case at hand, and states that the national authorities did not attempt to strike a "genuine balancing exercise between the interests of the child and his biological family," but only focused on "the child's interests instead of

[46] Ibid., paragraph 214.

[47] In chapter 2 of the thesis, I outlined the general principles which apply to child welfare cases, with references to Strand Lobben v. Norway. I will therefore not restate these principles beyond a summary.

[48] Strand Lobben v. Norway paragraph 204.

[49] Ibid., paragraph 205.

[50] Ibid., paragraph 211.

[51] Ibid., paragraph 210.

[52] Ibid.

trying to combine both sets of interests."[53] Further, the ECtHR notices that the domestic authorities did not "seriously contemplate any possibility of the child's reunification with his biological family."[54] The ECtHR is also critical to whether the domestic authorities seriously considered the substantial life changes that the mother was going through – she had both got married and had a second son. The public authorities should have considered the potential significance of these facts when reviewing the case.

In its evaluation of whether forced adoption was a necessary intervention in the mother and X's right to family life, the ECtHR contends that the decision was based on too scarce factual basis. The evaluation of the mother's ability to provide care for X was based on meeting sessions set to two hours four times per year, where the meetings were supervised in the presence of the foster mother as well as representatives from the social welfare service. This created a tense situation during the meetings. Moreover, according to the ECtHR, the expert assessment from the City Court was outdated. It was criticisable that the vulnerability of X had not in fact been assessed – moreover, and strikingly, the City Court did not explain why X ceased to display the aforementioned vulnerability (i.e. problems related to movement and growth) despite the fact that he had lived in foster home since he was three weeks old.

The ECtHR expressed concern that the factual basis for decision making had been too poor: all relevant facts had not been taken into consideration in the court's assessment of whether the care order and forced adoption was necessary. The ECtHR argues that the City Court did not evaluate whether the taking over of care and forced adoption were suitable. Indeed, the ECtHR questions whether the proportionality of the measure was at all considered – including an assessment of the measures and their effect on the parties' right to family life, as well as the son's need for protection. The, according to the ECtHR, weak factual basis led to a weak assessment of the proportionality of the best interest of X' and his mother's right to family life.

Although the majority primarily makes a procedural assessment of the City Courts decision, it is clear that the underlying issues are also of material concern: too little meetings were grant-

[53] Ibid., paragraph 220.
[54] Ibid.

ed, and no real assessment of the possibility and appropriateness of reunification between X and his biological mother was made.

3.2 K.O. and V.M. v. Norway

3.2.1 Facts of the case

After giving birth to her son, the mother was placed at a family centre – because of concerns about her mental health, drug abuse and relational issues with the child's father. When the mother wanted to move from the centre, the Child Welfare Service made an emergency decision to take over the care of the child. The mother's right to meet with the child was set to one hour every second week. The Child Welfare Service followed up with an ordinary case concerning care order and was given support by the Board. The Board assumed that the taking over of care would be long-term, and the parents were given permission to meet the child for one hour four times per year. The Child Welfare Service supervised the meetings. The parents referred the case to the City Court, which decided to extend the meetings to two hours six times per year. An appeal to the Courts of Appeal was denied and further appeals to the Supreme Court were in vain.

When the child was three years old, the parents submitted a request for reunification. The Child Welfare Service approved the request, but the Board did not. The parents appealed the case to the City Court which decided to uphold the approval of reunification. Despite the approval of reunification, the parents decided to appeal the case to the ECtHR: the question that was raised before the ECtHR was whether the placement in care and the determination of contact rights violated the right to respect for family life under Article 8 of the ECHR.[55]

3.2.1 Decision from the ECtHR

The ECtHR found no reason to criticise the decision-making process. According to the ECtHR, relevant and sufficient reasons were given for taking the child into public care: there had been "no violation of Article 8 of the Convention in respect to the placement of A in public care."[56] However, when it came to the contact rights, the ECtHR found that there had been a breach of Article 8.

[55] K.O. and V.M. v. Norway, paragraph 61.

[56] Ibid., paragraph 66.

The ECtHR examined the reasoning underlying the decision to limit the contact rights so strictly and found that there had been a breach of Article 8 of the ECHR. In the judgement from the ECtHR, the Court emphasised that both the Board and the City Court had – even at an early stage – left the aim of reunification.[57] Meetings separated by weeks and months were not suitable for facilitating reunification. The ECtHR stated that public authorities must facilitate as many and long meetings as possible without exposing the child to "undue hardship."[58] That is because the meetings shall protect, strengthen and develop family ties. In this particular case, where there could go months from one meeting to the other, the Court contended that the meetings were not in any meaningful sense aimed at reunification. Rather, the meetings simply functioned to upholding the child's "cognitive and intellectual understanding of who her parents were."[59] The Court also stated that the demand for supervision of meetings requires special justification – but the Court did not conclude on whether the justification was sufficient or not.

The ECtHR pointed out the unique nature of child welfare cases: each demands careful attention and consideration in order to strike a sound balance between the various interests. The Board and the City Court pointed out that the child was functioning normally, she displayed adequate development, and the meetings with the biological parents had worked well over time. Neither the Board nor the City Court had, except for general reference to children's need for stability, elaborated on why it would be contrary to the best interest of the child to see its parents more than four to six times per year.[60] On those grounds, the ECtHR concluded that there had been a breach of Article 8 of the ECHR.

3.3 A.S. v. Norway

3.3.1 Facts of the case

The applicant gave birth to a son in 2009 – and the son was conceived through artificial insemination at a clinic abroad. The father was unknown. The Child Welfare Service received several reports of concern from the health station and from the family concerning the mother's ability to care for her son. The Child Welfare Service took measures to improve the

[57] Ibid., paragraph 68.
[58] Ibid., paragraph 69.
[59] Ibid.
[60] Ibid., paragraph 70.

mother's parental competence, but in 2012, the Service decided to carry out emergency placement of the child.

When the case was tried by the County Social Welfare Board (simply "the Board" hereafter), the Board decided to take the child into public care. The child was placed in a foster home. The Board also set the contact rights between the biological mother and her son to two hours two times per year. The Board justified the decision on contact rights on the grounds that the child was considered to be particularly vulnerable, and that he had reacted negatively on the contact sessions with his biological mother. The contact sessions were supervised.

The foster home placement was made on the assumption that the taking over of care would be long-term, and the aim of the contact rights was that the child should have knowledge of his biological roots. The mother appealed the case to the City Court which upheld the Boards decision and reduced the extent of contact rights to one hour two times per year under supervision.

In 2015, one year after the City Courts decision, the mother filed a case for return of her son. The claim was rejected by the Board and later by the City Court. The City Court found that the child had gained such good connection to the foster home that a return could cause serious harm to him. Both the Board and the City Court decided to cut off all contact rights between the biological mother and her son. The decision was based on the child's negative reactions to visits, which sometimes lasted up to two months after the visit.

Before the trial in the City Court, the court had made two rulings that both rejected the biological mother's request for new expert assessments of her caring abilities. The mother agreed that the original care order was legitimate but argued that her caring abilities had improved since then: she had taken a parental course and got a job in a kindergarten. The biological mother's appeal to the Courts of Appeal was nevertheless refused and further appeal to the Supreme Court was in vain.

3.3.2 Decision from the ECtHR

The ECtHR observed that the placement of the child in foster home had a "long-term perspective," and that this implied that the authorities had *de facto* given up on reunification. At a general level, the ECtHR pointed out that such conclusions "should only be drawn after care-

ful consideration and also taking account of the authorities' positive duty to take measures to facilitate family reunification."[61] The ECtHR further noted that because the City Court had totally deprived the biological mother from all contact rights it must "carry out a 'stricter scrutiny' of whether the domestic authorities have shown that the circumstances were so exceptional that they justified the measures complained of, and of the decision-making process leading to the imposition of those measures."[62] The ECtHR pointed out that both the Board and the City Court had – by assuming long-term placement so early – contributed to "cementing the situation already at the very outset." That, in turn, led to a strict visiting regime.[63]

The ECtHR also evaluated the case which was decided by the City Court in 2015. Here it was decided that the care order should be maintained, and that the mother should be deprived of all contact rights as well as the right know her son's whereabouts. The ECtHR stated that "cases where the placement order is based on the general conclusion that the natural parent, due to his or her personality and not any psychological suffering, has shortcomings related to basic and intuitive parental skills, are particularly challenging, since such a conclusion to a notable degree will have to rest on vague and subjective criteria."[64] The ECtHR emphasised further the importance of "having a sufficiently broad and updated factual basis for far-reaching decisions," such as the one taken by the City Court. The need for an updated factual basis is particularly important in cases where a parent contends that there have been "positive developments as to his or her parental abilities."[65] The biological mother had completed a parental course, a course for kindergarten workers and also worked in a kindergarten for six months in order to improve her caring skills. These facts were oddly enough regarded as irrelevant by the City Court. The ECtHR stated that "it is striking that the City Court on that point rejected all evidence in the applicant's favour with limited or no reasoning."[66]

The problem was made more serious yet by the fact that the City Court had not only failed to update its factual basis but also rejected to do so on request of the mother, after she submitted evidence for having made significant lifestyle changes and requested a new assessment of her

[61] A.S. v. Norway, paragraph 62.
[62] Ibid.
[63] Ibid., paragraph 63.
[64] Ibid., paragraph 66.
[65] Ibid.
[66] Ibid., paragraph 67.

interaction with her son. The latest expert assessment was made two and a half years before and did not include the mother's declaration (nor the evidence that substantiated her claims) that she had undergone improvement as to her parental abilities. The City Court rather relied, at least primarily, on the foster parent's description of the child's development the last years. Two psychologists engaged by the biological mother opened for the very opposite evaluation from that of the foster parents: they made the case that the son's negative reactions could be due to him *missing* his mother, not that he met with the mother, which the foster parents suggested. The City Court did not properly consider that possibility and expressed that the reactions were "'mainly' an expression of the boy's insecure attachment to the applicant and the fact that the contact sessions had served to reawaken his trauma."[67]

The ECtHR found that the decision-making process leading to the rejection of the biological mother's request for lifting the care order and strictly restricting her contact rights and information about her son's whereabouts, was not properly conducted. Thus, the ECtHR concluded that there had been a violation of Article 8 of the ECHR.

In the next section, I look at the decisions legal and practical consequences for Norwegian child welfare – that is, consequences that can be derived from ECtHR's criticism in *Strand Lobben v. Norway*, *K.O. and V.M. v. Norway* and *A.S. v. Norway*.

[67] Ibid., paragraph 69.

4 Legal and practical consequences for Norwegian child welfare

4.1 General

The decisions in *Strand Lobben v. Norway*, *K.O. and V.M v. Norway* and *A.S. v. Norway* put pressure on the Norwegian government to consider whether Norwegian legislation and practice concerning intervention in the right to family life is in line with Article 8 of the ECHR viewed particularly in light of the three decisions from the ECtHR. This is especially evident for the practice of placement of children in foster home on a long-term basis and the limitation of contact rights, where the latter is the primary focus of this thesis.

In this chapter, I analyse what legal and practical implications the three ECtHR's decisions have for Norwegian child welfare practice and legislation, and specifically contact rights. Then, in the next chapter, I consider the extent to which the criticism of the ECtHR is taken into account in in the new Child Welfare Act.

4.2 The aim of reunification and determination of contact rights

4.2.1 Deviation from the aim of reunification

It is a guiding principle in child welfare cases that a care order is a *temporary* measure which must be discontinued as soon as the circumstances permit it.[68] In the three decisions I have analysed, the ECtHR has criticized Norwegian authorities for leaving the aim of reunification at an early stage without properly assessing the appropriateness of doing so.[69] The determination of contact rights has been a core issue in ECtHR's evaluation of whether the aim of reunification has been sufficiently protected. In *Strand Lobben v. Norway*, for instance, both the County Social Welfare Board and the Court of Appeal based their decision on the conviction that the placement in foster home would be long-term. Thus, the goal of the contact visits was to give the child an opportunity to know its biological origin, rather than opening the road to reunification, which, according to the ECtHR, should be the aim.[70]

K.O. and V.M. v. Norway exemplifies the issue. Both the County Social Welfare Board and the City Court based their decision on the conviction that the placement in foster care would

[68] See for instance Strand Lobben v. Norway, paragraph 208, and K. and T. v. Finland, paragraph 178.

[69] Strand Lobben v. Norway, paragraph 220, AS. V. Norway, paragraph 62 and K.O. and V.M. v. Norway, paragraph 68.

[70] Strand Lobben v. Norway, paragraph 208 and 221.

be long-term and that the child therefore required stability in the foster home. The ECtHR was critical to this conviction and stated that the authorities, instead of making a serious evaluation of the possibility of reunification, "gave up reunification as the ultimate goal at a very early stage."[71] The ECtHR further criticised the government for binding themselves to their conviction "without demonstrating why the ultimate aim of reunification was no longer compatible with [the child's] best interests."[72]

An analysis of 100 decisions by the Norwegian Social Welfare Board from 2018, shows that the criticism in *Strand Lobben v. Norway* and *K.O. and V.M. v. Norway* is prominent in other child welfare cases as well. In the analysis, Christian Børge Sørensen found that in an overwhelming majority of the cases, the Social Welfare Board assumed that the care order would be long-term.[73] Sørensen contends that in Norwegian child welfare practice, it is *not* the case that the taking over care is regarded as first and foremost a temporary measure.

In *A.S. v. Norway*, the ECtHR states that if the public authorities decide to give up on the ultimate aim of reuniting the child with its biological parents, the decision must be justified properly – or, in the parlance of *A.S. v. Norway*, the authorities must "carry out a 'stricter scrutiny' of whether the domestic authorities have shown that the circumstances were so exceptional that they justified the measures complained of."[74] Since such a measure is so grave for the involved parties, and demands a rejection of the authorities' positive obligation to facilitate reunification, it necessitates especially solid grounds. According to the ECtHR, it must be explicitly stated why reunification is no longer relevant, and it must be demonstrated what the Child Welfare Service has already done to enable reunification.[75]

In *K.O. and V.M. v. Norway* and *Strand Lobben v. Norway*, as well as *A.S. v. Norway*, ECtHR states that the guiding principle is that a care order is a temporary measure. It is, however, worth questioning whether this starting point is simply a rule of thumb, or something more absolute. Some parents might have so grossly abused their power and the child's trust that

[71] K.O. and V.M. v. Norway, paragraph 68.
[72] Ibid.
[73] Sørensen (2020), p. 109-110.
[74] A.S. v. Norway, paragraph 62.
[75] Ibid., paragraph 67.

returning the child is virtually impossible in any foreseeable future. Moreover, children often have a need for stability in order to develop as they should. The ECtHR does not, for such reasons, regard the goal of reunification as absolute, and stresses that

> it is crucial that the regime of contact rights effectively supports the goal of reunification until – after careful consideration and also taking account of the authorities' positive duty to take measures to facilitate family reunification – the authorities are justified in concluding that the ultimate aim of reunification is no longer compatible with the best interests of the child.[76]

Thus, public authorities can deviate from the ultimate aim of reunification if it is no longer in the best interests of the child. However, Norwegian child welfare practice can still be criticized for too swiftly – and sometimes on false grounds – concluding that this ultimate aim should be deviated from.

It seems that ECtHR nudges Norwegian authorities to be more careful about concluding that placement in a foster home should be long-term. Rather, the Norwegian authorities should take as principal starting point that a care order is a temporary measure; measures should be carried out with the ultimate aim of reuniting parent and child. To guarantee that a care order is not exercised for a longer time than what is necessary, the authorities should on a regular basis consider whether there have been improvements in the biological family's situation. In practice, that implies changes in the decision-making process: the authorities should make continuous evaluations of the family situation, which secures that they do not lock or cement cases at early stages.

4.2.2 Specific determination of contact rights

The ECtHR formulates the overarching purpose of contact visits in *K.O. and V.M v. Norway*: "to guard, strengthen and develop family ties."[77] In the decisions I have analysed, the ECtHR has been critical to the determination of contact rights. When a care order was assumed to be long-term, this had consequences for the determination of contact rights, which in turn reduced the probability for reunification – the ultimate aim – by alienating the child from its

[76] K.O. and V.M. v. Norway, paragraph 69.
[77] Ibid.

parents. In *K.O. and V.M v. Norway*, for instance, the contact visits had merely aimed at upholding the child's "cognitive and intellectual understanding of who her parents were."[78]

Moreover, in both *Strand Lobben v. Norway* and *K.O. and V.M. v. Norway*, the ECtHR points to the kinds of considerations that should be made when determining contact rights – and here it is stated that there should be a *specific assessment* of the appropriateness of the contact rights in *every case*.[79] It is crucial that the determination of contact rights "effectively supports" the aim of reunification, as the ECtHR states in *K.O. and V.M v. Norway*.[80] This marks a clear breach with Norwegian practice, where contact rights have, more or less, been standardized for long-term placements and set to three to six times per year,[81] which is about what has been the case in the ECtHR decisions in focus of this thesis. This is supported by an analysis Tina Gerdts-Andresen made of 91 decisions by the County Social Welfare Board between 2018 and 2019, where she found that the decisions to a little extent made visible the aforementioned specific assessments.[82]

In *Strand Lobben v. Norway*, the goal of the contact visits was to give the child an opportunity to know its biological origin rather than opening the road to reunification. The contact visits were set low (two hours six times per year), and they were unsuitable for improving the relationship between the mother and child.[83] The ECtHR also pointed out that the public authorities had done too little to improve the contact between the child and its mother during their meetings.[84] The contact visits provided, therefore, no suitable grounds for drawing any conclusions about the mother's caring abilities.

In *A.S. v. Norway*, the ECtHR states that the authorities assumed from the very outset that the placement would be long-term, and that this assumption had great implications for the authorities' evaluation of contact rights. The authorities were "cementing the situation", which lead

[78] Ibid.

[79] See Strand Lobben, paragraph 205, 208 and 221, and K.O. and V.M. v. Norway, paragraph 60 and 69. See also HR-2020-662-S, paragraph 130.

[80] K.O. and V.M. v. Norway, paragraph 69.

[81] See OsloMet (2018), p. 64, and NIM (2020), p. 34-35.

[82] Gerdts-Andresen (2020). See also Sørensen (2020) – and Alvik (2021) for a study which shows that there has been development in the determination of contact rights, which is something I return to in chapter 5.

[83] Strand Lobben v. Norway, paragraph 221.

[84] Ibid.

them to enforce a restrictive visiting regime (one hour two times per year, and later fully refused).

The ECtHR has been critical to several aspects of the Norwegian authorities' exercise of contact rights. For instance, it is critical to the authorities' determination of the *extent* of contact rights. In *Strand Lobben v. Norway*, where contact rights were set to two hours four times per year, the ECtHR states that the "ties between members of a family and the prospects of their successful reunification will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other."[85] In *K.O. and V.M. v. Norway*, where contact rights were set to two hours six times per year, the ECtHR is a bit more specific about the extent of contact rights, and states that "family reunification cannot normally be expected to be sufficiently supported if there are intervals of weeks, or even – as in the instant case – as much as months, between each contact session."[86]

Even though the statement in *K.O. and V.M. v. Norway* can be understood as ECtHR establishing a minimum level of contact rights, a human rights standard for determination of contact rights can hardly be deduced from it. That is supported by the fact that the ECtHR has dismissed two cases against Norway where contact rights were set to three to six times per year.[87] Further, in *Levin v. Sweden* from 2012, the ECtHR accepted contact visits set to four times per year.[88] Moreover, human rights assessments are generally based on individual assessments. That said, the decisions may provide some guidelines for the determination of contact rights. And that is, firstly, that contact rights should not be limited to a minimum. Secondly, the aim of reunification should be the starting point for the determination of contact rights. Thirdly, limitations in the execution of contact rights should be justified specifically. And fourthly, the extension of contact rights should be continuously evaluated.

4.2.3 Summary

It is reasonable to conclude that Norwegian authorities should be more careful in assuming, especially at an early stage, that a care order will be long-term. Doing so often opposes the

[85] Ibid., paragraph 208.

[86] K.O. and V.M. v. Norway, paragraph 69.

[87] J.M.N. and C.H v. Norway and I.D. v. Norway.

[88] Levin v. Sweden, paragraph 62-69.

ultimate aim of reunification. The assumption that a care order will be long-term also affects the determination of contact rights, which often is set very low as the aim of the contact right is no longer reunification of the child with its parents, but simply to enable the child to know its biological origin. In this way, the aim of reunification and contact rights are inextricably linked.

In other words, the decisions imply that the Norwegian authorities should not carry on its practice unaltered, that is, too swiftly assuming that a care order will be long-term and, on that ground, contact rights can be limited. Norwegian legislation and preparatory works for child welfare practice should, to a greater extent than what is currently the case, reflect these principles and starting points. In this way, one would secure that domestic legislation and practice were better in line with the ECHR and ECtHR's practice.

4.3 Supervision must be justified on special grounds

Sometimes it is necessary to require supervision during contact visits. The supervision can be in the best interest of the child, for instance as a way of ensuring that its security and protection. The ECtHR has, however, been critical to the use of supervision during contact visits. In *A.S. v. Norway*, contact visits had been limited to one hour twice a year under supervision, and later fully refused, which provided limited evidence to draw any conclusions from.[89] In *K.O. and V.M. v. Norway*, the ECtHR states that "bearing in mind the overarching purpose of contact visits in facilitating the strengthening of family ties, the decision to permit such visits to be invariably supervised by the child care authorities must be justified on special grounds in every case."[90] The ECtHR did not, however, thoroughly examine the use of supervision in those specific cases and did therefore not conclude on that concrete issue. That is because in neither of the cases did the alleged violation of Article 8 of the ECHR concern supervision as such.

In *A.S. v. Norway*, however, the ECtHR notes that

> the Board and City Court – which had found that A was a normally functioning child whose development was adequate for her age […] and that positive descriptions had been given of

[89] A.S. v. Norway, paragraph 67.

[90] K.O. and V.M. v. Norway, paragraph 69.

> the applicant's interactions with A during previous visits […] – did not explain, other than with very general references to the child's need for stability, why it would be contrary to A's best interests to see the applicants more than only four or six times a year.[91]

Although the ECtHR notes that all cases are characterised by unique facts, which must be taken into account and considered by the public authorities, the court, by referencing these facts, raises (unwillingly) the question whether supervision could actually be justified in the case at hand. But even if the ECtHR were critical to *some* use of supervision, that would not at all imply that the ECtHR is critical of *all* supervision. Quite the opposite is the case: the ECtHR points out that supervision may only be justified on special grounds – something which only makes sense if supervision indeed is legitimate under certain circumstances.

Since the alleged violation of Article 8 of the ECHR concerned supervision in neither *K.O. and V.M. v. Norway* nor *A.S. v. Norway*, the cases cannot be used as evidence for the claim that Norwegian legislation and practice is contrary to ECtHR's practice. It is, however, reasonable to conclude that the court's reference to the principle that supervision must be *justified on special grounds in every case*, implies that the court is critical to Norwegian authorities' use of supervision: the authorities should limit its use of supervision during contact visits, and they must justify the use of supervision specifically in future cases.

4.4 Factual basis for decision-making

4.4.1 Significance of a proper factual basis

According to ECtHR practice, intervention in the right to family life must be based on a sufficiently updated factual basis about the family's situation. It is somewhat obvious that it is necessary that decisions are based on a thorough assessment of the actual situation – this is, after all, the facts of the case. In several of the cases against Norway, the ECtHR has been critical to the factual basis which the domestic authorities relied on.[92] In *Strand Lobben v. Norway*, for instance, the ECtHR states that "the factual basis on which [the City Court] relied in making that assessment appears to disclose several shortcomings in the decision-making process."[93]

[91] A.S. v. Norway, paragraph 70.

[92] See for instance Strand Lobben v. Norway, paragraph 220, and A.S. v. Norway, paragraph 66.

[93] Strand Lobben v. Norway, paragraph 220.

The need for an updated factual basis increases in significance with the measure's level of intrusion. This was stated in *A.S. v. Norway*, where the ECtHR emphasised "the importance of having a sufficiently broad and updated factual basis for farreaching decisions."[94]

In *Strand Lobben v. Norway*, it was also central that the Norwegian authorities, in their decision-making process, did not attempt "to perform a genuine balancing exercise between the interests of the child and his biological family," but "focused on the child's interests instead of trying to combine both sets of interests."[95] Moreover, the authorities "did not seriously contemplate any possibility of the child's reunification with his biological family."[96]

In the case of *Strand Lobben v. Norway,* the ECtHR even demands that public authorities and courts make a thorough decision-making process and a proper assessment of the suitability of the intervention under consideration, hereunder whether it satisfies the principle of proportionality. This also follows from *A.S. v. Norway* where the ECtHR states that the authorities and courts did not consider "that the decision-making process […] was conducted so as to ensure that all views and interests of the applicant were duly taken into account."[97]

Another aspect of the factual basis that has been addressed in two of ECtHR's decisions – respectively *Strand Lobben v. Norway* and *A.S. v. Norway* – is the reference to the child's vulnerability. In *Strand Lobben v. Norway*, for instance, the ECtHR was sceptical about the characterization of the child as "particularly vulnerable" – and that this vulnerability was related to the caring abilities of the mother. There was no information about the nature of the vulnerability or the reason why it prevailed even after the child had been separated from its mother and placed in foster care. Since the public authorities put so much emphasis on the child's vulnerability, it is odd that they did not take any measures to understand it better. The ECtHR stressed that, granted the seriousness of the case, this information should have been acquired.[98]

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[94] A.S. v. Norway, paragraph 66.

[95] Strand Lobben v. Norway, paragraph 220.

[96] Ibid.

[97] A.S. v. Norway, paragraph 70.

[98] Strand Lobben v. Norway, paragraph 224.

In *A.S. v. Norway,* the ECtHR in a similar way criticized the unsatisfactory evaluation of the child's vulnerability. The authorities should, as far as possible, provide a concrete description with reference to the actual circumstances, of the cause of the vulnerability, what it consists of, whether it can be remedied by measures, and its significance for the child's care situation.[99]

Against this background, it is clear that the ECtHR finds several shortcomings in the decision-making processes in the mentioned decisions.[100] More specifically, that the factual basis for the decisions have been poor. Thus, it is natural to deduce from my analysis of ECtHR's decisions, that the factual basis Norwegian authorities base their decisions on in the future, should be more solid and transparent. If the domestic decisions make clear that the ultimate aim of the measures is reunification, as well as how the balancing of the various interests have been performed, then the ECtHR would probably have more carefully reviewed this evidence (of the specific assessments).

4.4.2 Lowering the threshold for appointing new expert assessments

Another aspect of the factual basis for decision-making is about the use of expert assessments. The ECtHR does not demand continuously updated expert assessments. But it can, depending on the circumstances of the case, be relevant to update the expert assessment – and especially so if there was made no such assessment in the first place.

The failure of appointing an expert assessment prior to deciding on forced adoption was a core issue in *Strand Lobben v. Norway*. The ECtHR contended that the decision was based on too scarce evidence. The ECtHR also found the City Court's expert assessment to be outdated: the expert assessment was performed two years ago and did, therefore, not take into con-

[99] A.S. v. Norway, paragraph 69. See also Strand Lobben v. Norway, paragraph 224.

[100] As to the factual basis for decision-making, two other interesting requirements may be derived from Strand Lobben v. Norway and A.S. v Norway. And that is, firstly, that the authorities should be careful with concluding about the parent's caring abilities based merely on limited or unsatisfactory contact visits – see Strand Lobben v. Norway, paragraph 221. And secondly, the authorities and domestic courts should, depending on the circumstances, be careful to build on information only given by the foster parents – see A.S. v. Norway paragraph 69 and HR-2020-661-S, paragraph 157. For the sake of the length of this thesis, I cannot look further into these requirements.

sideration the possibility that the mother's caring abilities in fact had improved. The lack of new assessments or appointment of new experts made it difficult to conclude about the mother's alleged lifestyle changes – and to what extent her caring abilities had sufficiently improved. The ECtHR considered that the lack of a new expert assessment "substantially limited the factual assessment of the [mother's] new situation and her caring skills at the material time."[101] The public authorities did therefore not only refuse to give the mother the benefit of the doubt, but seemingly rejected to consider evidence that challenged the public authorities' original conviction. As a consequence, the public authorities rendered themselves not only incapable to protect the rights of the mother, but also to truly promote the best interest of the child.

The lack of a fresh expert assessment was also criticized in *A.S. v. Norway*, which concerned refusal of all contact rights. The ECtHR on a general basis emphasised the importance of "having a sufficiently broad and updated factual basis for far-reaching decisions."[102] The ECtHR expressed concern about whether the City Court's decision was based on updated facts. The City Court relied on expert reports that were two and a half years old and did not take into consideration alleged developments in the mother's parental skills. The need for an updated factual basis is particularly important in cases where a parent informs the Board that there have been "positive developments as to his or her parental abilities," the court states.[103]

Moreover, in *A.S. v. Norway*, there were various interpretations of the child's reactions after contact visits. The City Court dismissed the mother's claim – a claim which was supported by two experts engaged by the mother – that the child reacted negatively because he missed his mother. The court maintained that the reactions were primarily "an expression of the boy's insecure attachment to the applicant and the fact that the contact sessions had served to reawaken his trauma."[104] When the City Court turned down the mother's request to appoint a new independent expert, they also, effectively, limited the possibility to have weighty evidence concerning core issues about the case reconsidered. Thus, according to the ECtHR, the City Court based their decision on insufficient grounds.

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[101] Strand Lobben v. Norway, paragraph 223.

[102] A.S. v. Norway, paragraph 66.

[103] Ibid.

[104] A.S. v. Norway, paragraph 69.

Against this background, it can be argued that the threshold for appointing new expert assessments should be set lower, or put differently, that the burden of proof concerning lifestyle changes should be lighter. Since the public authorities' intervention is so grave, the parents should be given the benefit of the doubt when it comes to reasons for reconsidering the case's factual basis. As both *Strand Lobben v. Norway* and *A.S. v. Norway* show, the decisions indicate a lowering of the threshold for appointing new expert assessments, especially when there has been a certain period of time since the last assessment, or there are alleged developments and changes of factual circumstances.

5 New Norwegian Child Welfare Act

5.1 About the 2021 Child Welfare Act

The proposition which the new Child Welfare Act (simply "2021 Act" hereafter) is based on puts great emphasis on human rights. Indeed, the Norwegian parliament passed a decision which requested (*anmodningsvedtak*) the 2021 Act to be in accordance with the UNCRC. And more specifically, the principles about the child's right to information and to be heard (Article 12) – and that the best interest of the child (Article 3) and it's right to a private life (Article 16) should make up the most important considerations.[105] The proposition also evaluates the latest ECtHR decisions against Norway, including those analysed in this thesis.

In the proposition, the Ministry assumes that the ECtHR's decisions do not point to any substantial conflict between the current Child Welfare Act (simply "1992 Act" hereafter) and the ECHR.[106] The Ministry lean on the Norwegian Supreme Court, which has reached the same conclusion: the ECtHR decisions do not demand alteration of the provisions in the 1992 Act itself.[107] The Supreme Court has, however, claimed that there is a need for some adjustments in practice. And the Ministry did, in fact, propose several clarifications in the 2021 Act and, in the preparatory work, specified the human rights obligations. For instance, in the 2021 Act there is a new chapter 7 which regulates contact rights. Chapter 7 in the 2021 Act replaces § 4-19 on contact rights in the 1992 Act.[108] By adopting six new paragraphs which regulates

[105] Stortingets anmodningsvedtak nr. 637 av 28 May 2020.

[106] Prop. 133 L (2020-2021), p. 15.

[107] See for instance HR-2020-661-S, paragraph 170.

[108] Barnevernloven 1992.

various aspects of contact rights, the new legislation does not only cover more legal ground but is also more accessible and predictable on the assessment of contact rights.

In this part of the thesis, I look at some of the changes that have been made in the 2021 Act and assess to what extent the 2021 Act takes into account criticisms of the ECtHR. I will take a closer look at (1) § 7-2 about decisions on contact rights, (2) § 14-11 (2) e) about the use of expert assessments, and (3) § 7-4 about petition for a new assessment by the County Social Welfare Board, which are provisions that can be related to the criticism from ECtHR's decisions outlined in chapter 4.

5.2 Does the 2021 Act take into account criticisms of the ECtHR?

5.2.1 § 7-2 Decisions on contact rights

§ 7-2 regulates the competence of the County Social Welfare Board when deciding in cases on contact rights. I focus, firstly, on § 7-2 (1) about supervision, and secondly, § 7-2 (2) about the specific assessment of contact rights.

5.2.1.1 Supervision

As outlined in chapter 4, the ECtHR has been critical to the use of supervision during contact visits: it must be *justified on special grounds in every case*.[109] I argued that the cases do not provide any basis to say that Norwegian legislation and practice is contrary to the ECtHR decisions I analysed, but that the court's critical references to the use of supervision implies that Norwegian authorities should limit and justify its future use thereof. It is therefore relevant to consider whether the 2021 Act takes into account the criticism of the ECtHR.

According to the first sentence of § 7-2 (1) of the 2021 Act, the County Social Welfare Board shall determine contact rights between the child and the parents when a decision of care order has been made. The first sentence of § 7-2 (1) is a continuation of the first sentence of § 4-19 (2) of the 1992 Act, which means that there are no changes in the legal text of the 2021 Act. The second sentence of § 7-2 (1) is about the Board's authority to set conditions for the contact, including whether the meetings should be supervised. According to the proposition, the sentence only serves to clarify the legal text, meaning that the Board's authority has not ex-

[109] Ibid.

panded. Since supervision is such an intrusive measure, the Norwegian legislator found it fitting that this authority is outlined explicitly – and thus legitimized – in the legal text.[110] Because there have not been any substantive changes in the legal text of the 2021 Act in relation to supervision, it is natural to consider whether the act takes into account criticisms of the ECtHR.

An interesting question is this: should the legal text in the 2021 Act also have included a specification that supervision must be "justified on special grounds in every case"? In the 2021 Act it is only specified that the Board may decide that contact visits are supervised – which is a wording that gives the Board rather wide powers. It is only when interpreting the legal text together with the preparatory works that the limitation of the legal text is made clear. According to the special remarks in the preparatory works to the second sentence of § 7-2 (1), meetings should only be supervised if a thorough consideration has been carried out in advance of the meeting, and the need for supervision has been justified specifically.[111] These requirements must be met in every case.[112]

Granted that the legislator included a specific reference to the Boards' authority to decide whether the contact visits should be supervised, the legislator should at least have considered whether it would be fitting to have specified, in the legal text, that the supervision must be justified on special grounds in every case, as well under which circumstances the supervision is in fact justified. But that was not considered.[113] Moreover, with reference to *K.O. and V.M. v. Norway*, the Norwegian Supreme Court – just like the 2021 Act – stated that permanent supervision during contact visits must be justified specifically in every case.[114] This statement is indicative of the importance of justification. Here, therefore, an odd tension arises: it is made very clear that the justification is regarded as very important indeed, but it is neither stated in the legal text, nor is there any clear description in the preparatory works of *what* a proper justification consists in.

[110] Prop. 133 L (2020-2021), p. 561.
[111] Ibid.
[112] Ibid.
[113] Prop. 133 L (2020-2021).
[114] HR-2020-661-S, paragraph 156.

Since ECtHR does not explicitly consider the concrete use of supervision during contact visits in Norwegian child welfare practice and legislation, the specific relation between ECtHR's practice and the Norwegian child welfare practice and legislation is unclear. Having said that, the ECtHR does require, unambiguously as such, that supervision is justified on special grounds in every case. This means that there must be strong reasons to believe that the supervision is efficient, in accordance with the ECHR and that, for each case, the need for supervision is thoroughly evaluated. Moreover, the fact that the ECtHR does not *require* any description of the need of special justification of supervision in the legal text, or when and how the supervision is justified, is not, however, in itself a reason for not providing such a description. On the contrary, the fact that the condition (that supervision must be "justified on special grounds in every case") is not in the legal text indirectly but inevitably undermines the condition. And, furthermore, the fact that the justification is not further detailed renders the necessity for such a justification somewhat hollow. It can also be argued that inclusion of the condition would make the application of the law more equal across different cases, as decisions are made more verifiable when they have to be justified explicitly. That would in turn strengthen the equality before the law and also the rule of law itself.

Since the ECtHR merely points out that supervised contact visits must be justified on special grounds in every case, without making any conclusions on that particular issue, it is, however, hard to draw any clear conclusions in relation to Norwegian legislation and practice. It cannot be concluded, for instance, that the legal text in the 2021 Act should – to be in line with ECtHR practice – have included a specification that supervision must be "justified on special grounds in every case."

Although the legal text in the 2021 Act does not in itself capture the criticism from the ECtHR, recent practice from the Norwegian Supreme Court as well as the preparatory works of the 2021 Act state that the use of supervision during contact visits should be justified specifically in every case.[115] This may indicate that the use of supervision will be more limited and thoroughly justified in future cases. Whether it will actually be practiced, remains to be seen.

[115] HR-2020-661-S, paragraph 156 and Prop. 133 L (2020-2021), p. 561.

5.2.1.2 Specific assessment of contact rights

As outlined in chapter 4, the ECtHR has been critical to the determination of contact rights in Norwegian child welfare cases. The decisions I analysed indicate that Norwegian authorities should be more careful in assuming, especially at an early stage, that a care order will be long-term and, on that ground, contact rights be limited. I argued that in order to meet this criticism from the ECtHR, Norwegian legislation and preparatory works should to a greater extent take explicitly into account these principles and starting points. The ECtHR has also been critical to cases of poor factual basis for decision-making. Domestic decisions should make clear that the ultimate aim of the measures was reunification as well as how the balancing of the various interests have been carried out. In the 2021 Act, the regulation of contact rights has been changed compared to the 1992 Act, which makes it relevant to consider whether the 2021 Act takes into account criticisms of the ECtHR.

The first sentence of § 7-2 (2) in the 2021 Act outline the Board's starting point when deciding on contact rights. And that starting point is rather straight forward: contact rights must in every case be based on a specific assessment. The second sentence of § 7-2 (2) lists some considerations that must be taken into consideration when the Board makes the assessment of contact rights, including the child's need for protection, the child's development and the child's and parents' ability to maintain and strengthen their mutual bonds. According to the third sentence of § 7-2 (2), contact rights should be in the best interest of the child. Under the 1992 Act, § 4-19 (2) regulated contact rights and stated that "[u]nless otherwise provided, children and parents are entitled to have contact with each other," and that the Board shall "determine the extent of contact" when a care order has been made. The fact that the 2021 Act both refers to a specific assessment of contact rights and lists considerations that must be taken into account in that assessment, makes it clearer and more predictable than the wording in the 1992 Act, which stated somewhat vaguely that the Board shall *determine the extent of contact*.

In light of recent ECtHR practice, the Norwegian Supreme Court has taken three child welfare cases into consideration in the Grand Chamber, which all included questions on contact rights.[116] In March 2021 they specified the guidelines for determining contact rights in three

[116] HR-2020-661-S; HR-2020-662-S; HR-2020-663-S.

new cases.[117] The Supreme Court did not find any conflict between the practice of the ECtHR and the *provisions* in the 1992 Act considered by the Supreme Court. However, they identified that it was necessary to adjust Norwegian Child Welfare *practice* – concretely the standardized determination of contact rights which was practiced. There had emerged a standard in Norwegian child welfare cases where the contact visits were often set to four to six times per year for long-term placements.[118] Both the Norwegian Supreme Court and the ECtHR have criticised Norwegian authorities for this standardization.[119] In addition, the Supreme Court outlined the starting points for the assessment of and procedures in cases about contact rights, which is in line with the principles outlined by the ECtHR in the decisions I analysed.

To summarize, the starting point for the Supreme Court was that contact rights must be determined through a specific assessment in every case. The child's best interest is the primary consideration in that assessment, and the child's right to be heard is considered as a leading principle. In the specific assessment, the basis shall be that a care order is a temporary measure and that it is best for children to live with their parents.[120] The aim is reunification of the child and parents as soon as the circumstances justify it, and contact rights must be determined to subserve this purpose.[121] Further, contact rights shall strengthen and develop the ties between the child and parents.[122] It is not enough to provide the opportunity for the child and parents to meet: the authorities has a positive duty to organize for contact visits of good quality.[123] As long as the ultimate aim of reunification is maintained, contact visits shall substantiate that aim.[124] That the Supreme Court – in the Grand Chamber – has outlined these principled starting points for Norwegian child welfare cases set a precedent for later cases as well as the interpretation of Norwegian child welfare legislation.[125] Thus, it is expected that the 2021 Act will be interpreted in line with practice from the Supreme Court.

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[117] HR-2021-474-A; JR-2021-475-A; HR-2021-476-A.

[118] Prop. 133 L (2020-2021), p. 261.

[119] Ibid., p. 267.

[120] HR-2020-662-S, paragraph 125; HR-2021-474-A, paragraph 37-38.

[121] Ibid.

[122] HR-2020-662-S, paragraph 128.

[123] HR-2020-661-S, paragraph 143-144.

[124] Ibid.

[125] Andenæs (2009), p. 82-83; 92-93.

Based on the development in case law – both from the Norwegian Supreme Court and the ECtHR – the Ministry of Children and Families proposed some clarifications in the 2021 Act. According to the preparatory works it was necessary to provide a clarification in the legal text where it is evident that contact rights shall be considered in *every case independently*, which is a change that was adopted by the Norwegian parliament.[126] The preparatory works further states that it is a fundamental legal safeguard for the child that contact rights are considered specifically in every case, based on the best interest of the child.[127] The leading principle for the County Social Welfare Board in determining contact rights must be the best interest of the child – and the starting point for the assessment is that a care order is temporary and that the child should be returned to its parents as soon as the circumstances permit it.[128] Thus, contact rights must be determined in the manner which best serves this purpose. The scope and frequency of contact rights must be based on the situation of each case and in the particular child's best interest.[129]

The 1992 Act did not describe the kinds of assessments that the contact rights should be based on. As described above, the 2021 Act includes such a description: in the second sentence of § 7-2 (2), it is stated that the child's need for protection, the child's development, and the child's and parents' ability to maintain and strengthen the bonds between them, must be taken into account. According to the third sentence of § 7-2 (2) contact rights should be in the best interest of the child.

The preparatory works to the 2021 Act states that these clarifications corroborate the rule of law and makes the assessment of contact rights better.[130] The wording "such as" (i.e. *blant annet*) shows that other considerations may potentially be relevant. The sheer variety of considerations will probably prevent standardization of contact rights and secure an individual assessment in every case. That the assessment of contact rights has changed in Norwegian County Social Welfare Boards may, in fact, already be evident: from October 2019 to 2021, the Boards reported to the Ministry on assessment of contact rights – and the numbers show

[126] Prop. 133 L (2020-2021), p. 261; p. 267.
[127] Ibid., p. 267.
[128] Ibid.
[129] Ibid. p. 267-268.
[130] Ibid. p. 268.

that contact rights were generally extended, as well as more varied, compared to the reported numbers from 2019 to the end of the reporting in 2021.[131] Further, a study of 37 decisions from the County Social Welfare Board and 32 decisions from the Court of Appeal delivered from March-December 2020, shows that practice seems to have changed in accordance with recent decisions from the ECtHR and Norwegian Supreme Court.[132] In this study, Ingunn Alvik found that the determination of contact rights are specifically and thoroughly assessed, and that the various interests at stake are considered and weighted against each other.[133]

Further, the Norwegian Directorate for Children, Youth and Family Affairs has distributed for public hearing guidelines for determination of contact rights in cases of care order.[134] The guideline is one measure to secure that the practice of the Child Welfare Service comply with the criticism from the ECtHR, and it shall contribute to thorough assessments of the determination of contact rights.[135] Thus, efforts are made in order to secure that Norwegian child welfare practice is better in line with practice from the ECtHR. How the final guidelines will be and what practical implications they will have must, however, be reviewed in the future.

The Norwegian Supreme Court has stated that the contact rights should be as extensive as possible without overriding the best interest of the child.[136] Further, both the Norwegian Supreme Court and the ECtHR has stated that a consideration of the best interest of the child includes a consideration of its health and development – moreover, the child should not be exposed to undue hardship.[137]

To secure that the Boards make a thorough assessment of contact rights, § 14-20 (3) in the 2021 Act explicitly states that the Boards' decision must state what the child's opinion is and what weight the child's opinion is given, how the child's best interest and – which is new in the 2021 Act – the effect on the family ties have been considered. It follows from the special remarks to the provision that consideration of family ties includes both the child's *and* the

[131] Prop. 133 L (2020-2021), p. 269.
[132] Alvik (2021), p. 2.
[133] Ibid., p. 2.
[134] Barne-, ungdoms- og familiedirektoratet (2021). Deadline for comments is 13th of March 2022.
[135] Barne-, ungdoms- og familiedirektoratet (2021).
[136] HR-2020-662-S, paragraph 134 and HR-2021-474-A, paragraph 43.
[137] Strand Lobben v. Norway paragraph 207 and HR-2021-474-A, paragraph 45.

parents' family ties.[138] Protecting and developing family ties will typically be in the interest of both parties, even though it is not necessarily so. In the Board's decision it must be made a thorough assessment of how those interests have been balanced, and what weight the consideration of family ties for both parties have been given in the assessment.[139]

That the County Social Welfare Board under the 2021 Act must explain how it assessed the family ties, arguably brings the Act closer in line with practice of the ECtHR. And that is because the ECtHR has previously criticised, as mentioned, Norwegian authorities for leaving the ultimate aim of reunification at an early stage and putting too little weight on the importance of family ties. The requirement in § 14-20 (3) forces the Board to assess the implications for family ties and make that assessment transparent. If the ECtHR is provided with the actual assessments, then it can, in the future, more carefully review the domestic decision. Moreover, the fact that the contact rights must be based on a specific assessment in every case, and the Board's decisions must be based on stricter requirements, arguably strengthens the rule of law in child welfare cases by increasing the transparency of the assessments and also the factual basis that the domestic authorities must base their decisions on.

The Norwegian legislator has evidently attempted to follow up the criticism from the ECtHR on the topic of contact rights, especially in relation to the change in the 2021 Act that determination of contact rights must be based on a specific assessment in every case. The 2021 Act is an important step in the direction of aligning Norwegian practice with the ECtHR. Indeed, there are, as mentioned, already signs that the practice of assessment of contact rights is changing.[140] When contact rights are determined specifically in every case, it subserves the aim of reunification of the child and parents as soon as circumstances justify it. But, again, it is, of course, too soon to conclude definitely that the change is taking place.

The 2021 Act also make stricter requirement as to the factual basis for decision making by making domestic decisions more transparent: the decisions should make clear how the balancing of the various interests have been performed and that the ultimate aim of the measures have been reunification. Thus, the 2021 Act, meets some of the criticism I pointed out in

[138] Prop. 133 L (2020-2021), p. 592.
[139] Ibid.
[140] Prop. 133 L (2020-2021), p. 269; Alvik (2021), p. 2.

chapter 4, in relation to poor factual basis for decision-making Norwegian authorities have based their decisions on.

5.2.2 § 14-11 (2) e) Use of expert assessments

In chapter 4, I described the criticism ECtHR has directed at Norwegian authorities concerning the lack of fresh expert assessments. The decisions in *Strand Lobben v. Norway* and *A.S. v. Norway* both indicate a lowering of the threshold for appointing new expert assessments, especially when there has been a certain period of time since the last assessment, or there are alleged developments and changes of factual circumstances.

In the 2021 Act, § 14-11 (2) e) states that the Board must consider whether it is necessary to get an expert assessment. The provision is a continuation of a corresponding provision in the 1992 Act. In other words: the legal text concerning expert assessments has not been changed in the 2021 Act, which implies that the Norwegian legislator did not consider it necessary to make changes in the legislation of appointment of expert assessments. Against this background, it is interesting to consider whether the 2021 Act takes into account criticisms of the ECtHR about the threshold for appointment of expert assessments.

Expert assessments provide an important contribution to the factual basis upon which decisions about for instance contact rights is made. Although the Norwegian legislator did not make any changes in the 2021 Act concerning the appointment of expert assessments, the preparatory works stresses the importance of updated expert assessments – and that it should be considered specifically if there is an apparent need for an updated expert assessment.[141] But there is no formal regulation of such considerations in the legal text. The preparatory works do, however, point out that it is crucial whether the case may be decided on safe grounds without a new expert assessment.[142]

The Norwegian Supreme Court has also considered the use of expert assessments. In HR-2020-663-S the mother pleaded that in cases concerning care order, the main rule should be that expert assessment about the parent and child is obtained. The Supreme Court stated that practice from the ECtHR did not demand this and that whether a new expert assessment must

[141] Prop. 133 L (2020-2021), p. 443.
[142] Ibid.

be provided depends on a specific consideration of the case at hand – and whether a decision can be made on safe grounds without it.[143] The Supreme Court further listed several components that this considerations must include, such as whether an expert assessment has previously been obtained, the time that has elapsed since that assessment, and whether there have been changes in the parent's life situation and caring abilities.[144]

The preparatory works point out that recent practice from the Norwegian Supreme Court, with reference to *A.S. v. Norway*, about the importance of having a sufficiently broad and updated factual basis for decision-making, indicate that the formal framework for appointment of expert assessments have been strengthened.[145] Thus, it is odd that the Ministry did not suggest to update the legal text as well, to ensure that this strengthened formal framework for appointment of expert assessments will actually be practiced, and moreover practiced equally which is something that would strengthen the rule of law.

Although the 2021 Act has not been changed, it can be concluded, in view of recent practice from the Norwegian Supreme Court referred to above, that the requirements for the appointment of new expert assessments is better in line with practice from the ECtHR. But whether an actual lowering of the threshold for appointing new expert assessments will be practiced – especially when there has been a certain period of time since the last assessment or there are alleged developments and changes of factual circumstances – remains to be seen.

5.2.3 § 7-4 Petition for a new assessment by the County Social Welfare Board

The access to petition for a new assessment of the determination of contact rights is not something the ECtHR has criticised Norway for. On the contrary, in *K.O. and V.M. v. Norway*, for instance, the ECtHR pointed to the twelve-month regulation of the 1992 Act as positive, as it provides the parents with the "requisite protection of their interests."[146] The 2021 Act, however, limits that access. Thus, it is relevant to address whether that limitation is in line with the ECHR in light of recent ECtHR decisions against Norway: should Norway be careful with

[143] HR-2020-663-S, paragraph 99.
[144] Ibid.
[145] Prop. 133 L (2020-2021), p. 404.
[146] K.O. and V.M. v. Norway, paragraph 62. See also the dismissal case J.M.N. and C.H. v. Norway, paragraph 29.

limiting the access to petition for a new assessment of the determination of contact rights, given the extensive criticism they have recently received from the ECtHR?

The access to petition for a new assessment is a mechanism which secures that the authorities must review developments in the factual basis of the case on a regular basis, which protects the rights of both child and parents. § 7-4 in the 2021 Act regulates the access to petition for a new assessment by the County Social Welfare Board of cases concerning contact rights. In the first sentence of § 7-4, which corresponds to § 4-19 (5) in the 1992 Act, the access to petition for a new assessment has undergone further restriction: whereas the parents had to wait twelve months under the 1992 Act, the parents must wait 18 months under the 2021 Act.

To further restrict the access to petition for an updated expert assessment seems controversial in light of the recent ECtHR decisions against Norway. The controversiality is underpinned by the fact that Norwegian authorities have been criticised for inadequate decision-making processes in child welfare cases, as well as for deviating from the main goal of reunification of children and parents. This was also pointed out by the Ministry of Children and Families in the proposition to the new Act, where they stated that a long extension of the right to petition for a new assessment could be unfortunate in light of ECtHR's criticism of Norway in recent decisions with regard to the aim of reunification.[147] The Ministry concluded, however, that an extension of six months would not be contrary to the aim of reunification and that it would balance children's need for stability and parent's need to have a case reviewed.[148]

As demonstrated in the analysis of the ECtHR decisions, Norway has been criticised for *cementing* cases at early stages by assuming that the placement of a child will be long-term – which then again led to a strict limitation of contact rights. Against that background, it can be argued that this movement in the 2021 Act – that is, reducing the rights of the parents, and thus inevitably increasing the power of the public authorities – does not sit well with the ECtHR and their decisions against Norway.

Simultaneously, it is important to put weight on the child's need for peace and stability. From that perspective, it is not clear that the movement in the 2021 Act conflicts with the ECHR.

[147] Prop. 133 L (2020-2021), p. 272-273.
[148] Ibid.

Legal proceedings – especially those that are long and frequent – may impose heavy psychological burdens on some children.[149] Research findings indicate that, from the perspective of the child's psychological health and development, it should be exposed to as few legal proceedings as possible.[150] And it is not the case that the legal proceedings can leave out the child. Children have a fundamental right to participate in matters that concern them, and their opinion should be consulted and given weight to, adjusted for their age and maturity, ref. the new Child Welfare Act § 1-4. Thus, many children must be involved in matters concerning contact rights before the Board and the Courts. In summary: frequent trial of contact rights lead to frequent legal proceedings which, *ceteris paribus*, have a negative effect on the child.

It can be contended, however, that this specific *kind* of legal proceedings are not so damaging to a child as other legal proceedings, such as, for instance, a review of whether a care order should be lifted or not. If one also takes into account that contact rights contribute significantly to the main goal of reunification, it may be argued that regular review with intervals of twelve months is indeed reasonable, and thus that the movement in the 2021 Act is unwarranted. Contact rights are essential for maintaining family relations, and thus for realizing the main goal of reunifying the child with its parents – which in turn implies that explicit or implicit restrictions in such contact rights must have a strong and clear justification. And such a justification is lacking.

Moreover, the degree of severity that characterize these interventions with the family life makes it particularly important that the legal security of both parents and child is properly safeguarded. And the more frequent the parents can request a new assessment; the more is their – and indeed the child's – legal security safeguarded. Moreover, granted that it is in the best interest of the child to be reunited with its parents, and the sooner the better, it can be argued that it is in the best interest of the child that the parents can frequently request a new assessment of their caring abilities. That point can be further buttressed: if the movement in the 2021 Act results in situations where contact rights are restricted longer than necessary, then that can potentially lock the situation in a negative spiral. Perhaps a child meets its parents so seldom, for instance, and therefore the meetings become tense and negative, which in

[149] OsloMet (2018), p. 160-162.
[150] Ibid.

turn renders the possibility for a reunification lower – even though it *could* be the case that the child would do better if it lived with its parents.

It must also be taken into account that limitation of the possibility to petition for a new assessment of a case about contact rights, may entail the risk that a limited visit arrangement between the child and the parents is practiced over a longer period of time than what there is actually basis for, which may also increase the possibility of cementing a negative situation.

The new and stricter regulation should however not be analysed in isolation, but rather together with other parts of the legislation – such as the Child Welfare Services' obligation to regularly assess whether circumstances have changed, and whether it is a need to extend the amount of contact beyond what is stipulated in the decision by the Board (§ 7-6 (2)). It can therefore be argued that there are other mechanisms, in addition to the legal proceedings, which serves to – in total – balance both the interests of the child and parent.

It follows from the last sentence of § 7-4 that the private parties may demand that the Board initiates a new assessment at an earlier stage if there exist information about significant changes in the child's or parents' situation that may be relevant for the decision on contact rights. Thus, it can be argued that the last sentence serves as a safety mechanism for both the parent as well as the child, in cases where circumstances has changed to such an extent that it may affect the contact rights. The use of the exception is, however, limited – ref. the wording "significant changes" (i.e. *vesentlige endringer*). There must have been "significant changes" if the exception is to be invoked, which indicates a very high threshold for granting a new assessment prior to the 18 months. That suggests that the exception will have little practical implications; it is only applicable in exceptional circumstances. As the provision has not entered into force yet, it is, however, too early to tell how the exception will be practiced.

To conclude, it is not evident whether the first sentence of § 7-4 in the 2021 Act is in line with the ECHR. I am convinced, however – in light of recent practice from the ECtHR – that the Norwegian legislator should be careful about restricting the Child Welfare Act, I will hesitantly support the new provision. That is because I believe it, in sum, balances both the child's need for peace and stability and also its, and its biological parents', need to be able to request a new assessment of the factual basis of the contact rights. Together, therefore, the different aspects of the 2021 Act seem to compensate for the restriction in the right to a new assess-

ment. That conclusion presupposes that the Child Welfare Service will make frequent assessments of the contact visits, which is something we will not know until the new act has been into force for some time.

6 Recommendations and concluding remarks

6.1 Recommendations

The analysis in chapter 4 and 5 shows that some changes in Norwegian child welfare legislation and practice should be considered. Based on the analysis, I make some brief recommendations concerning such changes. The recommendations aim to strengthen the rule of law in Norwegian child welfare cases and make sure that the criticism of the ECtHR is properly taken into account.

Firstly, concerning the use of supervision. Although I concluded in chapter 5 that the ECtHR does not demand any explicit requirement – in the legal text – that supervision must be "justified on special grounds in every case", I recommend that the legal text indeed should include such a specification, and, moreover, that the preparatory works makes a clear description of *what* a proper justification consists of. The fact that the requirement is not in the legal text indirectly undermines it by underplaying it – and the fact that the justification is not further detailed renders it somewhat hollow. Inclusion of that requirement would make it very clear that the right to impose supervision is limited and that Norwegian authorities actually limit their use of supervision in future cases. It would also make the application of the law more predictable and consistent. In turn, that would lead to more equal use of supervision.

Secondly, concerning the determination of contact rights. I argued that the changes in the 2021 Act – that is, that determination of contact rights must be based on a specific assessment in every case – is an important step in the direction of aligning Norwegian practice with the ECHR and ECtHR criticism. The legal text also lists a number of considerations that must be included in the determination of contact rights, which in turn can prevent an unformal standardization of contact rights, securing a properly attuned assessment in every case. Indeed, there are, as mentioned, already signs that the practice of assessment of contact rights is changing.[151] But the fact that there is evidence of such change does not automatically imply

[151] Prop. 133 L (2020-2021), p. 269; Alvik (2021), p. 2.

that a new standard is establishing itself. If the criticism from the ECtHR shall truly and deeply be incorporated in Norwegian Child Welfare practice, Norwegian authorities must frequently evaluate how the Child Welfare Service, the County Social Welfare Board and the Courts practice the 2021 Act. I therefore recommend precisely such frequent evaluation, securing that the burgeoning new practice is maintained.

Thirdly and lastly, concerning the use of expert assessments. I concluded in chapter 5 that the threshold for appointing expert assessments in child welfare cases should be set lower than what has been the case in Norwegian child welfare practice. Although the 2021 Act has not been changed on this point, recent practice from the Norwegian Supreme Court indicates that there has been a *de facto* change: new expert assessments are more in line with ECtHR practice. To make sure that this lower threshold is established as a new standard, I recommend, as also suggested for the determination of contact rights, that Norwegian authorities frequently evaluate the use of expert assessments. If the threshold goes back to its older and higher level, then the Norwegian legislator should consider including explicit requirements for appointing new expert assessments in the legal text.

If these recommendations were implemented, then it would become significantly more difficult to commit the kind of mistakes that were displayed in *Strand Lobben v. Norway*, *K.O. and V.M. v. Norway* and *A.S. v. Norway*. And, since these mistakes demonstrate serious and unreasonable violations of a fundamental human rights (without securing other such rights), namely the right to family life, there is manifestly a need to make it more difficult to commit them.

Moreover, the fact that such mistakes are committed, can be taken to indicate that Norwegian child welfare legislation and practice have allowed an insufficient understanding of the right to family life to emerge – as a right that is of less importance than other fundamental human rights. If so, then these recommendations would, with the changes in the 2021 Act, contribute to a recovery of an understanding of the proper place of the right to family life, and the profound human need it attempts to protect and promote.

6.2 Concluding remarks

In several cases over the last years, the ECtHR has decided that the Norwegian state has violated the right to respect for family life under Article 8 of the ECHR. The criticism has mainly

been directed at the Norwegian Child Welfare Service, the Norwegian Courts' justifications for intervention and the Norwegian authorities' failure to sufficiently endeavour to reunify the child with its parent. Central to the ECtHR's criticism was a consideration of contact rights: at an early stage, domestic authorities have assumed that a care order would be long-term, which then affected the determination of contact rights, in the sense that it was set too low. Thus, early into the process, the main aim of the contact rights was reduced to enable the child to know its biological origin rather than facilitating the reunification of the child with its parents.

The new Norwegian Child Welfare Act has provided specifications – both in the legal text as well as in the preparatory works – that (implicitly) respond to the criticism that the ECtHR directed at the Norwegian authorities on the topic of contact rights. Thus, the Norwegian legislator has evidently attempted to follow up on the criticism from the ECtHR on the topic of contact rights: the 2021 Act takes an important step in the direction of aligning Norwegian practice with the ECtHR. As of today, there is, however, a lack of comprehensive knowledge about current practice in Norwegian child welfare cases. Such knowledge is necessary to track changes in domestic practice, and specifically, whether the practice is aligning with the ECtHR's criticism.

Still, many cases are waiting to be concluded by the ECtHR, several of them which concern contact rights.[152] *R.A. v. Norway* will have a particular view to the appointment of experts in the decision-making process, and may therefore make clarifications as to the requirements for such appointments.[153] The many cases that have already been concluded by the ECtHR demonstrate that a clear precedent is taking shape, but clarifications, adjustments and further guidelines may still, of course, spring out of the cases to come.

[152] See for instance Å.N. v. Norway, R.A. v. Norway and T.H. v. Norway.

[153] R.A. v. Norway.

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