HØJESTERETS DOM
afsagt mandag den 4. februar 2019

Sag 140/2018 og 144/2018
(1. afdeling)

B
(advokat Lars Buurgaard Sørensen, beskikket)
og
A
(advokat Anders Christian Brøndtved, beskikket)
mod
Statsforvaltningen
(advokat Inge Houe)

Yderligere parter:
Barnet, tidligere C
(advokat Anne-Birgitte Bjerre-Olsen, beskikket)
og
Adoptant M og adoptant F
(advokat Lene Sejersen, beskikket)

I tidligere instanser er afsagt dom af Retten i Odense den 4. august 2017 og af Østre Landsrets 5. afdeling den 2. maj 2018.

I pådømmelsen har deltaget syv dommere: Thomas Rørdam, Marianne Højgaard Pedersen, Poul Dahl Jensen, Henrik Waaben, Kurt Rasmussen, Jens Kruse Mikkelsen og Anne Louise Bormann.

Påstande
Appellanterne, B og A, har nedlagt påstand om ophævelse af indstævnte, Statsforvaltningens, afgørelse af 25. april 2017 om bortadoption af deres fællesbarn, tidligere C, samt af Statsforvaltningens afgørelse af 19. juni 2018 om bevilling af bortadoption.

Statsforvaltningen har påstået stadfæstelse.

Barnet, tidligere C, og adoptanterne har påstået stadfæstelse.

Supplerende sagsfremstilling

Anbringelsen af barnet efter fødslen og samværet med forældrene
Formanden for børn og unge-udvalget i X-by Kommune traf den X. september 2016 – umiddelbart efter fødslen – foreløbig afgørelse om anbringelse af barnet i familiepleje. Afgørelsen blev den 29. september 2016 godkendt af børn og unge-udvalget, og den 17. oktober 2016 traf udvalget afgørelse om anbringelse af barnet i familiepleje samt om, at B og As samvær med hende skulle afbrydes i et år. Udvalget indstillede samtidig til Ankestyrelsen, at der blev meddelt tilladelse til bortadoption.

Ved afgørelse af 7. december 2016 stadfæstede Ankestyrelsen børn og unge-udvalgets afgørelse af 17. oktober 2016 om anbringelse i familiepleje. Ankestyrelsen ophævede samtidig udvalgets afgørelse om afbrudt samvær. Som begrundelse herfor anførte Ankestyrelsen bl.a.:

> ”*Begrundelse for at ophæve afgørelsen om afbrudt samvær*
>
> Vi vurderer, at det ikke er nødvendigt af hensyn til Cs sundhed og udvikling, at C og A og B ikke har samvær.
>
> Årsagen til det er, at C behov for tryghed og forudsigelighed kan opfyldes ved, at kommunen regulerer samværets omfang og tilrettelægger samværene på en anden måde.
>
> Vi henviser til, at A og B er beskrevet med omfattende vanskeligheder i forhold til at varetage omsorgen for C.
>
> Vi vurderer imidlertid ikke, at der er tale om sådanne forhold hos A, B eller C i forhold til samvær, at samværet med C skal afbrydes.
>
> Vi gør opmærksom på, at det forhold, at der er proces i gang med hensyn til en bortadoption af C ikke i sig selv betyder, at samværet skal afbrydes.
> …”

X-by Kommune fastsatte herefter ved afgørelse af 17. februar 2017, der blev meddelt A og B den 27. februar 2017, samvær med barnet. Det første samvær fandt sted den 1. marts 2017.

Bevilling til adoption
Statsforvaltningen meddelte den 19. juni 2018 adoptant M og adoptant F bevilling til at adoptere barnet, C. Barnets navn blev i den forbindelse ændret. Det er oplyst for Højesteret, at barnet har boet hos adoptanterne siden den 16. juni 2018. Det sidste samvær med A og B var den 6. juni 2018.

Procesbevillingsnævnet meddelte den 28. juni 2018 tilladelse til, at sagen blev indbragt for Højesteret. A og B anmodede herefter om, at Statsforvaltningen suspenderede adoptionsbevillingen, indtil Højesteret havde taget stilling til adoptionens lovlighed. De anmodede endvidere om, at der blev etableret samvær med barnet.

Statsforvaltningen meddelte den 5. juli 2018 og den 29. august 2018, at der ikke er hjemmel til at suspendere adoptionsbevillingen, og at Statsforvaltningens adoptionskontor ville videresende anmodningen om etablering af samvær til familiekontoret, der behandler sager om samvær efter forældreansvarslovens § 20 a.

Statsforvaltningen havde på tidspunktet for sagens hovedforhandling i Højesteret, den 25. januar 2019, endnu ikke truffet afgørelse om samvær.

Supplerende retsgrundlag

Supplerende om forarbejder til adoptionsloven og forældreansvarsloven
Ved lov nr. 530 af 29. april 2015 om ændring af adoptionsloven, lov om social service, forældreansvarsloven og lov om retssikkerhed og administration blev kriterierne for adoption uden samtykke i bl.a. adoptionslovens § 9, stk. 3, som beskrevet i landsrettens dom, lempet.

I det lovforslag, som dannede grundlag for lovændringen, fremgår bl.a. følgende om personer med nedsat fysisk eller psykisk funktionsevne (Folketingstidende 2014-2015, tillæg A, lovforslag nr. L 121, s. 6):

> ”*3.1. Adoptionslovens regler om adoption uden samtykke*
> *3.1.1. Gældende ret*
> *3.1.1.1. Betingelser for adoption*
> …

Det forhold, at en forælder har nedsat fysisk eller psykisk funktionsevne og har behov for f.eks. praktisk hjælp til at varetage deres forældreskab, er ikke i sig selv et udtryk for, at forælderen er uden forældreevne. Hvis forældre med nedsat fysisk eller psykisk funktionsevne skal have undersøgt deres forældreevne i forbindelse med adoption uden samtykke, skal det sikres, at forældrene konkret og rettidigt har modtaget den støtte og kompensation, som deres funktionsnedsættelse giver anledning til, herunder særligt i forbindelse med varetagelsen af forældrerollen. Hvis den hidtidige støtte til forældrene anses for utilstrækkelig, bør det overvejes at udsætte færdiggørelsen af prognosevurderingen, indtil forældrene har modtaget relevant støtte, og det kan vurderes, om denne støtte vil kunne forbedre forældreevnen."

Under lovforslagets behandling i Folketingets Socialudvalg besvarede ministeren for børn, ligestilling, integration og sociale forhold bl.a. følgende spørgsmål fra udvalget (Socialudvalget 2014-2015, L nr. 121, spørgsmål nr. 5):

"*Spørgsmål nr. 5:*
Ministeren bedes kommentere Danske Handicaporganisationers høringssvar, hvor de skriver, at Danske Handicaporganisationer er bekymret for, at en lempelse af reglerne af adoption uden samtykke, kan misbruges til at fratage forældre med handicap retten til at være forældre og have familieliv.

Svar:
Danske Handicaporganisationer understreger i høringssvaret, at adoption uden samtykke er et indgribende tiltag, og at proceduren omkring dette må være præget af faglig ekspertise og høje standarder for retssikkerhed for både børn og forældre. Organisationen er bekymret for, at lempelsen af reglerne for adoption uden samtykke kan misbruges til at fratage forældre med handicap retten til at være forældre og have familie.

Som organisationen således påpeger, er adoption uden samtykke en indgribende foranstaltning, idet retsforholdet mellem barnet og dets oprindelige forældre ophæves fuldstændigt. Det er derfor afgørende, at barnets og forældrenes retssikkerhed til stadighed holdes for øje, og at adoption uden samtykke først anvendes, når andre muligheder er afsøgte og udtømte. Lovforslaget ændrer ikke herved. Forældrenes og barnets situation skal altid vurderes konkret. Ved vurderingen af forældreevnen inddrages forældrenes livsforløb for at kunne opstille en prognose for, om der er mulighed for, at forældreevnen kan genvindes. Vurderingen skal afdække, om manglende forældreevne alene er en aktuel tilstand, eller om den har vist sig som et gentaget mønster på tværs af situationer, tid samt fysisk og psykisk tilstand.

Som det også fremgår af forslaget, er det forhold, at en forælder har nedsat fysisk eller psykisk funktionsevne og har behov for f.eks. praktisk hjælp til at varetage sit forældreskab, ikke i sig selv et udtryk for, at forælderen er uden forældreevne.
I tilfælde, hvor forældre med nedsat fysisk eller psykisk funktionsevne skal have undersøgt deres forældreevne i forbindelse med en adoption uden samtykke, skal det sikres, at forældrene konkret og rettidigt har modtaget den støtte og kompensation, som deres

funktionsnedsættelse giver anledning til, herunder særligt i forbindelse med varetagelsen af forældrerollen.

Hvis den støtte, forældrene hidtil har modtaget, er utilstrækkelig, bør sagen udsættes, indtil forældrene har modtaget relevant støtte, og det derfor kan vurderes, om støtten kan forbedre forældreevnen.
…"

Ved lov nr. 530 af 29. april 2015 ændredes endvidere bestemmelsen i forældreansvarslovens § 20 a, der herefter lyder således:

"§ 20 a. Er barnet adopteret, kan statsforvaltningen i helt særlige tilfælde efter anmodning fra barnets oprindelige slægtninge fastsætte samvær eller anden form for kontakt med disse, navnlig hvis barnet forud for adoptionen havde samvær eller anden form for kontakt med den, som anmoder om fastsættelse af samvær m.v."

I de almindelige bemærkninger hedder det bl.a. (Folketingstidende 2014-2015, tillæg A, lovforslag nr. L 121, s. 12-13):

"*3.2. Barnets samvær eller anden kontakt med dets oprindeligt slægt*
…

3.2.2. Ministeriets overvejelser

Som en konsekvens af forslaget i afsnit 3.1.3 om lempelse af betingelserne om adoption uden samtykke foreslås mulighederne i forældreansvarslovens § 20 a for i helt særlige tilfælde at fastsætte samvær eller anden kontakt efter adoptionen udvidet. De eksisterende muligheder for at fastsætte samvær eller anden kontakt må således i lyset af de foreslåede ændringer af adoptionsloven anses for at kunne være for begrænsede, da det efter de gældende regler er en forudsætning, at der har været kontakt forud for adoptionen.

Muligheden for fastsættelse af samvær eller anden form for kontakt må imidlertid ikke få den virkning, at adoption uden samtykke generelt anses for mindre indgribende. Statsforvaltningens afgørelse om samvær træffes ud fra, hvad der er bedst for barnet, og statsforvaltningen har først kompetencen til at træffe afgørelse efter forældreansvarslovens § 20 a, når adoptionen er gennemført.

Det er vigtigt for den adopterede at have kendskab til egen historie og oprindelse. Derfor har adoptionsmyndighederne i alle adoptionstyper fokus på at sikre tilgængeligheden af oplysninger om den adopteredes baggrund, herunder forældre, søskende m.v. og motivet for adoptionen, sådan at den adopteredes mulighed for at få disse oplysninger understøttes mest muligt. I forbindelse med den politiske aftale fra 2. oktober 2014 om et nyt adoptionssystem i Danmark blev ovennævnte fremhævet, og partierne bag aftalen

var enige om at iværksætte forskning, der belyser åbenheds betydning for den adopteredes trivsel og livskvalitet.

Der vil fortsat være adgang for de oprindelige forældre til at få oplysninger om barnets opvækst frem til det fyldte 18. år i form af opfølgningsrapporter. Hertil kommer, at størstedelen af de omhandlede børn vil have en eller anden form for kontakt eller viden om deres forældre i og med, at der er tale om børn, der inden adoptionen var anbragte børn, og hvor kommunen derfor har været forpligtet til at arbejde med relationen mellem barn og forældre. Adoption af et plejebarn vil derfor oftest betyde, at der som minimum er viden om og kendskab til de biologiske forældre. Samtidig skal det bemærkes, at det ikke er muligt for myndighederne at sikre løbende viden om den oprindelige familie efter adoptionen. Der foreslås således ikke med dette lovforslag generelle ændringer i forhold til åbenhed i adoptivforhold.

I familier, hvor barnet er adopteret, har familierne mulighed for at modtage forskellige former for rådgivning, hvor blandt andet forholdet til barnets oprindelige slægt kan indgå. I den forbindelse sondres mellem, om adoptionen er gennemført som en fremmedadoption eller en familieadoption, eksempelvis hvor adoptanterne er barnets tidligere plejeforældre.

Ved en fremmedadoption kan adoptivfamilien modtage adoptionsrådgivning og støtte gennem den statslige Post Adoption Service-ordning (PAS-ordning), der hører under Ankestyrelsen. Med den netop indgåede politiske aftale om et fremtidigt adoptionssystem er det også aftalt, at rådgivningen i PAS-ordningen fremover kan indeholde spørgsmål om åbenhed i adoptionen. Endvidere er det aftalt, at ordningen skal tilrettelægges sådan, at det fremover vil være muligt at modtage et rådgivningsforløb frem til barnet fylder 18 år, samtidig med at der i den forbindelse er fokus på barnets eventuelle behov for selv at modtage rådgivning som en del af forløbet.

Lovforslag til ændring af lov om social service (Styrkelse af plejefamilieområdet), der er nævnt i afsnit 2, vil gøre det muligt at støtte en tidligere plejefamilie, der nu er adoptivfamilie, i at håndtere den ændrede rolle. Dette omfatter også barnets eller den unges behov for hjælp til at håndtere samspillet med den biologiske familie.

3.2.3. Den foreslåede ordning

Det foreslås at ændre forældreansvarslovens § 20 a, jf. lovforslagets § 3, om fastsættelse af samvær eller anden kontakt mellem barnets og dets oprindelige slægt efter adoption, sådan at der i særlige tilfælde efter en konkret vurdering også vil kunne fastsættes samvær eller anden kontakt, selvom der ikke forud for adoptionen har været kontakt mellem barnet og den pågældende slægtning. Dette forslag skal ses i lyset af forslaget i afsnit 3.1.4 om lempelse af betingelserne for adoption uden samtykke, herunder ophævelsen af kravet om at det ved adoption uden samtykke af børn under 1 år skal være godtgjort, at forældrene varigt ikke vil være i stand til at spille en positiv rolle for barnet i forbindelse med samvær."

I de specielle bemærkninger til bestemmelsen hedder det bl.a. (Folketingstidende 2014-2015, tillæg A, lovforslag nr. L 121, s. 29):

”Forældreansvarslovens § 20 a regulerer muligheden for at fastsætte samvær eller anden kontakt efter en adoption mellem barnets og dets oprindelige slægtninge, herunder barnets forældre. Det er en betingelse for at fastsætte samvær m.v. efter bestemmelsen, at der har været samvær eller anden form for kontakt mellem barnet og den, der ansøger om samvær m.v., forud for adoptionen. Endvidere træffes disse samværsafgørelser ud fra, hvad der er bedst for barnet, jf. forældreansvarslovens § 4. Bestemmelsen gælder alle tilfælde, hvor der er gennemført en adoption, og er således ikke begrænset til tilfælde, hvor den gennemførte adoption er gennemført uden samtykke.

Med den foreslåede ændring af § 20 a modificeres betingelsen om, at der skal have været samvær m.v. mellem barnet og ansøgeren forud for adoptionen, før der kan fastsættes samvær eller anden form for kontakt. Efter forslaget skal der navnlig lægges vægt på forudgående samvær, når der efter adoptionen skal træffes afgørelse om fastsættelse af samvær.

Ved vurderingen af, om der skal fastsættes samvær, giver den foreslåede ændring af bestemmelsen mulighed for at tage hensyn til, om der forud for adoptionen har været samvær mellem barnet og ansøgeren.

Med den foreslåede ændring vil det bl.a. blive muligt at fastsætte samvær mellem et helt lille barn og de oprindelige slægtninge efter bortadoption af barnet, selvom der ikke har været kontakt forud for adoptionen. I sådanne tilfælde forudsætter fastsættelse af samvær, at samværet kan foregå under betryggende forhold, eventuelt med professionel støtte, og at samværet vurderes at være bedst for barnet.

Bestemmelsen vil også omfatte situationer, hvor der hverken før eller efter adoptionen har været kontakt mellem barnet og ansøgeren, men hvor der i forhold til et større barn opstår et behov for eller ønske om kontakt, og en sådan kontakt vurderes at være bedst for barnet.”

Konventionsbestemmelser

Den Europæiske Menneskerettighedskonventions artikel 8 lyder således:

”*Ret til respekt for privatliv og familieliv*
Artikel 8
Stk. 1. Enhver har ret til respekt for sit privatliv og familieliv, sit hjem og sin korrespondance.
Stk. 2. Ingen offentlig myndighed må gøre indgreb i udøvelsen af denne ret, medmindre det sker i overensstemmelse med loven og er nødvendigt i et demokratisk samfund af hensyn til den nationale sikkerhed, den offentlige tryghed eller landets økonomiske velfærd, for at forebygge uro eller forbrydelse, for at beskytte sundheden eller sædeligheden eller for at beskytte andres rettigheder og friheder.”

Artikel 3, stk. 1, og artikel 9 i FN-konvention af 20. november 1989 om Barnets Rettigheder (FN’s Børnekonvention) lyder således:

”*Artikel 3*
Stk. 1. I alle foranstaltninger vedrørende børn, hvad enten disse udøves af offentlige eller private institutioner for socialt velfærd, domstole, forvaltningsmyndigheder eller lovgivende organer, skal barnets tarv komme i første række.
…

Artikel 9
Stk. 1. Deltagerstaterne skal sikre, at barnet ikke adskilles fra sine forældre mod deres vilje, undtagen når kompetente myndigheder, hvis afgørelser er undergivet retlig prøvelse, i overensstemmelse med gældende lov og praksis bestemmer, at en sådan adskillelse er nødvendig af hensyn til barnets tarv. En sådan beslutning kan være nødvendig i særlige tilfælde, f.eks. ved forældres misbrug eller vanrøgt af barnet, eller hvor forældrene lever adskilt og der skal træffes beslutning om barnets bopæl.
Stk. 2. I behandlingen af enhver sag i medfør af stykke 1 skal alle interesserede parter gives mulighed for at deltage i sagsbehandlingen og fremføre deres synspunkter.
Stk. 3. Deltagerstaterne skal respektere retten for et barn, der er adskilt fra den ene eller begge forældre, til at opretholde regelmæssig personlig forbindelse og direkte kontakt med begge forældre, undtagen hvis dette strider mod barnets tarv.
Stk. 4. Hvor en sådan adskillelse er en følge af en handling iværksat af en deltagerstat, såsom tilbageholdelse, fængsling, udvisning, forvisning eller død (herunder dødsfald af en hvilken som helst årsag, mens personen er i statens varetægt) af den ene eller begge forældre eller af barnet, skal deltagerstaten efter anmodning give forældrene, barnet eller om nødvendigt et andet medlem af familien de væsentlige oplysninger om, hvor den eller de fraværende medlemmer af familien befinder sig, medmindre afgivelsen af oplysningerne ville være skadelig for barnets velfærd. Deltagerstaterne skal desuden sikre, at fremsættelsen af en sådan anmodning ikke i sig selv medfører skadelige følger for vedkommende person eller personer.”

Artikel 23 i FN-konvention af 13. december 2006 om rettigheder for personer med handicap (FN’s handicapkonvention) lyder således:

”*Respekt for hjemmet og familien*
Artikel 23
Stk. 1. Deltagerstaterne skal træffe effektive og passende foranstaltninger til at afskaffe diskrimination af personer med handicap i alle forhold vedrørende ægteskab, familieliv, forældreskab og personlige forhold på lige fod med andre med henblik på at sikre:
1. anerkendelse af retten for alle personer med handicap i den giftefærdige alder til at indgå ægteskab og stifte familie på basis af de kommende ægtefællers frie og uforbeholdne samtykke,
2. anerkendelse af retten for personer med handicap til frit og under ansvar at bestemme antallet af deres børn og intervallerne mellem dem og til at få adgang til alderssvarende oplysninger samt undervisning om forplantning og familieplanlægning, samt at der sørges for de nødvendige midler til, at de kan udøve disse rettigheder,
3. at personer med handicap, herunder børn, bevarer deres fertilitet på lige fod med andre.

Stk. 2. Deltagerstaterne skal sikre de rettigheder og det ansvar, som hhv. tilkommer og påhviler personer med handicap, med hensyn til værgemål, formynderskab, adoption af

børn og lignende retsbegreber, såfremt disse retsbegreber findes i national lovgivning, dog således at barnets tarv altid er af altafgørende betydning. Deltagerstaterne skal yde passende bistand til personer med handicap ved disses udførelse af deres pligter som opdragere af børn.
Stk. 3. Deltagerstaterne skal sikre, at børn med handicap har lige rettigheder med hensyn til familieliv. Med henblik på at virkeliggøre disse rettigheder og forebygge, at børn med handicap skjules, forlades, vanrøgtes eller isoleres, forpligter deltagerstaterne sig til at give tidlige og omfattende oplysninger, tilbud og støtte til børn med handicap og deres familie.
Stk. 4. Deltagerstaterne skal sikre, at et barn ikke adskilles fra sine forældre mod deres vilje, undtagen når kompetente myndigheder, hvis afgørelser er undergivet retlig prøvelse, i overensstemmelse med gældende lov og praksis bestemmer, at en sådan adskillelse er nødvendig af hensyn til barnets tarv. Et barn må under ingen omstændigheder adskilles fra sine forældre på grund af, at enten barnet eller den ene eller begge forældre har et handicap.
Stk. 5. Deltagerstaterne skal, hvis den nærmeste familie ikke er i stand til at passe et barn med handicap, udfolde alle bestræbelser på at tilvejebringe alternativ pasning hos den fjernere familie eller, hvis dette ikke lykkes, i samfundet i familielignende omgivelser."

Praksis fra Den Europæiske Menneskerettighedsdomstol

Den Europæiske Menneskerettighedsdomstol har i en række sager taget stilling til, om adoption uden samtykke er forenelig med Menneskerettighedskonventionens artikel 8.

Menneskerettighedsdomstolens dom af 7. august 1996 i sagen Johansen mod Norge (nr. 17383/90) angik et barn, der blev tvangsfjernet umiddelbart efter fødslen, fordi moderen var ude af stand til at tage sig af det – navnlig på grund af psykisk sygdom. Moderen fik i den første tid samvær to gange ugentligt, men da barnet var ca. 6 måneder, besluttede myndighederne, at barnet skulle bortadopteres, og samværet blev standset. Menneskerettighedsdomstolen fandt, at beslutningen om bortadoption og nægtelsen af samvær udgjorde en krænkelse af Menneskerettighedskonventionens artikel 8. I dommen hedder det bl.a.:

"*I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)*
…

(ii) The deprivation of parental rights and access

74. In the applicant's and the Commission's opinion, taking into care should in principle be a temporary measure to be discontinued as soon as circumstances permit. The deprivation of the applicant's parental rights and access had a permanent character and could only be considered "necessary" within the meaning of Article 8 para. 2 (art. 8-2) if supported by particularly strong reasons. However, the applicant's state of health had not been such that she would have been permanently unable to care for her daughter. The

argument that the applicant might disturb the calm and stable foster-home environment could not be decisive as access arrangements could have been implemented outside the foster home. Having regard to the improvements in the applicant's situation and the irreversible effects which the deprivation of the applicant's parental rights and access had on her enjoyment of family life with her daughter, the measures could not be said to be justified.

75. In addition, the applicant disputed that the deprivation of her parental rights and access were in her daughter's interest. On the contrary, the mother's contact with her child during the period preceding her placement with the foster parents had been positive and such contact could have contributed to a stable development of the child's identity had it been allowed to continue. The applicant further stressed that the measures had not been based on proper and repeated reviews of the specific circumstances of her case but on a general and prevailing view that adoption offered better prospects for the child's welfare than long-term fostering. Having been taken primarily to facilitate adoption, the measures had seriously and permanently prejudiced the applicant's interests by depriving her of any prospects of being reunited with her daughter.

76. The Government argued that in cases such as the present one the necessity test to be applied under Article 8 of the Convention (art. 8), rather than attempting to strike a "fair balance" between the interests of the natural parent and those of the child, should attach paramount importance to the best interests of the child, a principle which was firmly rooted not only in the laws of the Council of Europe member States but also in the Organisation's own policies (see Council of Europe: Committee of Ministers Resolution (77) 33 on placement of children, adopted on 3 November 1977; 16th Conference of European Ministers of Justice, Lisbon, 21-22 June 1988, Conclusions and resolutions of the conference, pp. 5-6). In this connection the Government referred also to the preamble to the 1996 European Convention on the Exercise of Children's Rights and to Articles 3, 9 paras. 1 and 3, and 21 of the 1989 United Nations Convention on the Rights of the Child. In any event, so the Government submitted, Article 8 of the Convention (art. 8) should not be interpreted so as to protect family life to the detriment of the child's health and development.

77. In the instant case, they maintained, the reasons mentioned above for the taking into care and for maintaining the care decision concerned in force all suggested that it was necessary to place the child permanently in a foster home. There was strong scientific evidence indicating that the placement was more likely to be successful if the child was adopted by the foster parents.

Reuniting the applicant with her daughter would have required extensive preparation presupposing good cooperation between all the parties involved. However, the applicant had shown an extremely hostile attitude towards the child welfare authorities in Bergen and had actively obstructed their implementation of the care decision in respect of her son by attempting to take him with her to Oslo. The competent authorities had therefore considered that there was a danger that she might disturb the daughter's development in the foster home and try to abduct her if given access. In these circumstances, having regard to their margin of appreciation, the relevant authorities were entitled to think that it was necessary for the protection of the child's best interests to deprive the applicant of her parental rights and access.

78. The Court considers that taking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit and that any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child (see, in particular, the above-mentioned Olsson (no. 1) judgment, p. 36, para. 81). In this regard, a fair balance 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 (see, for instance, the above-mentioned Olsson (no. 2) judgment, pp. 35-36, para. 90; and the above-mentioned Hokkanen judgment, p. 20, para. 55). In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, as suggested by the Government, the parent cannot be entitled under Article 8 of the Convention (art. 8) to have such measures taken as would harm the child's health and development.

In the present case the applicant had been deprived of her parental rights and access in the context of a permanent placement of her daughter in a foster home with a view to adoption by the foster parents (see paragraphs 17 and 22 above). These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests (see, mutatis mutandis, the Margareta and Roger Andersson judgment cited above, p. 31, para. 95).

79. The question whether the deprivation of the applicant's parental rights and access was justified must be assessed in the light of the circumstances obtaining at the time when the decisions were taken and not with the benefit of hindsight. That question must moreover be considered in the light of the reasons mentioned in paragraphs 71 to 73 above for taking the daughter into care and for maintaining the care decision in force.

80. It is also relevant that it was in the child's interest to ensure that the process of establishing bonds with her foster parents was not disrupted. As already mentioned, the girl, who had been taken into care shortly after birth and had already spent half a year with temporary carers before being placed in a long-term foster home, was at a stage of her development when it was crucial that she live under secure and emotionally stable conditions. The Court sees no reason to doubt that the care in the foster home had better prospects of success if the placement was made with a view to adoption (see paragraphs 17 and 27 above). Furthermore, regard must be had to the fact that the child welfare authorities found that the applicant was not "particularly motivated to accept treatment" (see paragraph 17 above) and even feared that she might take her daughter away; for instance, she had on one occasion tried to disappear with her son and on another occasion she had failed to inform the authorities that he had run away from the children's home to join her (see paragraph 16 above).

81. In the Court's opinion, the above considerations were all relevant to the issue of necessity under paragraph 2 of Article 8 (art. 8-2). It remains to be examined whether they were also sufficient to justify the Committee's decision of 3 May 1990 to cut off the contact between the mother and the child (see paragraphs 17 and 22 above).

82. In the first place, it must be observed that during the period between the birth of the applicant's daughter on 7 December 1989 and the Committee's decision of 3 May 1990, the applicant had had access to her child twice a week in a manner which does not appear to be open to criticism (see paragraph 16 above).

83. Secondly, as indicated in the Committee's decision of 3 May 1990, the applicant's lifestyle had by then already somewhat changed for the better (see paragraph 17 above).

It was rather the difficulties experienced in the implementation of the care decision concerning her son which provided the reason for the authorities' view that the applicant was unlikely to cooperate and that there was a risk of her disturbing the daughter's care if given access to the foster home (see paragraphs 16 and 17 above).

However, it cannot be said that those difficulties and that risk were of such a nature and degree as to dispense the authorities altogether from their normal obligation under Article 8 of the Convention (art. 8) to take measures with a view to reuniting them if the mother were to become able to provide the daughter with a satisfactory upbringing.

84. Against this background, the Court does not consider that the decision of 3 May 1990, in so far as it deprived the applicant of her access and parental rights in respect of her daughter, was sufficiently justified for the purposes of Article 8 para. 2 (art. 8-2), it not having been shown that the measure corresponded to any overriding requirement in the child's best interests (see paragraph 78 above). Therefore the Court reaches the conclusion that the national authorities overstepped their margin of appreciation, thereby violating the applicant's rights under Article 8 of the Convention (art. 8).

In this connection it should be noted that less than a year after 3 May 1990 the City Court found that the applicant's material conditions had improved to the point where she would have been able to provide her daughter with a satisfactory upbringing. An important consideration for the City Court in refusing to terminate care was the lack of contact between the applicant and her daughter pending the proceedings, which state of affairs resulted directly from the decision of 3 May 1990 to deprive the applicant of her access (see paragraph 27 above)."

Menneskerettighedsdomstolens dom af 28. oktober 2010 i sagen Aune mod Norge (nr. 52502/07) angik et barn, der i en alder af 6 måneder blev anbragt i pleje. Da barnet var 7 år, blev det af de sociale myndigheder frigivet til bortadoption og blev herefter adopteret af dets plejeforældre, som barnet havde boet hos, siden barnet var omkring 1 år og 8 måneder. Menneskerettighedsdomstolen fandt, at der ikke forelå en krænkelse af Menneskerettighedskonventionens artikel 8. I dommen hedder det bl.a.:

"*I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION*

69. The Court observes in particular that A, who is now aged twelve, has been in foster care practically all his life. He has never lived with the applicant except for the first six

months of his life, during which he was neglected. During the next five years she saw him on six of the fifteen opportunities offered, and for approximately a year she did not see him because of her drug abuse problem. In the autumn of 2003 contact resumed and in 2004 it became regular. She met A once in 2005, twice in 2006 and likewise thereafter. Thus the social ties between the applicant and A have been very limited. This must have implications for the degree of protection that ought to be afforded to her right to respect for family life under paragraph 1 of Article 8 when assessing the necessity of the interference under paragraph 2 (see Chepelev v. Russia, no. 58077/00, § 28, 26 July 2007; Johansen (dec.), cited above; and Söderbäck v. Sweden, 28 October 1998, § 32, Reports of Judgments and Decisions 1998-VII).

70. Furthermore, as observed by Mrs Justice Coward and as has already been mentioned above, A's foster home placement had been of a long term character and was intended to last for a long period. According to the court-appointed expert, A had no real attachment to his biological parents. On the basis of expert assessments, the County Board and the national courts found that A had been a vulnerable child since his first year, born seven weeks prematurely, exposed to aggravated ill-treatment several times and to the burden of being moved several times during the first months of his life. Because of this he had a significant need for security, notably to be certain about his belonging to his foster parents, which was likely to increase as he grew up. His need for absolute emotional security would become crucial as he became aware of the fact that both his mother and father had been heavy drug abusers, that they were undergoing methadone treatment, that he had been exposed to serious ill-treatment and that the parents had been suspected of this, as well as the fact that the father had spent more than six years in prison. All these elements had to be integrated into his identity.

71. The Court also notes that A's particular need for security had been significantly challenged by the applicant's wishing A to live with her father and his cohabitant and by the great disturbance around his placement with his foster parents. The Court has taken note of the applicant's submissions that she had accepted that A's foster home placement was long term. According to her, there had been no disturbance around the foster home placement since 2003, except for the disturbance created by the adoption proceedings. She had stated clearly that she would not seek to have A returned to live with her and that she considered it was in his best interest to grow up in the foster home. There was no risk that the earlier conflicts would resume. However, from the material submitted and her lawyer's pleadings to the Court, it appears that there is still a latent conflict which could erupt into challenges to A's particular vulnerability and need for security. Adoption would seem to counter such an eventuality.

72. Moreover, for the reasons set out in paragraph 60 of the Supreme Court's judgment (quoted in paragraph 38 above), the Court sees no reason to doubt that the impugned measures corresponded to A's wishes.

73. In view of the above, the Court is satisfied that there were such exceptional circumstances in the present case as could justify the measures in question (see Johansen, cited above).

74. A particular issue arose with regard to contact: whilst it was undisputed that contact between A and the applicant (and his brother) was desirable, in the event of adoption the applicant would no longer have a legal right of contact with A.

75. On this point Mrs Justice Coward emphasised that the foster parents had facilitated contact with the biological family far beyond their entitlements, both as regards the circle of persons and the extent of the contact. The applicant had at earlier periods not been fit to have contact, which could not be attributed to the foster parents. G. had not wished to have contact as long as his situation was characterised by drug abuse and crime. His mother and grandparents were on good terms with the foster parents and had kept in contact with them and with A.

76. As to the doubt raised by the applicant about whether the foster parents would continue to be open to contact, Mrs Justice Coward pointed out that the County Board, the City Court, the High Court and the court-appointed experts who had heard the foster parents had found with great, almost absolute, certainty that this openness would continue. Agreeing with this finding, Mrs Justice Coward considered that the fact that contact rights as such would disappear as a result of adoption could not carry great weight in the assessment of A's best interest.

77. The applicant laid great stress in her pleadings to the Court on her argument that the above assumption had been erroneous. However, the Court is unable to agree with this argument. Contact did take place twice in 2007 (before and after the Supreme Court's judgment of 20 April 2007), in 2008 and in 2009, and included overnight visits to A's home and the applicant's home, several times in the presence of B and the applicant's mother. In the Court's view, the fact that the level of contact after the Supreme Court judgment corresponded to that which had existed before, clearly confirms the correctness of the national assessment as to A's foster parents' openness to continued contact. This is not undermined by the applicant's various submissions to the effect that the contact arrangements proposed did not always meet her expectations and demands.

78. Against this background, it appears that the disputed measures did not in fact prevent the applicant from continuing to have a personal relationship with A and did not result in "cutting him off from his roots" with respect to contact with his biological mother. In the Court's view, the relevant national authorities could reasonably consider that the applicant's interest in maintaining a legal right of contact was outweighed by the interest in authorising adoption.

79. Having regard to the circumstances of the case as a whole, the Court is satisfied that the decision to deprive the applicant of parental responsibilities and to authorise the adoption was supported by relevant and sufficient reasons and, bearing in mind the national margin of appreciation, was proportionate to the legitimate aim of protecting A's best interests."

Menneskerettighedsdomstolens dom af 31. maj 2011 i sagen R & H mod United Kingdom (nr. 35348/06) angik et barn, der blev tvangsfjernet umiddelbart efter fødslen. Da barnet var ca. 1 år, indledte myndighederne en sag om frigivelse af barnet til bortadoption. Spørgsmålet i sagen var bl.a., hvilken betydning muligheden for efterfølgende samvær havde for beslutningen om frigivelse til bortadoption. Under sagen for de nationale domstole afgav en ekspert

(professor Triseliotis) forklaring. Han anbefalede, at der burde være samvær mellem barnet og de biologiske forældre efter en adoption, og at adoptionsmyndighederne skulle gøre alt, hvad der var muligt, for at finde adoptivforældre, der var indstillet på et sådant samvær. Hvis dette inden for en periode på seks måneder ikke viste sig at være muligt, anbefalede han dog, at barnet alligevel blev frigivet til adoption. Den nationale domstol besluttede at frigive barnet til adoption uden at afvente, at der blev fundet adoptanter, som var indstillet på samvær, men den myndighed, som skulle gennemføre adoptionen, tilkendegav, at den ville bestræbe sig på at finde adoptanter, som var indstillet på samvær.

Menneskerettighedsdomstolen fandt, at der ikke forelå en krænkelse af artikel 8, og udtalte bl.a.:

> "2. The Court's assessment
> …
>
> 73. The Court has observed that the applicants' complaints relate to both the procedural and substantive requirements of Article 8 (see paragraph 57 above) and it will examine each in turn. At the outset, however, the Court wishes to underline that, in all decisions concerning children, their best interests must be paramount. As the Grand Chamber recently observed in Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 136, 6 July 2010:
>
> > "The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows 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 [Gnahoré v. France, no. 40031/98, § 59, ECHR 2000-IX] On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see, among many other authorities, Elsholz v. Germany [GC], no. 25735/94, § 50, ECHR 2000-VIII, and Maršálek v. the Czech Republic, no. 8153/04, § 71, 4 April 2006)."
>
> …
>
> *b. The substantive requirements of Article 8*
> 81. In assessing whether the freeing order was a disproportionate interference with the applicants' Article 8 rights, the Court must consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention (see, among other authorities, K and T. v. Finland [GC], no. 25702/94, § 154, ECHR 2001-VII).
>
> In carrying out that assessment, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned, often at the very stage

when care measures are being envisaged or immediately after their implementation. The Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the public care of children and the rights of parents whose children have been taken into care, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 201, ECHR 2000-VIII; Johansen v. Norway, 7 August 1996, § 64, Reports of Judgments and Decisions 1996 III). Those considerations also apply to the making of adoption orders and issues of post-adoption contact (G.H. B. v. the United Kingdom (dec.), no. 42455/98, 4 May 2000).The Court would also recall that, while national authorities enjoy a wide margin of appreciation in deciding whether a child should be taken into care, stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed (see Elsholz v. Germany [GC], no. 25735/94, § 49, ECHR 2000-VIII, and Kutzner v. Germany, no. 46544/99, § 67, ECHR 2002-I). For these reasons, measures which deprive biological parents of the parental responsibilities and authorise adoption should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests (see Aune v. Norway, no. 52502/07, § 66, 28 October 2010; Johansen, cited above, § 78 and, mutatis mutandis, P., C. and S. v. the United Kingdom, no. 56547/00, § 118, ECHR 2002-VI). However, mistaken judgments or assessments by professionals do not per se render childcare measures incompatible with the requirements of Article 8 of the Convention. The authorities, both medical and social, have duties to protect children and cannot be held liable every time genuine and reasonably held concerns about the safety of children vis-à-vis members of their family are proved, retrospectively, to have been misguided (R.K. and A.K. v. the United Kingdom, no. 38000/05, § 36, 30 September 2008).
…

87. On the issue of post-adoption contact, the Court finds some force in the applicants' submission that the High Court should have followed Professor Triseliotis's advice and given the Trust six months to find suitable adopters before making the freeing order: it is not apparent from the High Court's judgment why this course of action was rejected. However, in the Court's view, any failing on the part of the High Court was remedied by the approach taken by the Court of Appeal, which made clear its views that post-adoption contact was in N's interests and that the Trust should make every effort to find prospective adopters who would agree to such contact. Lord Justice Nicholson's direction that Lord Justice Campbell should preside at the adoption order hearing was made precisely in order to ensure that the Trust made those efforts. It cannot be said, therefore, that the domestic courts allowed N to be freed for adoption without proper regard for the fact that her interests, and those of the applicants, were best served by post-adoption contact.

88. Finally, the efforts of the domestic courts to ensure that the Trust found suitable prospective adopters also means that the Court should attach less weight to the applicants' submissions that first, they could not be criticised for not consenting to an adoption when that adoption might have put an end to any prospect of rehabilitation and

second, they were justified in refusing to consent to the order without proper guarantees that contact would be maintained. As to the first submission, it is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that she be placed permanently in a new family. Article 8 does not require that domestic authorities make endless attempts at family reunification; it only requires that they take all the necessary steps that can reasonably be demanded to facilitate the reunion of the child and his or her parents (Pini and Others v. Romania, nos. 78028/01 and 78030/01, § 155, ECHR 2004-V (extracts)). Equally, the Court has observed that, when a considerable period of time has passed since a child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited (see, mutatis mutandis, K. and T. v. Finland, cited above, § 155; Hofmann v. Germany (dec.), no. 66516/01, 28 August 2007). Similar considerations must also apply when a child has been taken from his or her parents. As to the second submission, had the position of the Trust not changed in the course of the proceedings, and had the domestic courts not clearly expressed their preference for post-adoption contact, the Court might have seen greater force in the applicants' submission that they were acting reasonably in refusing to agree to adoption. However, the manner in which the freeing proceedings evolved demonstrates to the Court's satisfaction that, once the domestic courts had concluded that adoption was in N's best interests, they were also entitled to conclude that any reasonable parent who paid regard to their child's welfare would have consented to the adoption. That conclusion was well within the margin of appreciation that domestic courts enjoy in such cases.

89. For the foregoing reasons, the Court concludes that the reasons given by the domestic courts for the freeing order were relevant and sufficient. The freeing order was therefore a proportionate interference with the applicants' Article 8 rights."

Menneskerettighedsdomstolens dom af 13. marts 2012 i sagen Y.C. mod United Kingdom (nr. 4547/10) angik et barn, der som 7-årig blev tvangsfjernet, hvorefter myndighederne indledte en adoptionssag. Barnet blev anbragt hos den familie, der skulle adoptere barnet, og samværet med de biologiske forældre blev afbrudt. Menneskerettighedsdomstolen fandt, at der ikke forelå nogen krænkelse af artikel 8. Vedrørende baggrunden for den nationale domstols afslag på samvær efter adoptionen fremgår det af dommen:

"*B. The domestic proceedings*
…
5. Subsequent events
…
91. On 5 May 2010 the applicant made an application to the court for contact with K. pursuant to section 26(3) of the 2002 Act (see paragraph 102 below). This was refused on 16 September 2010. No court decision has been submitted to the Court but it appears that there were ongoing concerns about the level of the parents' separation. In a statement to the court the social worker said that K. was forming a positive attachment to his prospective adopter and that he had unhappy memories of his life with his parents. In

> her professional opinion direct contact would undoubtedly cause K. stress and anxiety which would impact on the stability of his placement. The guardian filed a report along similar lines. It is unclear whether the applicant sought leave to appeal."

Menneskerettighedsdomstolen udtalte i sin begrundelse for, at der ikke forelå en krænkelse, bl.a.:

> "*2. The Court's assessment*
> …
> *a. General principles*
> …
> 134. The Court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount (see Johansen v. Norway, 7 August 1996, § 78, Reports of Judgments and Decisions 1996-III; Kearns v. France, no. 35991/04, § 79, 10 January 2008; and R. and H., cited above, §§ 73 and 81). In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and second, it is in the child's best interests to ensure his development in a safe and secure environment (see Neulinger and Shuruk, cited above, § 136; and R. and H., cited above, §§ 73-74). It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to "rebuild" the family (see Neulinger and Shuruk, cited above, § 136; and R. and H., cited above, § 73). It is not enough to show that a child could be placed in a more beneficial environment for his upbringing (see K and T., cited above, § 173; and T.S. and D.S., cited above). However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under Article 8 to insist that such ties be maintained (see Neulinger and Shuruk, cited above, § 136; and R. and H., cited above, § 73).
> …
>
> *b. Application of the general principles to the facts of the case*
> …
>
> 146. … While, as the Court has explained above, it is in a child's best interests that his family ties be maintained where possible, it is clear that in K.'s case this was outweighed by the need to ensure his development in a safe and secure environment…"

Menneskerettighedsdomstolens dom af 30. november 2017 i sagen Strand Lobben m.fl. mod Norge (nr. 37283/13) angik bortadoption af et spædbarn. Moderen og barnet blev efter fødslen placeret på en familieinstitution, men barnet blev tvangsfjernet efter ca. 3 uger, idet moderen efter institutionens opfattelse ikke var i stand til at varetage omsorgen for barnet og derved bragte det i livsfare. Moderen fik efterfølgende samvær 6 gange 2 timer om året. Samværet blev senere udvidet, men da det forløb dårligt, fandt myndighederne, at samværet var til skade for barnet. Da barnet var ca. 3 år, blev der truffet beslutning om, at plejeforældrene

skulle adoptere barnet. Menneskerettighedsdomstolen fandt med stemmerne 4-3, at der ikke forelå en krænkelse af artikel 8. I dommen, der endnu ikke er endelig, idet den ved beslutning af 9. april 2018 er henvist til Menneskerettighedsdomstolens Storkammer, udtaler flertallet bl.a.:

> *"2. The Court's assessment*
> …
>
> *(b) Proportionality*
> *(i) General principles*
>
> 104. The margin of appreciation so 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, such as, on the one hand, the importance of protecting a child in a situation which is assessed as seriously threatening his or her health or development and, on the other hand, the aim to reunite the family as soon as circumstances permit. When a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited. The Court thus recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by the authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed (see K. and T. v. Finland, cited above, § 155).
> …
>
> 106. In cases where the authorities have decided to replace a foster home arrangement with a more far-reaching measure, such as deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicants' legal ties with the child have been broken, the Court will still apply its case-law according to which "such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests" (see, for example, Johansen, cited above, § 78, and Aune, cited above, § 66). It should also be reiterated that in Gnahoré v. France, no. 40031/98, § 59, ECHR 2000 IX; see also Görgülü v. Germany, no. 74969/01, § 48, 26 February 2004), the Court held:
>
> > "it is clear that it is equally in the child's interest for its ties with its family to be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots. It follows that the interest of the child dictates 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."

107. As to the decision-making process under Article 8, what has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests and have been able fully to present their case. Thus it is incumbent upon the Court to ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what would be the best solution for the child. In practice, there is likely to be a degree of overlap in this respect with the need for relevant and sufficient reasons to justify a measure in respect of the care of a child (see, inter alia, *Y.C. v. the United Kingdom*, cited above, § 138).

108. Where children are involved, their best interests must be taken into account. The Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see, among other authorities, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, ECHR 2010). Indeed, the Court has emphasised that in cases involving the care of children and contact restrictions, the child's interest must come before all other considerations (see *Jovanovic v. Sweden*, no. 10592/12, § 77, 22 October 2015, and Gnahoré, cited above, § 59).

109. The best interests of the child dictate, on the one hand, that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development (see, among many other authorities, *Neulinger and Shuruk*, cited above, § 136). When a "considerable period of time" has passed since the child was first placed in care, the child's interest in not undergoing further de facto changes to its family situation may prevail over the parents' interest in seeing the family reunited (see K. and T. v. Finland, § 155, cited at paragraph 104 above, and, for instance, Kutzner, cited above, § 67). It is also recalled that, in R. and H. v. the United Kingdom, no. 35348/06, § 88, 31 May 2011, the Court held:

> "... it is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that she be placed permanently in a new family. Article 8 does not require that domestic authorities make endless attempts at family reunification; it only requires that they take all the necessary steps that can reasonably be demanded to facilitate the reunion of the child and his or her parents (Pini and Others v. Romania, nos. 78028/01 and 78030/01, § 155, ECHR 2004 V (extracts)). Equally, the Court has observed that, when a considerable period of time has passed since a child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited (see, mutatis mutandis, K. and T. v. Finland, cited above, § 155; Hofmann v. Germany (dec.), no. 66516/01, 28 August 2007). Similar considerations must also apply when a child has been taken from his or her parents."

110. In determining whether the reasons for the impugned measures were relevant and sufficient for the purpose of paragraph 2 of Article 8 of the Convention, the Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area. However, consideration of what is in the best interests of the child is in every case of crucial importance. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned, often at the very stage when care measures are being envisaged or immediately after their implementtation. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the care of children and the rights of parents whose children have been taken into local authority care, but rather to review under the Convention the decisions taken by those authorities in the exercise of their power of appreciation (see, for example*, K. and T. v. Finland, cited above, § 154).*

…

(ii) Application of those principles to the present case
…

(y) The decision to remove the first applicant's parental authority and to authorise the adoption
…

122. Authorising the adoption meant that X would lose his legal ties to his biological mother. In that respect, the City Court took account, however, of how, despite the first three weeks with the first applicant and the many subsequent contact sessions, X had not bonded psychologically with the first applicant, despite having been told that she was his biological mother (see paragraph 58 above). Moreover, the City Court emphasised that X was three and a half years old at the time of the decision to authorise adoption and had lived in his foster home since he was three weeks old. His fundamental attachment in the social and psychological sense was to his foster parents (see paragraph 57 above)

123. In essence, the above remarks show that the City Court found that the social ties between X and the first applicant were very limited. The Court has previously held that a finding to that effect had to have implications for the degree of protection that ought to be afforded to the applicant's right to respect for her family life under paragraph 1 of

Article 8 when assessing the necessity of the interference under paragraph 2 (see *Aune*, cited above § 69, with further references to, *inter alia*, *Johansen v. Norway* (dec.), cited above). In the instant case, the City Court also emphasised that if the adoption were not authorised, it was in any event envisaged that X's placement in foster care would be long-term (see paragraph 57 above and also *Aune*, cited above, §§ 70-71).

124. As to the specific issue of contact between X and the first applicant, the Court has observed that the City Court did not fix any such legal rights, nor was it competent to do so (see paragraph 61 above). The adoption thus implied that the first applicant and X no longer had any legal rights to access each other. The City Court took into account, however, that although the established access arrangements had been far from successful, the foster parents were nevertheless willing to let X contact the first applicant if he so wished (see paragraph 59 above). In the Court's view, it is less certain what may be inferred from the foster parents "openness to continued contact" in the present case compared to in that of *Aune*, cited above, §§ 74-78. The Court still considers that it was not an irrelevant matter.

…

129. Against the above background, the Court observes that the City Court was faced with the difficult and sensitive task of striking a fair balance between the relevant competing interests in a complex case. It was clearly guided by the interests of X, notably his particular need for security in his foster-home environment, given his psychological vulnerability. Taking also into account the City Court's conclusion that there had been no positive development in the first applicant's competence in contact situations throughout the three years in which she had had rights of access (see para-graph 51 above); that the decision-making process was fair (see paragraph 112 above), and having regard to the fact that the domestic authorities had the benefit of direct contact with all the persons concerned (see paragraph 110 above), the Court is satisfied that there were such exceptional circumstances in the present case as could justify the mea-sures in question and that they were motivated by an overriding requirement pertaining to X's best interests (see paragraphs 106 and 119 above).

(iii) Conclusion as to merits

130. In light of the foregoing (see, in particular, paragraphs 112, 117 and 129 above), there has been no violation of Article 8 of the Convention."

Mindretallet, som fandt, at der var sket en krænkelse af artikel 8, udtalte bl.a.:

"IV. Whether in the present case the standards established in the case-law were met?

17. In our view, it has not been demonstrated in the instant case that the relevant standards in relation to adoption have been met.

18. As a preliminary point, it is stated in the majority judgment that it is not for the Court to assess whether there were relevant and sufficient reasons for placing X in care first as an emergency measure and subsequently for a longer period. While this is, strictly speaking, true (the first applicant's complaint relates to the child's adoption), it cannot be forgotten that those decisions fed inexorably into the decisions leading to adoption, created the passage of time so detrimental to the reunification of a family unit, influenced the assessment over time of the child's best interests and, crucially, placed the

first applicant in a position which was inevitably in conflict with that of the authorities which had ordered and maintained the placement and with the foster parents, whose interest lay in promoting the relationship with the child with a view ultimately to adopting him. It is not our purpose, in this dissent, to call into question the decisions of the domestic authorities regarding placement given the evidence that the first applicant, particularly as the aforementioned conflict spiralled, had difficulty placing the interests, experience and perceptions of the child above her own loss. However, it is not possible to ignore the sequence of events which preceded and led to the adoption and in the context of which that conflict appeared to grow. As the general principles outlined above clearly state, a care order should be regarded as a temporary measure to be discontinued as soon as possible where circumstances permit and States have a positive duty to facilitate reunification.

19. As regards the deprivation of the first applicant's parental responsibility with a view to authorising adoption, the majority judgment endorses the City Court decision of 22 February 2012 according to which there were "particularly weighty reasons" to allow the latter (§ 120 of the majority judgment). Those reasons emerge in the majority judgment as follows:

20. Firstly, the fundamental and psychological attachment of X to his foster parents given the length of time spent with them and the lack of psychological attachment to his mother despite the many contact sessions is considered important (§ 122 of the majority judgment). Relying on Aune v. Norway, the majority held that those limited social ties between biological mother and child "had to have implications for the degree of protection that ought to be afforded to the first applicant's right to respect for her family life" (§ 123 of the majority judgment).

21. Although the adoption meant that the first applicant and X no longer had any legal rights to access each other, the majority pointed secondly to the City Court's reference to the willingness of the foster parent's "to let X contact the first applicant if he so wished" (§§ 59 and 124 of the majority judgment). For the majority, this did not correspond to the guaranteed access at issue in Aune, where no violation of Article 8 in an adoption context had been found. However, the willingness of the foster parents is nevertheless considered either a relevant or a sufficient reason in the instant case.

22. Thirdly, throughout the decisions of the domestic authorities and the majority judgment, X's vulnerability is referred to. In the Board's decision of 2011 authorising adoption, it is stated that the Board "finds it reasonable to assume that X is a particularly vulnerable child" (§ 43 of the majority judgment).

The child welfare authorities, in their opposition to the first applicant's appeal against the adoption report him as being a vulnerable child (ibid, § 46), a description also used by the City Court (ibid, §§ 49 and 57). The majority judgment refers to these sources and concludes that the City Court was guided by the interests of X, notably his particular need for security in the foster-home environment given his "psychological vulnerability" (ibid, §§ 125 and 129).

23. Finally, the tension and conflict during contact sessions between the first applicant, the authorities and the foster mother and the child's reaction to the latter, which were relied on by the domestic authorities to extend the placement in care, are also relied on to justify deprivation of parental responsibilities and adoption. Once again relying on Aune, adoption was seen as a means to counter such risks of latent conflict.

24. Given the legal and social effects of adoption, its irreversibility and the exceptional circumstances standard announced in the Court's case-law and ostensibly adhered to in the instant case, do these factors suffice? In addition, are there other factors absent from the majority's assessment given the material in the case file?

(1) As regards the lack of social and/or psychological ties between the biological mother and the child, while the former was clearly at least partly responsible for the quality of the contact sessions which took place, a mother who has been deprived of access to her child, aged three weeks, albeit for legitimate reasons, is held solely responsible for the inevitable decrease and even degradation in their social ties. Norwegian access rights are notably restrictive and limited access rights have a particularly detrimental impact in the first weeks, months and years of life. By April 2010, the first applicant's contact rights had been reduced to four two-hour visits per year. In addition, reliance on Aune v. Norway is relevant only to a certain extent and should have been very clearly qualified in our view. In that case the child who was later the subject of adoption proceedings aged 12 years had been placed in care aged six months following serious physical and psychological abuse which had culminated in a brain haemorrhage. His parents, both drug users, continued to abuse drugs after his placement. His biological mother frequently failed to attend contact sessions and disappeared entirely for one year. In contrast, while there is no doubt that the first applicant neglected her child in the first weeks of its life, it is difficult not to see very fundamental differences between the factual matrix in Aune, where some of the legal principles applied by the majority in this case were developed, and the actions of the first applicant and her extended family since X was first removed from their care.

(2) It is undisputed that the adoption put an end to the legal ties between the biological mother and the child and the access rights of both. It therefore seems extraordinary that the foster parents' willingness to contemplate contact "if the child so wished" is factored into the legal assessment given that this willingness had no legally binding force and that the child in question was aged three and a half years at the relevant time. Reference is made to the provision in Norwegian law for a form of open adoption but there is no discussion of the need for the formal consent of the adoptive parents to such an arrangement or their ability to withdraw it. Aune is once again relied on, this time to highlight a fundamental difference between the two cases – in Aune contact had been guaranteed and willingness proved. However, this difference is dismissed as not relevant."

Anbringender

B har supplerende anført bl.a., at bortadoptionen er i strid med Den Europæiske Menneskerettighedskonventions artikel 8, FN's Børnekonventions artikel 9 og FN's Handicapkonventionens artikel 23.

Det følger af praksis fra Den Europæiske Menneskerettighedsdomstol, at medlemsstaterne ved adoption uden samtykke ikke har samme skønsmargin – som ved anbringelse uden for hjemmet – til at vurdere, om indgrebet er nødvendigt. Bortadoptionen er unødvendig, og Statsforvaltningen har ved sin afgørelse handlet uden for den skønsmargin, der tilkommer den efter Menneskerettighedskonventionens artikel 8.

Myndighederne har ved deres tilrettelæggelse af sagsbehandlingen forsøgt at sikre, at betingelserne for bortadoption ville blive opfyldt. Dette ved at tvangsfjerne barnet kort tid efter fødslen og herefter først etablere samvær med forældrene efter ca. et halvt år, hvorved relationen mellem barnet og forældrene reelt blev afbrudt. En sådan bevidst tilrettelæggelse af sagsbehandlingen med henblik på at sikre, at betingelserne for bortadoption blev opfyldt, er ulovlig.

Menneskerettighedskonventionens artikel 8 skal fortolkes i lyset af FN's Børnekonventions artikel 9, hvorefter myndighederne er forpligtet til at opretholde en regelmæssig, personlig forbindelse mellem barnet og forældrene fra fødslen og fremefter. Statsforvaltningens undladelse heraf er en krænkelse af såvel Menneskerettighedskonventionens artikel 8 som Børnekonventionens artikel 9.

Den omstændighed, at der – efter at der er truffet beslutning om bortadoption uden samtykke – efter forældreansvarslovens § 20 a i princippet er mulighed for at etablere samvær mellem barnet og de oprindelige forældre, er uden betydning for lovligheden af Statsforvaltningens afgørelse, idet spørgsmålet om samvær ikke som et vilkår eller på anden måde indgår ved afgørelsen af, om der er grundlag for bortadoption uden samtykke efter adoptionslovens § 9, stk. 2 og 3. Forældreansvarslovens § 20 a giver i øvrigt ikke de oprindelige forældre nogen ret til samvær, da samvær efter bestemmelsen alene tillades "i helt særlige tilfælde".

Statsforvaltningen har på trods af, at bevillingen om bortadoption blev givet den 19. juni 2018, endnu ikke taget stilling til, om der kan etableres samvær i medfør af forældreansvarslovens § 20 a.

Menneskerettighedskonventionens artikel 8 skal endvidere fortolkes i lyset af FN's Handicapkonventions artikel 23, hvorefter medlemsstaterne er forpligtet til om muligt at sikre handicappede personer retten til at udøve et familieliv med relevant støtte. Denne forpligtelse har Statsforvaltningen ikke iagttaget i tilstrækkeligt omfang ved som sket alene at yde støtte under samvær og ved at tildele en støtteperson efter servicelovens § 54, stk. 1. Han er dermed i strid med Handicapkonventionens artikel 23 blevet adskilt fra barnet på grund af sit handicap.

A har supplerende anført bl.a., at bortadoptionen er i strid med Den Europæiske Menneskerettighedskonventions artikel 8, idet båndet mellem forældre og børn alene i ekstremt exceptionelle tilfælde og under tvingende hensyn kan brydes. Sådanne helt exceptionelle omstændigheder foreligger ikke.

Sagsbehandlingen har været præget af, at myndighederne stedse har arbejdet for, at barnet skulle bortadopteres. Dette ved først at afbryde og efterfølgende at minimere samværet samt ved at gennemføre tvangsadoptionen, inden Højesteret har haft lejlighed til at tage stilling til lovligheden af Statsforvaltningens afgørelse af 25. april 2017 om bortadoption. En sådan tilrettelæggelse af sagsbehandlingen med henblik på at skabe rammerne for bortadoption er ulovlig.

Statsforvaltningen har på trods af, at bevillingen om bortadoption blev givet den 19. juni 2018, endnu ikke taget stilling til, om der kan etableres samvær med barnet.

Statsforvaltningen har supplerende anført bl.a., at afgørelsen af 25. april 2017 om adoption ikke er i strid med hverken Den Europæiske Menneskerettighedskonvention, FN's Børnekonvention eller FN's Handicapkonvention.

Det krav, som er etableret i praksis fra Den Europæiske Menneskerettighedsdomstol vedrørende Menneskerettighedskonventionens artikel 8, hvorefter der skal foreligge helt exceptionelle omstændigheder før der kan ske adoption uden samtykke, er opfyldt, idet begge biologiske forældre varigt er ude af stand til at varetage omsorgen for barnet, og idet adoption under hensyn til kontinuiteten og stabiliteten er bedst for barnet.

Barnets bedste kan ikke konkret tilgodeses i tilstrækkelig grad ved en tvangsmæssig anbringelse efter serviceloven. En tvangsmæssig anbringelse vil indebære, at barnet vil blive placeret hos en plejefamilie, der mod betaling skal sørge for hende, og som vil kunne opsige plejeforholdet. Barnet vil således ikke få mulighed for at udvikle grundlæggende familiemæssige relationer, som er af afgørende betydning for hendes trivsel og udvikling.

De familiemæssige relationer, som A og B ville kunne tilbyde i forbindelse med samvær, særligt henset til deres muligheder for følelsesmæssigt at tilgodese barnets behov, er utilstrækkelige. Hertil kommer, at en hjemgivelse af barnet må anses for at være helt urealistisk.

Ved vurderingen af, om adoptionen er i overensstemmelse med Menneskerettighedskonventionen, skal det i øvrigt tillægges betydning, at adoptionen ikke nødvendigvis medfører, at kontakten mellem A og B og barnet ophører, jf. forældreansvarslovens § 20 a om adgang til samvær efter bortadoption. Statsforvaltningen har endnu ikke truffet afgørelse herom.

Indgrebet er på baggrund af det anførte både nødvendigt og proportionalt og dermed ikke i strid med Menneskerettighedskonventionens artikel 8.

Der foreligger af samme grunde ikke nogen krænkelse af FN's Børnekonvention, der bestemmer, at børn kan adskilles fra deres forældre og kontakt afbrydes, når det er nødvendigt af hensyn til barnets tarv.

Handicapkonventionens artikel 23 forpligter deltagerstaterne til at støtte forældre, så de kan udfylde deres forældrerolle, og sikre, at forældre med handicap ikke får frataget deres forældremyndighed udelukkende med henvisning til deres handicap. Bestemmelsen indebærer imidlertid ikke en forpligtelse til at afprøve eller forsøge at afprøve støtteforanstaltninger, når det i det hele er urealistisk, at foranstaltninger skulle kunne sætte forældrene i stand til at udfylde deres forældrerolle. B er blevet tilbudt den støtte, som er relevant set i forhold til hans massive vanskeligheder, og bortadoptionen indebærer således ikke en krænkelse af Handicapkonventionens artikel 23.

Barnet og adoptanterne har tilsluttet sig det, som Statsforvaltningen har anført.

Højesterets begrundelse og resultat

Denne sag angår, om Statsforvaltningens afgørelse af 25. april 2017 om frigivelse til adoption af barnet, som dengang hed C, og dermed den adoption, som efter landsrettens dom blev gennemført ved bevilling af 19. juni 2018, skal ophæves.

Efter adoptionslovens § 9, stk. 2, kan adoption i særlige tilfælde meddeles uden forældrenes samtykke, hvis væsentlige hensyn til, hvad der er bedst for barnet, taler for det. Efter § 9, stk. 3, kan adoption efter stk. 2 meddeles, hvis betingelserne i servicelovens § 58, stk. 1, nr. 1 eller 2, for anbringelse af barnet uden for hjemmet er opfyldt, og det er sandsynliggjort, at forældrene varigt er ude af stand til at varetage omsorgen for barnet, og at adoption af hensyn til kontinuiteten og stabiliteten i barnets opvækst vil være bedst for barnet.

Ved lov nr. 530 af 29. april 2015 blev kriterierne for adoption uden samtykke i § 9, stk. 3, ændret. Efter lovændringen er det ikke længere en betingelse for adoption uden samtykke, at forældrene ikke vil være i stand til at spille en positiv rolle for barnet i forbindelse med samvær. Af lovens forarbejder fremgår, at denne ændring betyder, at barnets eventuelle samvær eller anden kontakt med forældrene ikke i sig selv vil være til hinder for at gennemføre en adoption, der anses for at være til gavn for barnet. Det er anført, at i en situation, hvor forældrene ikke vil komme til at kunne varetage omsorgen for barnet, men hvor forældrene måske i nogen grad formår at gennemføre samvær med barnet, eventuelt med professionel støtte, vil barnets behov for stabilitet og kontinuitet i opvæksten bedst kunne tilgodeses gennem en adoption.

Lovændringen indebar endvidere, at det ikke skal være "godtgjort", at forældrenes manglende forældreevne er varig, men "sandsynliggjort". Det fremgår af forarbejderne, at begrundelsen for ændringen var, at kravet om, at det skulle være godtgjort, at forældrene varigt er uden forældreevne, unødigt komplicerede anvendelsen af adoption som den rigtige indsats for udsatte børn. Formålet med ændringen fra "godtgjort" til "sandsynliggjort" var således at fjerne en barriere i forhold til at anvende adoption uden samtykke i tilfælde, hvor der reelt ikke er udsigt til, at forældrene kommer til at kunne varetage omsorgen for barnet, og dette er sandsynliggjort, men hvor det ikke kan dokumenteres endegyldigt, at forældrene varigt er uden forældreevne. Forarbejderne beskriver endvidere en række situationer, hvor betingelserne i § 9, stk. 3, kan være opfyldt. Højesteret finder, at det kan udledes af denne beskrivelse, at der

skal være en høj grad af sandsynlighed for, at forældrene uanset støtteforanstaltninger ikke vil blive i stand til at varetage omsorgen for barnet.

Af de grunde, som landsretten har anført, tiltræder Højesteret, at der er en høj grad af sandsynlighed for, at A og B uanset støtteforanstaltninger varigt er ude af stand til at varetage omsorgen for deres barn, og at væsentlige hensyn til kontinuiteten og stabiliteten i hendes opvækst indebærer, at adoption er bedst for hende. Af de samme grunde er betingelserne for at anbringe hende uden for hjemmet i medfør af servicelovens § 58, stk. 1, nr. 1, opfyldt. Højesteret tiltræder derfor, at betingelserne for adoption uden samtykke efter adoptionslovens § 9, stk. 2 og 3, er opfyldt.

Adoptionslovens regler om adoption uden samtykke skal dog fortolkes i overensstemmelse med Den Europæiske Menneskerettighedskonventions artikel 8 om ret til familieliv, og adoption kan således kun ske, hvis det er foreneligt med konventionen. Spørgsmålet er herefter, om beslutningen om adoption er forenelig med konventionen.

Det følger af Den Europæiske Menneskerettighedsdomstols praksis, at bortadoption af et barn uden forældrenes samtykke kan være forenelig med konventionen, men at dette forudsætter, at der er tale om helt særlige omstændigheder ("exceptional circumstances"), og at adoptionen er begrundet i tungtvejende hensyn til barnets bedste ("an overriding requirement pertaining to the child's best interests"). Det fremgår af flere afgørelser fra Menneskerettighedsdomstolen, at Domstolen i sin proportionalitetsvurdering har lagt vægt på, at adoptionen i den konkrete sag ikke fuldstændigt afskar relationen mellem barnet og dets oprindelige slægt, idet der også efter adoptionen måtte formodes at være kontakt ("post adoption contact") mellem barnet og den oprindelige slægt. Det er ifølge disse afgørelser ikke en betingelse, at samvær eller anden kontakt indgår som et vilkår for beslutningen om frigivelse til adoption, eller at der på tidspunktet for denne beslutning er sikkerhed for, at der vil være samvær eller anden kontakt efter adoptionen, jf. herved dom af 31. maj 2011 i sagen R og H mod United Kingdom (nr. 35348/06), præmis 87 og 89, og dom af 28. oktober 2010 i sagen Aune mod Norge (nr. 52502/07), præmis 75-79. I de nævnte sager lagde Domstolen imidlertid i den første sag til grund, at myndighederne gjorde alt for at sikre, at adoptionen skete til adoptanter, der var indstillet på fortsat samvær mellem barnet og de oprindelige forældre, og i den sidste sag lagde den til grund, at et hidtil velfungerende samvær ville fortsætte. Menneskerettighedsdom-

stolen har endvidere i dom af 30. november 2017 i sagen Strand Lobben m.fl. mod Norge (nr. 37283/13), præmis 124, udtalt, at spørgsmålet om kontakt efter adoptionen ikke er irrelevant (”not an irrelevant matter”). Sagen verserer nu ved Menneskerettighedsdomstolens Storkammer.

Som anført finder Højesteret, at det med en høj grad af sandsynlighed må antages, at A og B varigt er ude af stand til at varetage omsorgen for deres fælles barn, og at de heller ikke med støtteforanstaltninger vil kunne blive i stand til dette. Alternativet til adoption vil derfor være, at barnet med en høj grad af sandsynlighed vil skulle tilbringe hele sin barndom hos en professionel plejefamilie med den usikkerhed, dette indebærer bl.a. med hensyn til, at plejeforholdet kan blive opsagt.

Højesteret finder derfor, at der foreligger sådanne helt særlige omstændigheder og tungtvejende hensyn til barnets bedste, at adoption uden samtykke som udgangspunkt er forenelig med Menneskerettighedskonventionens artikel 8.

Spørgsmålet er, hvilken betydning det skal tillægges, at A og B fra få timer efter fødslen den X. september 2016 og frem til den 1. marts 2017 ikke fik samvær med barnet, og at der endnu ikke er taget stilling til spørgsmålet om samvær eller anden kontakt efter forældreansvarslovens § 20 a, efter at det hidtidige samvær bortfaldt som følge af adoptionsbevillingen af 19. juni 2018.

For så vidt angår spørgsmålet om samvær inden adoptionen, bemærkes, at Ankestyrelsen ved afgørelse af 14. december 2016 fastslog, at det ikke var nødvendigt af hensyn til barnets sundhed og udvikling, at forældrene ikke havde samvær. Kommunen traf herefter afgørelse om samvær, og det første samvær fandt sted den 1. marts 2017.

Adoptionen er begrundet i, at A og B er vurderet varigt at være ude af stand til at varetage omsorgen for deres barn, og Højesteret finder intet grundlag for at antage, at det manglende samvær i barnets første måneder har haft betydning for denne vurdering. Højesteret finder derfor, at tilsidesættelsen af deres ret til samvær i denne periode ikke kan føre til, at der ved bortadoptionen af barnet er sket en krænkelse af Menneskerettighedskonventionen.

For så vidt angår betydningen af, at A og Bs samvær med barnet ophørte ved adoptionen, og at Statsforvaltningen endnu ikke har truffet afgørelse herom, bemærker Højesteret, at der først kan træffes afgørelse om en anmodning efter forældreansvarslovens § 20 a om samvær eller anden form for kontakt, når adoptionen er gennemført. Højesteret bemærker herved yderligere, at det som anført ovenfor ikke kan udledes af Menneskerettighedsdomstolens praksis, at samvær eller anden kontakt skal indgå som et vilkår for adoptionen, eller at der på tidspunktet for adoptionen skal være sikkerhed for, at der vil være samvær eller kontakt efter adoptionen. Samtidig fremgår det dog af Domstolens praksis, at spørgsmålet om kontakt mellem barnet og dets oprindelige slægt kan indgå i proportionalitetsvurderingen ved afgørelsen af, om en adoption uden samtykke er forenelig med artikel 8. Højesteret finder på den baggrund, at det i almindelighed må kræves, at afgørelsen af, om der efter adoptionen skal være samvær eller kontakt mellem de biologiske forældre og barnet, træffes i så nær tidsmæssig tilknytning til adoptionen som muligt.

Ved vurderingen efter forældreansvarslovens § 20 a af, om betingelserne for at træffe bestemmelse om samvær eller anden form for kontakt er opfyldt, finder Højesteret, at bestemmelsen må fortolkes i overensstemmelse med Menneskerettighedskonventionen. Der skal således tages hensyn til, at Menneskerettighedsdomstolen i flere afgørelser om adoption uden samtykke har tillagt det betydning, at adoptionen ikke fuldstændigt afskar relationen mellem barnet og dets oprindelige slægt. Højesteret finder derfor, at det næppe vil være i overensstemmelse med konventionen, hvis samvær eller anden kontakt efter forældreansvarslovens § 20 a kun er en mulighed "i helt særlige tilfælde". Afgørelsen skal i alle tilfælde træffes under hensyntagen til, hvad der er bedst for barnet. Det må således ved afgørelsen om samvær indgå, om det bl.a. i lyset af forløbet af et samvær forud for adoptionen kan antages, at forældrene, eventuelt med støtte, vil kunne spille en positiv rolle for barnet i forbindelse med samvær eller anden kontakt, herunder ved at barnet får mulighed for at kende sine rødder, muligt gennem et samvær, der er mere begrænset end før adoptionen.

Statsforvaltningen bør så hurtigt, som det er muligt, træffe afgørelse efter forældreansvarslovens § 20 a, om det er bedst for barnet, at hun fortsat skal have samvær eller anden kontakt med A og B.

Sammenfattende finder Højesteret, at adoptionen uden samtykke ikke udgør en krænkelse af Menneskerettighedskonventionens artikel 8.

For så vidt angår forholdet til FN's Børnekonvention og FN's Handicapkonvention bemærker Højesteret, at afgørelsen om adoption ikke er begrundet i Bs handicap, men i hans og As manglende evne til at varetage omsorgen for deres barn. Som anført finder Højesteret, at det med en høj grad af sandsynlighed må antages, at de uanset støtteforanstaltninger varigt vil være ude af stand til at varetage omsorgen for deres barn. Herefter, og da beslutningen om adoption er truffet ud fra hensynet til barnets bedste, finder Højesteret, at afgørelsen om adoption uden samtykke er i overensstemmelse med FN's Børnekonvention, og at den ikke er i strid med FN's Handicapkonvention.

Højesteret stadfæster herefter dommen.

Thi kendes for ret:

Landsrettens dom stadfæstes.

Ingen part skal betale sagsomkostninger til nogen anden part eller til statskassen.