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Bruning, M.R.

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Kinderbescherming, Adoptie, Gezagsbeëindiging, Belangen van het kind, Langdurige pleegzorg jong kind

GEGEVENS

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SAMENVATTING

Eerste klaagster is in 2008 moeder geworden van tweede klager, X. Op dat moment waren er meteen al zorgen over hun onderlinge relatie en de gezondheid en veiligheid van X. Aanvankelijk was eerste klaagster bereid om met X in een gezinscentrum te gaan wonen, maar na drie weken wilde zij daar weg en wilde ze X meenemen. Gelet op de belangen van het kind is daarop een serie van procedures gestart om ervoor te zorgen dat X in goede handen zou zijn. De omgang tussen X en moeder wordt beperkt tot enkele keren per jaar twee uur onder begeleiding. Deze contacten verlopen niet positief voor X. Tevens wordt het ouderlijk gezag van eerste klaagster beëindigd zodat X door zijn pleegouders, waar hij inmiddels ruim drie jaar woont, en zich positief ontwikkelt, geadopteerd kan worden. Ondertussen is de situatie van moeder verbeterd; zij heeft een nieuwe partner en heeft een dochter, voor wie zij zelf zorgt zonder dat de bevoegde autoriteiten zich zorgen maken over de opvoeding.

Moeder klaagt bij het EHRM, mede namens haar zoon, dat de beslissing om de pleegouders X te laten adopteren in strijd is met haar recht op respect voor gezinsleven (art. 8 EVRM). De procedure voor het EHRM gaat over de kwaliteit en redelijkheid van de beslissing tot gezagsbeëindiging en adoptie. Het EHRM accepteert dat eerste klaagster ontvankelijk is in haar klacht, ook al zijn haar belangen niet altijd in overeenstemming met die van X en is zij volgens nationaal recht geen wettelijke vertegenwoordiger van X. Het EHRM stelt zich terughoudend op en stelt vast dat de nationale rechter zorgvuldig te werk is gegaan en in zijn oordeel de relevante criteria uit de art. 8-rechtspraak van het EHRM ten aanzien van de belangen van het kind bij langdurige uithuisplaatsing heeft betrokken. De beslissingen die zijn genomen, waren voldoende onderbouwd en gebaseerd op relevante feiten en deskundigenverklaringen. Dat geldt zowel voor de beslissing dat X in het zorgcentrum zou moeten blijven als vervolgens voor de beslissing om klaagster het ouderlijk gezag te ontnemen en om X voor adoptie voor te dragen. De nationale autoriteiten hebben tevens voldoende onderbouwd dat aan de strenge voorwaarden die gelden voor een adoptie is voldaan. De procedurele rechten van moeder zijn in de nationale procedures gewaarborgd. Het EHRM benadrukt dat het in het belang is van X, die al ruim drie-en-een-half jaar bij zijn pleegouders woont vanaf enkele maanden na zijn geboorte, om duidelijkheid over zijn opvoedperspectief te hebben. X is psychologisch kwetsbaar en heeft recht op continuïteit en stabiliteit in zijn verzorging en opvoeding. Nu hij veilig is gehecht aan zijn pleegouders en zij in sociaal en psychologisch perspectief voor hem zijn ouders zijn, zou een adoptie hem helpen om zijn band met hen te versterken voor de rest van zijn leven. Gelet op de gevoelige aard van de kwestie en de ruimte die de nationale rechter moet hebben in dit soort gevallen, en gelet op de zorgvuldige manier waarop de nationale rechter die ruimte heeft benut, is het Hof ervan overtuigd dat art. 8 EVRM hier niet is aangetast (4 stemmen tegen 3).

UITSPRAAK

Alleged violation of Article 8 of the Convention

76. The applicants complained that the domestic authorities' decision to let the foster parents adopt X had infringed their right to family life as provided for in Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

77. The Government contested the allegation that there had been a violation of Article 8.

A. Admissibility

1. The first applicant

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

2. The second applicant

(a) The Government's objection

79. The Government argued that since there was a conflict of interests between X and the first applicant, who had no right to represent X in domestic legal proceedings, this part of the application should be dismissed as incompatible *ratione personae* with the Convention's provisions, in accordance with Article 35 §§ 3 and 4 of the Convention.

80. The second applicant made no remarks in response to this objection.

(b) The Court's assessment

81. The Court notes that a possible conflict of interests between the first applicant and X is of relevance to the question of whether the first applicant can lodge an application on X's behalf (see, for example, *Kruskic v. Croatia* (dec.), no. 10140/13, §§ 101-102, 25 November 2014). However, the Court has also stated, in *Scozzari and Giunta v. Italy* ([GC], nos. 39221/98 and 41963/98, §§ 138-139, ECHR 2000 VIII):

"138. The Court points out that in principle a person who is not entitled under domestic law to represent another may nevertheless, in certain circumstances, act before the Court in the name of the other person ... In particular, minors can apply to the Court even, or indeed especially, if they are represented by a mother who is in conflict with the authorities and criticises their decisions and conduct as not being consistent with the rights guaranteed by the Convention. Like the Commission, the Court considers that in the event of a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian, there is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his rights under the Convention. Consequently, as the Commission observed, even though the mother has been deprived of parental rights – indeed that is one of the causes of the dispute which she has referred to the Court – her standing as the natural mother suffices to afford her the necessary power to apply to the Court on the children's behalf, too, in order to protect their interests."

139. Moreover, the conditions governing individual applications are not necessarily the same as national criteria relating to locus standi. National rules in this respect may serve purposes different from those contemplated by Article 34 of the Convention and, whilst those purposes may sometimes be analogous, they need not always be so (see the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, p. 15, § 31)."

82. In the circumstances, the Court finds that these principles are applicable also in the present case insofar as the second applicant, X, is concerned. It notes in that respect that X's complaint concerns the decision to sever his ties with his biological mother and the proceedings in that regard, as opposed to measures taken subsequent to a decision of that type (compare, for example, *A.K. and L. v. Croatia*, no. 37956/11, § 48, 8 January 2013). The decisions to deprive the first applicant of her parental responsibility and to authorise X's adoption resulted in the first applicant losing legal guardianship over X.

83. Accordingly, the Court dismisses the Government's objection regarding the second applicant. It further notes that this complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

3. The third, fourth and fifth applicants

(a) The Government's objection

84. The Government submitted that since the third, fourth and fifth applicants (X's sister Y and the grandparents) had not been part of the domestic proceedings, and the application to the Court did not specify or substantiate that those applicants' own rights had been violated, or that X and the grandparents had shared a "family life", their complaints should be declared inadmissible under Article 35 § 1 of the Convention as manifestly ill-founded or for failure to exhaust domestic remedies.

85. No remarks in response to the Government's objection were made on behalf of the third applicant. The fourth and fifth applicants submitted that it was "very clear" that they were victims of a violation of Article 8 of the Convention. They did not comment on the question of exhaustion of domestic remedies.

(b) The Court's assessment

86. The Court reiterates that in order to be able to lodge an application in accordance with Article 34 of the Convention, "an individual must be able to show that he or she was 'directly affected' by the measure complained of". This is "indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings" (see, for example, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 96, ECHR 2014). The applicants' participation in the domestic proceedings has been found to be one of several relevant criteria when assessing their status as victims (see *Nölkenbockhoff v. Germany*, 25 August 1987, § 33, Series A no. 123; *Micallef v. Malta* [GC], no. 17056/06, §§ 48-49, ECHR 2009; and *Kaburov v. Bulgaria* (dec.), no. 9035/06, §§ 52-53, 19 June 2012).

87. As to the scope of Article 8 of the Convention, 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" (see, for instance, *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII, and *Znamenskaya v. Russia*, no. 77785/01, § 27, 2 June 2005).

88. The domestic proceedings concerned the deprivation of the first applicant's parental responsibility for the second applicant, X, and the authorisation for the foster parents to adopt him. The first and second applicants were therefore directly affected by the measures complained of.

89. It goes without saying that, in general, other family members are also affected by such measures, whether directly or indirectly. Moreover, "family life" within the meaning of Article 8 of the Convention can also exist between siblings (see, *inter alia, Moustaquim v. Belgium*, no. 12313/86, § 36, 18 February 1991) and "includes at least the ties between near relatives, for instance those between grandparents and grandchildren" (see, among other authorities, *Scozzari and Giunta*, cited above, § 221). Within the meaning of Article 8, "family life" between grandparents and grandchildren may, accordingly, exist "where there are sufficiently close family ties between them ... While cohabitation is not a prerequisite, as close relationships created by frequent contact also suffice, relations between a child and its grandparents with whom it had lived for a time will normally be considered to fall within that category" (see *T.S. and J.J. v. Norway* (dec.), no. 15633/15, 11 October 2016, with further references).

90. As regards the question of "interference", it should be noted that, when a parent is denied access to a child taken into public care, this would constitute in most cases an interference with the parent's right to respect for family life as protected by Article 8 of the Convention. However, this would not necessarily be the case where grandparents are concerned. In the latter situation, there may be an interference with the grandparents' right to respect for their family life only if the public authority reduces access below what is normal, that is, diminishes contacts by refusing to grandparents the reasonable access necessary to preserve a normal grandparent-grandchild relationship (see, *inter alia, Price v. the United Kingdom*, no. 12402/86, Commission decision of 9 March 1988, DR 55, p. 224; *Lawlor v. the United Kingdom*, no. 12763/87, Commission decision of 14 July 1988, Decisions and Reports (DR) 57, p. 216; and *Kruskic*, cited above, § 110). Thus, the right to respect for family life of grandparents in relation to their grandchildren primarily entails the right to maintain a normal grandparent-grandchild relationship through contacts between them (see *Kruskic*, cited above, § 111). However, the Court reiterates that contacts between grandparents and grandchildren normally take place with the agreement of the person who has parental responsibility which means that access of a grandparent to his or her grandchild is normally at the discretion of the child's

parents (see *Price*, cited above; *Lawlor*, cited above; and *Kruskic*, cited above, § 112).

91. Turning to the circumstances of the present case, the Court notes that the third applicant was born in October 2011, when X had already been placed in foster care. It also observes that, immediately after X's birth in September 2008, the fourth applicant lived with the first applicant and X at the family centre for five days (see paragraph 7 above). She subsequently joined the first applicant in most of the visits with X, whereas the fifth applicant was present at some (see paragraph 8 above). However, the Court does not find it necessary to take a stand on whether this suffices to constitute "family life" within the meaning of Article 8 of the Convention, or whether, within the meaning of Article 34 of the Convention, the third, fourth and fifth applicants were thereby "directly affected" by the impugned measures, since in any event it finds that their complaints should be rejected for failure to exhaust domestic remedies.

92. The Court reiterates that the purpose of the requirement of exhaustion of domestic remedies set out in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I).

93. As stated above, the domestic proceedings at hand concerned the removal of the first applicant's parental responsibility for the second applicant and his adoption. The third, fourth and fifth applicants were not parties to those proceedings, and the first applicant did not maintain in those proceeding that the impugned decisions would impinge on their rights under Article 8 of the Convention. Nor does it appear that the third, fourth and fifth applicants complained, in form or substance, before any other domestic authorities that their rights under Article 8 had been violated. The Court therefore agrees with the respondent Government that the complaints by the third, fourth and fifth applicants must be declared inadmissible for failure to exhaust domestic remedies under Article 35 §§ 3 (a) and 4 of the Convention.

4. Conclusion as to admissibility

94. In conclusion, the Court declares the complaints by the first and second applicants admissible, and the remainder of the application inadmissible. The Court adds that it has observed that the applicants, in their observations, made a mention of "six" applicants and X's "two siblings" – without providing any further information. For the Court it suffices to note that at no point in time has it received any application from any other sibling than Y.

B. Merits

1. The parties' submissions

95. The first and second applicants submitted in particular that the decision to remove the first applicant's parental authority over X and to authorise that X be adopted had not been in accordance with the law and had not pursued a legitimate aim. They also argued that there had been no reasons to authorise the adoption of X.

96. In order for interferences such as those in the present case to be justified under the second paragraph of Article 8, they would have to be required by a pressing social need and be proportionate. This called for an examination of two aspects; firstly, whether the reasons adduced to justify the interference were relevant and sufficient, and secondly, whether the decision-making process was fair and afforded due respect to the applicants' rights under Article 8.

97. Particularly far-reaching measures had been adopted in the instant case, measures which could be applied only in truly exceptional circumstances and when motivated by an overriding requirement pertaining to the child's best interests. It was in the child's best interest that his ties with his family be maintained except in cases where the family has proved particularly unfit. Moreover, it was in the child's best interest to ensure his development in a safe and secure environment. For family ties to be severed, very exceptional circumstances had to be present and everything must be done to preserve personal relations and, where appropriate to rebuild the family. It was not enough to show that a child could be placed in a more beneficial environment for his upbringing. In the present case, nothing could justify the adopted measures. The applicants lived like a normal family.

98. The Government submitted in general that the area of child welfare services was surrounded by procedural safeguards and that even far-reaching measures were justifiable when motivated by an overriding requirement to the child's best interest. The interference in the instant case had been adopted in accordance with domestic law that reflected the Court's case law. Reference was in that respect particularly made to the Court's judgment in *Aune*, cited above).

99. A crucial element in the assessment of X's best interests was the fact that he was a vulnerable child with special care needs. The first applicant had continued to display a grave lack of understanding of this fact and her conduct and X's reactions during the times that they had seen each other in contact sessions, had highlighted the deficiencies in the first applicant's abilities as a carer for a vulnerable child. Moreover, no psychological parent-child relationship had developed between the first applicant and X. Although the foster parents had been open to letting X contact the first applicant on his own volition, the first applicant had not taken any initiatives to establish contact with X and his foster parents after adoption.

100. X's best interests had been assessed several times and balanced against the legitimate interests of his biological mother. The removal of the first applicant's parental responsibility and the authorisation of the adoption had its background in a long history of compulsory care measures. All necessary steps that could reasonably be demanded to facilitate the reunion of X and his biological mother had been taken. A considerable period of time had passed since X was taken into care in 2008, and his interests in not having his *de facto* family situation changed, overrode the first applicant's interest to be reunited with him.

2. The Court's assessment

(a) Lawfulness and legitimate aim

101. Based on the material presented to it, the Court is satisfied that domestic proceedings complained of were in accordance with the 1992 Child Welfare Act (see paragraph 65 above) and were adopted in pursuance of "the protection of health or morals" and the "rights and freedoms" of X in accordance with Article 8 § 2 of the Convention.

(b) Proportionality

(i) General principles

102. The Court reiterates that in determining whether an impugned measure was "necessary in a democratic society", it will consider whether, in the light of the case as a whole, the reasons adduced to justify that measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, among many other authorities, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 179, 24 January 2017). The essential object of Article 8 is to protect the individual against arbitrary action by the public authorities (see, for example, *Wagner and J.M.W.L. v. Luxembourg* , no. 76240/01, § 118, 28 June 2007). Moreover, it must be borne in mind that the decisions taken by the courts in the field of child welfare are often irreversible, particularly in a case such as the present one where an adoption has been authorised. This is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences (see, for example, *Y.C. v. the United Kingdom* , no. 4547/10, § 136, 13 March 2012, with further references).

103. According to the Court's established case-law, the notion of necessity 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. In determining whether an interference was "necessary in a democratic society", the Court will take into account that a margin of appreciation is left to the national authorities, whose

decision remains subject to review by the Court for conformity with the requirements of the Convention (see *Paradiso and Campanelli*, cited above, § 181).

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).

105. The Court also recalls the guiding principle whereby a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child. The positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child (see, for example, *K. and T. v. Finland*, cited above, § 178).

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 implementation. 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

(α) The procedures

111. As to the domestic procedures, the Court notes that the impugned measures were first decided by the County Social Welfare Board, comprised of three persons – one jurist, one psychologist and one layperson – which heard the case over three days. The first applicant was present and represented by counsel. Twenty-one witnesses were heard (see paragraph 40 above). The case was later heard during another three days by the City Court, similarly composed of one professional judge, one psychologist and one lay person. Again, the first applicant was present and represented by counsel, and twenty-one witnesses were heard, including several experts (see paragraph 47 above). An additional review was inherent in the two levels of leave to appeal-proceedings (see paragraphs 62-64 above).

112. One of the experts, psychologist K.M., who had examined, consulted and treated the first applicant, disagreed with the need to authorise the adoption (see paragraph 53 above). The City Court was thus presented with diverging professional opinions as to which decision would be in the best interests of X. It examined and assessed the different reports and testimonies, and provided reasons for finding that it could not attach decisive weight to the views of the psychologist who had testified in favour of discontinuing the foster care, namely that they were not based on up-to-date research (see paragraph 53 above). Taking additional account of the first applicant's full involvement in the proceedings, seen as a whole, the Court is satisfied that the domestic decision-making process was fair and capable of safeguarding the first and second applicants' rights under Article 8 of the Convention.

(b) The decision not to discontinue foster care

113. Turning to the question of whether relevant and sufficient reasons were adduced for the decision not to discontinue X's foster care, the Court observes from the outset that no allegations have been made before the Court that the foster parents were not suitable to raise X. The first applicant has, however, maintained that she could provide appropriate care for X herself. She submitted that prior to the adoption of X, she had given birth to another child, Y, that she had married, and that no child welfare measures had been decided in respect of Y.

114. The Court notes that the City Court reasoned, on the basis of the evidence presented to it, that unlike X, Y did not have special care needs (see paragraph 49 above). As to X, the City Court concluded that he was a vulnerable child with special needs and that there would be a "considerable risk of abnormal development" if his needs were not met. The court's conclusion was supported by relevant evidence, including the testimony of several professionals (see paragraph 49 above). Whilst the Court is aware, as emphasised by the first applicant, that no measures were adopted with respect to Y, it concurrently notes that the City Court provided reasonable justification as to why that factor could not be decisive with respect to the decision concerning X. In principle, the Court does not consider such an individualised approach as problematic.

115. Furthermore, it is not for the Court to assess whether there were relevant and sufficient reasons supporting the initial decision to place X in foster care in 2008 or the High Court's judgment upholding the decision to issue a care order in 2010. The Court observes, however, that in its judgment of 22 February 2012, the City Court found that the evidence had "clearly shown" that the "fundamental limitations" with respect to the first applicant and her parenting skills that had existed when the High Court decided that X was to be placed in care, still applied almost two years later (see paragraph 51 above). It substantiated that finding by reference to relevant evidence, including the negative development with respect to the contact sessions (see paragraphs 50-51 above).

116. In addition, the Court takes account of the fact that compulsory measures concerning the care of X had been decided and implemented since 17 October 2008, when the first applicant withdrew her consent to stay at the family centre (see paragraph 8 above). After that date, X remained in the foster home continuously until the Board on 8 December 2011 authorised the foster parents to adopt him (see paragraph 41 above). In general, 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 when a "considerable period of time" has passed since the child was first placed in care (see paragraphs 104 and 109 above). In the present case X had lived with his foster parents for approximately three and a half years when the City Court considered the case (see paragraph 57 above), which in the Court's view amounts to a considerable period of time. Moreover, he was in his early childhood, a period in which it was particularly important to secure his rights (see also, *inter alia*, the General Comment no. 7 (2005) on implementing child rights in early childhood, paragraph 75 above).

117. Against the above background, the Court is satisfied that the City Court had the best interests of X in mind, and that its conclusion that X should remain in care, in the light of his particular care needs, was not arbitrary. Given the circumstances of the case, the Court considers that the domestic authorities, when finding that discontinuing the public care for X would not be in his best interests, did not exceed the margin of appreciation afforded to the respondent State, and that the reasons for that decision were relevant and sufficient.

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

118. The Court observes that the reason for removing the parental authority from the first applicant was only that it would then be transferred to the authorities, so that consent to adoption could be given. It is therefore appropriate to examine the two elements of the decision simultaneously.

119. At the outset, the Court recalls that the decisions to remove the first applicant's parental authority over X and to authorise that he be adopted by his foster parents, were, by their nature, measures which could "totally deprive... the [first] applicant of her family life with the child and were inconsistent with the aim of reuniting them" (see *Johansen*, cited above, § 78). The measures in question, accordingly, fall to be tested against the standard reiterated in paragraph 106 above, namely that "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".

120. The City Court took as its general starting point that there had to be "strong reasons" and a "high degree of certainty" that adoption would be in the child's best interests (see paragraphs 55 and 56 above). It also stated that the decision would have to be based on a concrete assessment of the instant case, and in the light of general experience from child psychology research (see paragraph 56 above). Furthermore, the City Court expressly referred to the decision in *Rt.* 2007 page 561, in which the Supreme Court had elaborated on the standard applicable to adoption cases in light of the Court's case-law (see paragraph 69 above), and it concluded that there were "particularly weighty reasons" in favour of allowing that X be adopted (see paragraph 60 above). The Court understands these statements to imply that the City Court intended to apply the relevant domestic legislation in line with the general principles set out in the Court's case-law under Article 8 of the Convention, in conformity with the Supreme Court's jurisprudence (see paragraphs 67-72 and 106 above). Emphasising that adoption would mean that the legal ties to the biological family would be broken (see paragraph 58 above), but that it would strengthen the relation with the foster family (see paragraph 57 above), the City Court found that it would be in the best interests of X that a decision to that extent be made (see paragraph 60 above). The Court reiterates from its case-law that it recognises that, in reaching decisions in so sensitive an area, local authorities and courts are faced with a task that is extremely difficult (see, for example, *Y.C. v. the United Kingdom*, cited above, § 136).

121. When turning to the facts in X's specific case, the Court recalls that the City Court's decision to authorise the adoption of X was taken on the basis that it had already found that a discontinuation of the public care of X would not be in his best interests (see paragraphs 48-54 above). The Court has concluded that this decision was adopted within the respondent State's margin of appreciation (see paragraph 117 above). Accordingly, the examination of whether the circumstances of the present case were exceptional and whether the adoption was motivated by an overriding requirement pertaining to X's best interest (see paragraphs 106 and 119 above) must in the present case be carried out taking account of the alternative that lay in continued foster care.

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.

125. Turning to the City Court's assessment relating to the alternative of a continued stay in foster care, the Court observes that the City Court emphasised that X was a vulnerable child and that an adoption would help to strengthen his sense of belonging with his current foster parents, whom he regarded as his parents, and provide him with security in the years ahead (see paragraphs 49 and 57 above and, *mutatis mutandis, Aune*, cited above, § 70). It referred in particular to a statement from a professional at the Children's and Young People's Psychiatric Out-Patient Clinic that had explained how X was easily stressed and needed a lot of quiet, security and support (see paragraph 49 above). Also the County Social Welfare Board in its decision of 8 December 2011 had described him as a "particularly vulnerable child" and based that on the findings of the psychologist, M.S. (see paragraph 41 above).

126. In this regard, the Court observes that in justifying its decision not to discontinue X's public care, the City Court took account of how the foster parents and supervisor had described X's emotional reactions after contact sessions with his mother in the form of "inconsolable crying and his needing a lot of sleep" (see paragraph 50 above). It considered that a possible reason for that could be that the boy was "vulnerable to inexpedient interaction and information that was not adapted to his age and functioning. The first applicant's emotional outbursts in situations during the contact sessions, for example when X had sought out his foster mother and called her "mummy", were seen as potentially frightening and not conducive to X's development" (see paragraph 50 above).

127. In *Aune*, where the Court considered that the adoption did not violate Article 8 of the Convention, it found that there was still a "latent conflict which could erupt into challenges to A's particular vulnerability and need for security", and that adoption "would seem to counter such an eventuality" (ibid. § 71). In the present case, the conflict had been a recurring theme in all the proceedings (see, *inter alia*, paragraph 18, 29, 41 and 46 above) and the City Court's judgment states that the first applicant had said in court that she would fight until X was returned to her and that she did not consider that public exposure and repeated legal proceedings could be harmful for X in the long term (see paragraph 52 above). Even though it is to be expected that a biological parent will oppose a placement order, the mother's behaviour, leading to X's emotional reactions, was clearly a relevant factor.

128. Whilst the City Court found that the first applicant's situation had improved in some areas – she had married, the couple had another child and there had been progress in her material situation (see paragraph 48 above) – the evidence presented to that court led it to conclude that it had been clearly shown that the "fundamental limitations" still applied and that she had not shown any positive development (see paragraphs 42, 34 and 51 above). In this connection the Court also notes that the County Social Welfare Board, after emphasising the need for the first applicant having "a great capacity to empathise with and understand" X and his problems in the event of a return, described her as "completely devoid of any such empathy and understanding" (see paragraph 41 above).

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 paragraph 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 measures 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.

FOR THESE REASONS, THE COURT

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1. *Declares*, unanimously, the complaints by the first and second applicants admissible and the remainder of the application inadmissible;

2. *Holds*, by four votes to three, that there has been no violation of Article 8 of the Convention.

Joint dissenting opinion of Judges Grozev, O'Leary and Hüseynov

I. Introduction

1. A majority of the chamber has found that the decision authorising the adoption of the second applicant by foster parents was not in violation of his or his biological mother's right to family life under Article 8 of the Convention.[1]

2. Given the particular circumstances of the present case, the information provided in support of the decisions by the domestic authorities and the respondent Government and the legal standards established in the Court's case-law in this field, we respectfully disagree with the majority.

3. It is well-established that in cases relating to placement of children in care, the domestic authorities enjoy a wide margin of appreciation. The margin narrows when parental rights are restricted or removed.[2] Furthermore, the national authorities enjoy direct contact with the persons whose rights are affected by any decision alleged to violate Article 8 of the Convention. As a result, it is clearly not for the Court to don the mantle of a fourth instance tribunal and, advertently or inadvertently, substitute its own assessment for that of the domestic authorities in such a sensitive field.[3] By dissenting in the present case we do not lose sight of these necessary and fundamental strictures.

4. Nevertheless, it cannot be forgotten that the Court's case-law recognises that adoption against the wishes of a biological parent, with the consequent breaking of *de facto* and *de jure* ties between parent and child and the termination of access rights, is an irreversible and far-reaching interference with the right to family life of both parent and child. The "severing of those ties means cutting a child off from its roots".[4] It is for this reason that the Court has held that the interest of the child dictates that "family ties may only be severed in *very exceptional circumstances*".[5]

5. Subsidiarity and the margin of appreciation dictate particular caution in a case such as this. However, they do not absolve the Court from a forensic examination of the facts, of whether the reasons provided by the domestic authorities were both relevant and sufficient and, lastly, of whether the aforementioned exceptional circumstances standard was met.

II. Circumstances of the case

6. As our disagreement with the majority turns not only on the manner in which they have presented and applied the relevant jurisprudential standards under Article 8 of the Convention, but also the manner in which they have considered, or perhaps distanced themselves, from the concrete circumstances of the present case, it is necessary to recapitulate the facts in some detail.

7. The first applicant's child was born on 25 September 2008. The first applicant and the child moved to a family centre four days later, the mother having agreed, given her recognised need for guidance and support in early motherhood, to stay in such a centre for three months.[6]

1. Emergency placement in care

8. On 17 October 2008, when the child was three weeks old, the first applicant withdrew her consent to stay in the family centre and, on the same date, the child was

placed in emergency care due to weight loss during the first weeks of life and the mother's reported failure to understand or respond to his needs. It appears from the majority judgment that the first applicant had sought assurances that after the three month stay she would be allowed to return home with her child. When such assurances were not forthcoming she had sought to leave (see § 33 of the majority judgment). In her appeal to the County Social Welfare Board, the first applicant indicated that she and X could live with her parents, that her mother was willing to provide support and that she was willing to accept the help of the child welfare authorities. Both the County Social Welfare Board and the City Court rejected the first applicant's appeal, referring to the report of the family centre which had considered that the mother was incapable of taking care of her child without support or follow up, as well as a psychological report, based on an evaluation of X between ten days old and two months, which had pointed to his early delayed development and the fact that he had been a child at high risk when first sent for evaluation. That report went on to state that by two months old, after placement, X was "functioning as a normal two-month-old baby [with] the possibility of a good normal development" (see § 12 of the majority judgment).

2. Extended placement in care

9. The emergency placement order was transformed into a more long-term one in March 2009 when the child was just over five months. The first applicant's contact rights were from that moment reduced to six two-hour visits per year under supervision. The extension of the placement was justified by the risk of serious physical and psychological deficiencies in his care-giving were he returned to his mother and the impossibility of remedying that risk through assistance measures. The first applicant's appeal – in which she had complained of a failure to examine alternative measures to placement and a lack of sufficient evidence for extended placement – initially succeeded. The City Court, which handed down its decision when X was almost eleven months old, held that he should be returned to the first applicant after a period of readjustment and that the weight loss in the early weeks of his life might have been due to an infection. Increased access was granted to the first applicant but it was reported that both she and her parents, who attended several of the visits, demonstrated hostility towards the foster mother and the child welfare authorities. At no point in the file is it explained why all supervised visits with the child occurred in the presence of the foster mother. The child welfare authorities appealed the City Court judgment and enforcement of the latter was suspended until the case could be heard by the High Court. Psychologists and a family expert were appointed by the child welfare authorities and the High Court. In its decision of 22 April 2010, the High Court confirmed the decision of the Board that X should be taken into compulsory care and reduced the first applicant's visits to four two-hour visits per year. At this stage X was almost one year and seven months old. The High Court based its decision on the early report from the family centre which detailed the lack of care during the first three weeks of X's life, as well as reports by a family therapist and a psychologist, M.S. The behaviour of the first applicant during the contact sessions with X, which were viewed negatively by the appointed supervisors, also played an important role. According to the psychologist M.S., those sessions were so negative the mother should be given no access to her child. Furthermore, she relied heavily on the aforementioned report established by the family centre which had documented the neglect of X during the first three weeks of his life and previous reports detailing the biological mother's medical history and medical difficulties as a child. The High Court concluded that a care order was necessary and that assistance measures for the mother would not be sufficient to allow X to be returned to her care. The High Court also gave weight to the attachment that X had by then formed with the foster parents, particularly the foster mother. It is worth noting that by the date of the High Court judgment on 22 April 2010, the first applicant's access to X had been restricted from when he was three weeks old and highly restricted from the age of five months.[7]

3. Adoption proceedings

10. In July 2011, when the child was two years and ten months old, the authorities sought to deprive the first applicant of her parental responsibility with a view to authorising X's adoption by his foster parents. In the alternative, they sought to deny her contact rights. For her part, the first applicant sought termination of the care order or extended contact rights.

11. By a decision of 8 December 2011, the County Social Welfare Board held that the first applicant should be deprived of her parental responsibility for X and that the latter's foster parents should be allowed to adopt him.

12. The formal procedure followed by the Board to reach that decision is not at the heart of this dissent, albeit how and what expert and other evidence it considered is relevant.[8]

13. What is of more importance is the basis for the Board's decision – the statements of the first applicant during the hearing attesting to continued tension between her and the child welfare authorities, the contact sessions which continued to be influenced by tensions between the biological and foster mothers and the maternal grandmother, the reasonable assumption of the Board that X was "a particularly vulnerable child", his circumstances since soon after he was born, the expert opinion of M.S., consulted a year and a half previously in the context of the child placement proceedings and the fact that the alternative to adoption would have been long-term care, which would not have been in X's interests or those of his foster parents, who were his primary caregivers.

14. When the Board adopted its decision in 2011, the first applicant had since married and given birth to a second child Y. She relied on this change in her personal circumstances and on the fact that her competence as a care-giver had been examined and not called into question as regards her second child. The Board took note of this information but deemed the first applicant's capacity to care for her second child, Y, insufficient to demonstrate her capacity to care for her first child, X, given the latter's special needs.

15. The Board's decision was upheld by the City Court on 22 February 2012.

III. General principles under Article 8 of the Convention in relation to child placement and adoption

16. The majority judgment reproduces the general principles established in the Court's case-law on Article 8 in relation to child placement and adoption proceedings.[9] Distinguishing between the two, as the case-law of the Court requires us to do, those principles and the legal standards which derive from them can be summarised as follows:

– When assessing whether a child needs to be taken into care, domestic authorities enjoy a wide margin of appreciation. The margin tightens however depending on the nature of the issues and the seriousness of the interests at stake. Where access rights are restricted or removed, the margin is indisputably narrower and the Court's scrutiny stricter.[10]

– The Court has repeatedly recognised that perceptions as to the appropriateness of the intervention by public authorities in a child's care vary from one State to the next. Furthermore, as the domestic authorities have direct contact with the persons concerned by an impugned decision, the Court must be careful not to substitute itself for the domestic authorities in the exercise of their responsibilities in this field.[11]

– When it comes to assessing whether the process leading to a decision impugned under Article 8 reaches the Convention standard, the Court will look at the process as a whole, whether a parent was sufficiently involved and fully able to present his or her case, whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of other factors (factual, emotional, psychological, material and medical), whether there was a balanced and reasonable assessment of the respective interests of each person and whether relevant and sufficient reasons were provided for the impugned decisions.[12]

– A distinction is drawn in the case-law between placement decisions and those relating to adoption. As regards the former, the Court has repeatedly stated that care should be regarded as a temporary measure, that it should be discontinued when circumstances permit and measures implementing temporary care orders should be consistent with the ultimate aim of reuniting the natural parents and the child. The positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child.[13]

– As regards, once again, placement in care, passage of a considerable period of time may mean that the interest of the child not to have his or her *de facto* family situation changed may override the interest of the biological parents to have the family reunited.[14]

– In contrast, where decisions relating to childcare are irreversible, such as when adoption is authorised, resulting in the breaking of *de facto* and *de jure* ties between a biological parent and a child, the Court's case-law points to "an even greater call than usual for protection against arbitrary interferences".[15] Stricter scrutiny is required of additional restrictions on parental rights of access; scrutiny which becomes even stricter when it comes to deprivation of parental responsibilities and the authorisation of adoption. As the majority judgment points out "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".[16]

– Consideration of what lies in the best interest of the child is of crucial importance in every case of this kind. The domestic authorities must strike a fair balance between the interests of the child and those of the parents and, in the balancing process, particular importance should be attached to the best interests of the child which, depending on the circumstances, may override those of the parents.[17]

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.[18] 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]

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.[20] 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[21] and limited access rights have a particularly detrimental impact in the first weeks, months and years of life.[22] 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.[23]

(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.

(3) There is no doubt that when X was admitted to emergency care he was a vulnerable new-born child whose basic needs were not being cared for. However, at two months he is described in the report of the family care centre as functioning as a normal two-month old and as bearing "the mark of good psychosocial and cognitive development". The reports before the domestic authorities highlight the difficulties created for the child by tense contact sessions. However, his special care needs are never explained.[24] In the Board's decision of 8 December 2011 it is stated that X suffered "serious life-threatening neglect during the first three weeks of his life" and that he had been through a lot having "lived in the foster home for three years and not [knowing] his biological mother". The former statement is not explained or

necessarily supported by the evidence.[25] Once again, it is not our intention to call into question the authorities' decision to place the child in care and, crucially, the consequences for his care arrangements flowing from the passage of time. As the Court has repeatedly held, passage of time essentially means that the interest of a child not to have his or her *de facto* family situation changed may override the parent's interest in reunification. However, the irreversible severing of legal ties is different. It requires exceptional circumstances and these appear to be assumed as reasonably existing in the instant case rather than being concretely demonstrated.

(4) Nowhere in the file does it emerge clearly that the domestic authorities considered the long-term effects on the child of the permanent and irreversible cutting of *de facto* and legal ties with his biological mother.[26] The Court has repeatedly held that severing such ties cuts a child off from its roots, which is a measure which can be justified only in exceptional circumstances. Regarding the preservation of such roots, it has in other circumstances held that domestic authorities could legitimately deprive a minor, against the latter's will, of his filiation with the person who he considered to be his father and with whom he had a strong emotional bond, in order to recognise the minor's filiation with his biological father as the child's interests lay primarily in knowing the truth about his origins. According to the Court in that case – *Mandet v. France* – it was reasonable for the domestic authorities to determine that the child's interests lay not where he perceived them but rather in ascertaining his real paternity.[27] Each Article 8 case must be assessed individually, in relation to its own facts and the crucial margin of the domestic authorities referred to above. However, the only thread of legal logic holding these cases together appears to be the margin itself, with the Court a bystander, by virtue of the principle of subsidiarity, to the disintegration of familial relationships and the destruction of roots depending on how that margin is exercised in any given case.

(5) As the Court has repeatedly stated, not only do the circumstances justifying the severing of all ties have to be exceptional, but the reasons justifying their existence have to be relevant and sufficient. In challenging the deprivation of parental responsibility and adoption, the first applicant set considerable store by the change in her personal circumstances since X was first born and taken into care and since her competence as a carer had first been assessed. She had married and had a second child, Y, and an investigation into her care of the latter had found no shortcomings. A third child was born after the domestic adoption proceedings had ended and her care for that child has not been questioned either. The advice of an expert who spoke in support of the first applicant's care-giving, who had counselled her in relation to the trauma of losing her first child to placement and who argued in favour of the restoration of her rights was dismissed as based on outdated research. The evaluation of the municipality in which she now lives is passed over by the majority in silence.[28] In the individual assessment required and the balancing of the interests of the child and the biological parent, nowhere does the severing of X's ties with his other sibling (and subsequently a second sibling) or his grandparents appear to feature. The domestic authorities held that the needs of the second child, Y, could not be confused with the unexplained special needs of X. The favourable change in the first applicant's personal circumstances therefore had no bearing on the adoption assessment and X's best interests in that regard. In *Johansen*, where the Court found no violation as regards placement but a violation of Article 8 as regards adoption, it held that the domestic authorities had provided relevant reasons for the impugned adoption decision but not sufficient ones. A failure to take into consideration the changed and better circumstances of the biological mother in that case appeared key in this regard.[29] In a recent Norwegian case, *I.D.*, which concerned access rights, the Court found the complaint of a biological mother to be manifestly ill-founded but emphasised that access rights could and should be kept under review: "[the mother] has the possibility for regular review of these measures *where the authorities will need to take into account any changes and developments in the applicant's and X's circumstances* , including eventual further improvements of the applicant's care abilities or increased emotional robustness of X."[30] In the instant case, the first applicant appealed to the High Court in relation both to the assessment of evidence and the failure to obtain an expert witness concerning her and her husband's ability to provide adequate care. Despite the rejection by the City Court of the expert evidence in favour of the first applicant, the High Court refused leave to appeal and held that the first applicant had not explained why it was necessary to appoint an expert before the High Court (see § 63 of the majority judgment). There would appear to be a contradiction between supposing the mother's care-giving problems were of a fundamental nature and her potential for change limited, as argued by the respondent Government and the domestic authorities (§ 128 of the majority judgment and the paragraphs referred to therein), and the absence of any care arrangements as regards her subsequent children.[31] To sever the child's ties with his mother and siblings the family had to be proved to be particularly unfit; yet there is evidence that, over time, it had proved itself not to be.[32]

(6) Furthermore, it is difficult to avoid the impression that assessment of the first applicant's competence and conduct was influenced throughout by the very fact of her conflict with the child welfare authorities and foster mother. The City Court highlighted the fact that "nothing had emerged (...) to indicate that the first applicant had developed a more positive attitude to the child welfare authorities or to the foster mother".[33] However, conflict of this nature is hardly exceptional.[34] Since both the foster parents and domestic authorities were deemed to be acting in the best interests of the child, by challenging or being in conflict with them the first applicant was perceived to be doing the opposite.[35] The mother's behaviour in relation to the authorities and her express determination to fight until her child was returned were factors which played against her (see § 127 of the majority judgment). It is noteworthy that neither of these factors are counterbalanced in the majority judgment by her repeated indications that, if her parental responsibility were preserved, access rights increased or the child returned, she would work with the child welfare authorities.[36] In the instant case, the authority charged with balancing the different interests involved was itself in conflict with one of the persons whose interests were being balanced. This is a very delicate situation.

(7) Finally, the conflict which created tension during contact visits was between the first applicant, her extended family, and the foster mother and child welfare authorities. No explanation is given why arrangements were not attempted which removed the child and allowed visits to proceed outside the sphere of tension created when the biological and foster mothers met.[37] In other cases in this field the Court has pointed to the need to give due consideration to possible alternatives and to safeguard parental rights while finding a means to allow children to regain their emotional balance.[38] In addition, while the Court has recognised the difficult position domestic authorities find themselves in when faced with strained (parental) relationships; it has held that such a lack of cooperation does not exempt the authorities from their positive obligations under Article 8.[39]

V. The need to respect existing jurisprudential standards

25. We have attempted to explain why, factually and legally, we do not share the assessment of our colleagues in the circumstances of the present case, conscious throughout of the limits rightfully dictated by subsidiarity and the margin of appreciation.

26. We are acutely aware not only of the direct contact enjoyed by the authorities with the persons affected by their decisions but also of their expertise in questions relating to child placement, access rights and adoption. This case demonstrates that there is a marked preference in Norway for adoption rather than long-term foster care and that the former is considered in the best interests of the child. Policy decisions of that nature and the assessments which underpin them are legitimate and fall within the margin of appreciation of the domestic authorities.

27. However, a review of the Court's case-law demonstrates the existence of legal standards – the need to establish particularly weighty reasons, to limit the breaking of *de facto* and *de jure* ties to exceptional circumstances and to apply stricter scrutiny when the latter occurs. They are standards with legal meaning and which should, in our view, have legal consequences. The majority judgment takes cognizance of these legal standards in an abstract manner but only partly applies them to the circumstances of the present case.

28. The general principles outlined in Section III reflect the case-law as it stands and clearly point to procedural and substantive requirements which must be met in a case like this. Once it comes to the concrete application of those principles to the circumstances of the individual case, it would appear that the focus becomes almost exclusively procedural. However, an excessive focus on procedures risks rendering banal what are far-reaching intrusions in family and private life. In addition, the Court's general principles when read in the abstract risk providing false hopes of reunification which, as this case demonstrates, are unlikely to be fulfilled once a child has been taken into care, access rights have been significantly limited, time has passed and domestic proceedings formally meet Article 8 procedural standards.

NOOT

1. In deze zaak ligt een dilemma op tafel dat in veel kinderbeschermingszaken als het meest ingrijpende en ingewikkelde beslismoment wordt ervaren: waar ligt het omslagpunt voor jonge uit huis geplaatste kinderen tussen het werken aan hereniging met de ouders en het nemen van een beslissing over het toekomstperspectief van een jong pleegkind in een nieuw gezin? Daarbij wordt op het scherpst van de snede gestreden over de vraag of langdurige pleegzorg dan wel adoptie – de meest vergaande maatregel voor ouder en kind die hun juridische banden volledig doorsnijdt – het meest in het belang van kind X is. Beide principes – recht op hereniging en recht op continuïteit en stabiliteit voor uit huis geplaatste kinderen – vloeien voort uit de door het EHRM ontwikkelde vaste lijn in de relevante jurisprudentie over art. 8 EVRM, maar ook bijvoorbeeld uit het Internationaal Verdrag inzake de Rechten van het Kind (verder: IVRK; art. 5, 9, 18 en 20), General Comments van het VN-Kinderrechtencomité (o.m. nr. 7, par. 15, 18 en 20 (Early Childhood) en nr. 14, par. 58-65, 80-81 (Best Interests of the Child)) en de Richtlijnen voor Kinderen in Alternatieve Zorg uit 2010. Deze internationale standaarden benoemen beide principes en koppelen die aan de belangen van het kind, maar geven geen blauwdruk voor hoe deze principes zich tot elkaar verhouden in situaties waarin de balans naar beide kanten kan doorslaan: nog verder investeren in de gezinssituatie om een terugplaatsing of in elk geval structureel contact weer mogelijk te maken, of de knoop doorhakken en werken aan een nieuw toekomstperspectief voor het kind in een nieuw gezin, al dan niet met een gezagsbeëindiging van de ouder en een adoptie door de pleegouders. Wat het meest in het belang is van het jonge kind, kan enkel door een zorgvuldige en transparante belangenafweging duidelijk worden. Met een dergelijke belangenafweging kan door kinderbeschermingsautoriteiten het omslagpunt in een concrete situatie worden bepaald. Maar de vraag of een beslissing tot een nieuw toekomstperspectief van een jong pleegkind ook betekent dat dit moet uitmonden in een adoptie in plaats van in een gezagsbeëindiging met mogelijk een voogdij-overdracht naar pleegouders, lijkt uiteindelijk een kwestie van smaak die per verdragsstaat verschilt, zonder dat hier binnen Europa consensus over bestaat. De verschillende benaderingen over deze kwestie blijken duidelijk uit de krappe meerderheid in deze Hof-uitspraak, waarbij drie rechters in een uitgebreide *dissenting opinion* bepleiten waarom zij hierover een andere zienswijze hebben. Het Hof verwoordt dit in algemene zin als volgt: "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 arena". Noorwegen staat in dergelijke situaties eerder een adoptie voor omdat dit voor het kind zou helpen om zijn 'sense of belonging' met zijn pleegouders te versterken, die hij als zijn eigen ouders zag, en dit hem zekerheid, continuïteit en stabiliteit zou bieden in de jaren die nog voor hem lagen. Met een adoptie wordt immers gerealiseerd dat pleegouders de juridische ouders worden en het ouderlijke gezag over het kind uitoefenen, terwijl de biologische ouder geen juridische band meer heeft met het kind en derhalve ook geen aanspraak kan maken op omgang of contact. In bijvoorbeeld Nederland zou eerder voor een permanente gezagsbeëindiging (met op termijn overheveling van de voogdij aan pleegouders) zijn gekozen in plaats van voor een adoptie, omdat hiermee de banden tussen de biologische ouder(s) en het kind in stand blijven en omgang of contact mogelijk blijft. De Staatscommissie Herijking Ouderschap heeft overigens in haar eindrapport in 2016 gepleit voor de invoering van een 'open' of 'zwakke' adoptie, waarmee de voordelen van beide varianten samenkomen (*Kind en ouders in de 21ste eeuw. Rapport van de Staatscommissie Herijking Ouderschap*, Den Haag 2016, p. 435-438).

2. Maar laten wij eerst teruggaan naar de feiten in deze zaak. Een jong kind, X, wordt al na enkele weken van zijn biologische moeder gescheiden als blijkt dat zij de aanwijzingen van de kinderbeschermingsautoriteiten niet wil opvolgen en niet langer in een gezinsopvanghuis wil verblijven met haar kind, terwijl de maatschappelijk werkers vinden dat haar kind speciale aandacht nodig heeft die zij op dat moment niet kan geven. X wordt daarom in een pleeggezin geplaatst, waarbij de omgang tussen X en moeder ernstig wordt beperkt tot zes keer twee uur per jaar onder begeleiding. De begeleide omgang verloopt niet soepel en X laat signalen zien van spanning en stress na deze omgangsmomenten. Tegelijk is hij veilig gehecht aan zijn pleegouders en verloopt zijn ontwikkeling positief, terwijl de moeder laat zien dat zij niet (optimaal) wil meewerken aan de aanwijzingen van de kinderbeschermingsautoriteiten en de strijd aangaat om haar kind weer thuis te krijgen. Na een beslissing in beroep waarin wordt besloten dat X op termijn terug mag naar zijn moeder en de contacten derhalve worden uitgebreid, beslist het High Court uiteindelijk dat X niet terug mag worden geplaatst, maar een toekomst heeft in het pleeggezin, waarbij de contacten tussen X en moeder worden beperkt tot vier keer twee uur per jaar. Daarbij is uitdrukkelijk beoordeeld of ondersteunende maatregelen er toe zouden kunnen leiden dat moeder haar opvoedvaardigheden verbetert. Op grond van een deskundigenverklaring beslist het High Court dat de moeder voor dit kwetsbare kind onvoldoende in huis heeft – geen 'good enough parent' is –, mede gezien haar verstandelijke beperkingen, en dat dit geen redelijk alternatief was voor een langdurige pleeggezinplaatsing van X, te meer aangezien X veilig is gehecht aan zijn pleegouders. Als X bijna drie jaar is, verzoeken de kinderbeschermingsautoriteiten om gezagsbeëindiging van de moeder, zodat de pleegouders X kunnen adopteren. Dit verzoek wordt toegewezen, waarbij een belangrijke factor is dat X dermate gehecht is aan zijn pleegouders dat een terugplaatsing naar huis voor hem ernstige en permanente problemen zou meebrengen. Een adoptie zou het meest in het belang van X zijn. Deze beslissing wordt door moeder in beroep aangevochten. Zij voert aan dat zij inmiddels een stabiele relatie heeft, een dochter heeft gekregen waar zij zelf voor zorgt zonder dat er zorgen zijn over de opvoeding, en daarom een nieuwe kans verdient. De maatschappelijk werkers voeren aan dat adoptie het meest in het belang van X is, ook omdat de omgang tussen X en zijn moeder telkens spanning meebrengt voor hem en moeder zich niet goed kan verplaatsen in zijn belangen. De rechtbank neemt deze zorgen over X ten aanzien van de omgang met zijn moeder serieus en weegt daarbij mee dat moeder op alle mogelijke manieren tegen de kinderbeschermingsautoriteiten 'vocht' en daarbij ook haar verhaal, inclusief foto's van X, op internet had geplaatst. De rechtbank overweegt dat dit er op wijst dat moeder de belangen van X niet voorop stelt. Zij was niet dermate veranderd dat zij X de juiste zorg zou kunnen bieden. Het toekomstperspectief van X lag bij zijn pleegouders en zij waren voor X zijn psychologische ouders, aan wie hij veilig was gehecht. De rechtbank overweegt verder dat een beslissing voor adoptie slechts kan worden genomen als aan strenge voorwaarden is voldaan en daarbij bepalend is of de adoptie in het belang van X was op grond van een zorgvuldige belangenafweging. Voor X zou een adoptie betekenen dat hem zekerheid, stabiliteit en continuïteit zou worden geboden voor de rest van zijn leven, een langere periode dan die welke zou volgen uit een langdurige pleeggezinplaatsing met voogdij-overdracht (dit zou namelijk slechts gelden totdat X meerderjarig zou worden). Daarbij is het ook in praktisch opzicht voor X van belang dat degenen die de dagelijkse zorg voor de verzorging en opvoeding hadden, in de praktijk ook daadwerkelijk als zijn ouders werden gezien en de taken konden uitoefenen die uit de ouderlijke verantwoordelijkheid voortvloeien. Het Hof en het Hooggerechtshof houden deze beslissing in stand.

3. Bij het Europese Hof dient moeder namens haarzelf en haar zoon een klacht in. De Noorse Staat vecht de ontvankelijkheid van moeder voor een klacht namens haar zoon aan, aangezien zij geen wettelijke vertegenwoordiger (meer) is van haar zoon en in de procedure op nationaal niveau dan ook geen recht heeft om haar zoon in rechte te vertegenwoordigen. De adoptieouders van X zijn namelijk zijn wettelijke vertegenwoordigers. Volgens vaste rechtspraak laat het Hof echter weten dat, ook bij een mogelijk conflict van plichten tussen moeder en kind, de moeder in bijzondere omstandigheden van het geval toch ontvankelijk kan worden verklaard om namens haar kind bij het Hof een klacht in te dienen. In geval een moeder in conflict is met de kinderbeschermingsautoriteiten, kan zij namens haar kind een klacht indienen in Straatsburg: "In the event of a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian, there is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his rights under the Convention", aldus het Hof in *Scozzari en Giunta* t. *Italië* (EHRM 13 juli 2000 (GK), nrs. 39221/98 en 41963/98, ECLI:CE:ECHR:2000:0713JUD003922198, «EHRC» 2000/74 m.nt. Van der Velde). Deze moeder is dan ook bevoegd om in haar strijd tegen de kinderbeschermingsautoriteiten haar zoon in rechte te vertegenwoordigen bij het Europees Hof. Overigens wilden ook het zusje van X, dat wel bij haar moeder opgroeide, en zijn grootouders een klacht indienen, maar deze werd niet-ontvankelijk verklaard omdat zij de nationale rechtsmiddelen nog niet hadden uitgeput. Zij waren immers geen belanghebbende geweest in de nationale procedures die moeder had gevoerd.

4. Het Straatsburgse Hof benadrukt in zaken als deze telkens dat in acht moet worden gehouden dat er bij de beoordeling van de noodzaak tot overheidsinterventie in het gezinsleven een beoordelingsvrijheid voor Verdragsstaten bestaat (zie o.m. par. 110). Deze beoordelingsvrijheid is ruim bij initiële beslissingen tot scheiding van ouder(s) en kind, bijvoorbeeld bij vermoedens van kindermishandeling, maar minder ruim ten aanzien van beslissingen die verdergaande inbreuken op het gezinsleven betreffen, zoals beperkingen ten aanzien van omgang en contact. Als het gaat om een nog meer vergaande beslissing tot gezagsbeëindiging en vervolgens adoptie, waarmee alle juridische banden tussen ouder(s) en kind worden doorbroken, dan hanteert het Hof volgens vaste jurisprudentie het criterium in hoeverre sprake is van uitzonderlijke omstandigheden die maken dat deze vergaande inbreuk noodzakelijk is in het belang van het kind. Het Hof maakt ook telkens duidelijk dat het geen beroepsinstantie in vierde aanleg is en dat het zijn taak is om te beoordelen of de nationale gerechten een inhoudelijke beoordeling hebben verricht naar de gehele gezinssituatie waarbij vele belangen van feitelijke, emotionele, psychologische, materiële en medische aard zijn meegenomen. Vervolgens is het de taak van het Hof om te beoordelen of een

inhoudelijke en redelijke belangenafweging is gemaakt van de verschillende belangen van alle betrokkenen, waarbij de vraag centraal staat wat de best mogelijke oplossing voor het kind is. Zoals het Hof in eerdere uitspraken al duidelijk maakte, gelden daarbij twee principes: (1) het is in het belang van het kind om de banden met zijn familie intact te laten, tenzij sprake is van een situatie waarin de ouders hebben aangetoond uitermate ongeschikt te zijn voor de verzorging en opvoeding van het kind; (2) het is in het belang van het kind om zijn ontwikkeling in een veilige en stabiele omgeving te waarborgen (zie o.m. *Neulinger and Shuruk* t. *Zwitserland*, EHRM 6 juli 2010 (GK), nr. 41615/07, ECLI:CH:EHCR:2010:0706JUD004161507, «EHRC» 2010/93 m.nt. Rutten; *Y.C.* t. *Verenigd Koninkrijk*, EHRM 13 maart 2012, nr. 4547/10, ECLI:CE:EHCR:2012:0313JUD000454710, «EHRC» 2012/111 m.nt. Bruning). Met deze vaste lijn in de jurisprudentie heeft het Hof getracht om de belangen van het kind meer handvatten te geven door de verschillende factoren die daarbij een rol spelen, te benoemen (zie hierover mijn annotatie in «EHRC» 2012/111). Je zou kunnen verwachten dat bij dermate ingrijpende beslissingen als die van adoptie, het Hof de beoordelingsvrijheid zo nauw mogelijk benadert. Dit betekent echter niet dat het Hof een inhoudelijke afweging zal maken, integendeel, zijn taak is "rather to review under the Convention the decisions taken by those authorities in the exercise of their power of appreciation" (par. 110). De zware voorwaarden die gelden voor een beslissing tot adoptie worden derhalve niet inhoudelijk beoordeeld, maar onderzocht wordt alleen of de nationale gerechten deze voorwaarden zorgvuldig inhoudelijk hebben getoetst en daarbij alle relevante onderdelen van de belangen van betrokkenen hebben meegewogen. De focus van het Hof is daarmee eigenlijk een louter procedurele. In de *dissenting opinion* van Grozev, O'Leary en Hüseynov wordt dit bekritiseerd (par. 28), aangezien volgens de dissenters door een excessieve nadruk op slechts procedurele, en niet op materiële aspecten, de vergaande inbreuken op het gezinsleven van ouder(s) en kind op eenvoudige wijze door de vingers zal worden gezien. "The Court's general principles when read in the abstract risk providing false hopes of reunification which, as this case demonstrates, are unlikely to be fulfilled once a child has been taken into care, access rights have been significantly limited, time has passed and domestic proceedings formally meet Article 8 procedural standards" (par. 28 *dissenting opinion*). Met andere woorden, een dergelijk traject van steeds verdergaande inbreuken op het gezinsleven kan door ouder(s) en kind in feite niet succesvol aangevochten worden zolang de bevoegde nationale autoriteiten kunnen onderbouwen dat zij een zorgvuldige belangenafweging hebben gemaakt. Bij adoptiebeslissingen waarmee de juridische band tussen ouder(s) en kind volledig wordt doorgesneden, is dit volgens de dissenters voor de direct betrokkenen een schrijnende conclusie.

5. De procedurele toets die het Hof uitvoert, leidt tot de conclusie dat de beslissing tot gezagsbeëindiging en adoptie van X niet in strijd zijn met art. 8 EVRM, aangezien op het recht op respect voor gezinsleven tussen moeder en X een geoorloofde inbreuk wordt gemaakt. Als eerste oordeelt het Hof over de vraag of alle direct betrokkenen een eerlijk proces hebben gehad en voldoende konden participeren in de procedures. Dat is volgens het Hof het geval geweest; de moeder heeft in alle fasen van de procedure actief kunnen meedoen en werd vertegenwoordigd door een raadsman. Er zijn in de procedure in eerste aanleg 21 getuigen gehoord, en in beroep zijn deze getuigen opnieuw gehoord en is moeder, bijgestaan door haar raadsman, uitgebreid gehoord. Er werden verschillende deskundigenverklaringen ingebracht. De deskundige die, in tegenstelling tot de andere deskundigen, van mening was dat X naar de moeder zou moeten, onderbouwde zijn verklaring volgens de nationale autoriteiten zonder gebruikmaking van recente onderzoeksbevindingen; deze verklaring werd daarom terzijde geschoven. Volgens het Hof zijn de procedurele rechten van moeder en X derhalve in alle fasen van de procedure voldoende gewaarborgd.

6. Ten aanzien van de procedurele beoordeling van de inhoudelijke toetsing die de nationale autoriteiten hebben uitgevoerd, merkt het het Hof op dat zij voldoende relevante en passende redenen hadden om te beslissen dat X in het pleeggezin moest blijven. Ondanks het feit dat de situatie van de moeder in verschillende opzichten was verbeterd – ze was getrouwd, had een tweede kind gekregen over wie geen zorgen bestonden en die zij zelf opvoedde en haar materiële situatie was verbeterd – beslist het Hof dat de inhoudelijke belangenafweging van de nationale autoriteiten bij de adoptiebeslissing van X, die dan ongeveer drie-en-een-half jaar in het pleeggezin woont, niet in strijd is met art. 8 EVRM. Bij deze belangenafweging werden de belangen van X tot veiligheid en duidelijkheid in zijn opvoedsituatie bij zijn psychologische ouders in zijn pleeggezinomgeving zwaarder gewogen dan de belangen van moeder en X om hun juridische banden niet volledig door te snijden met een adoptie. Het Hof stelt hierbij verschillende onderdelen van de onderbouwing van de nationale autoriteiten centraal. Allereerst benadrukt het Hof het belang van de (veilige) gehechtheidsrelatie van X met zijn pleegouders in sociaal en psychologisch opzicht. Hierbij onderstreept het Hof dat juist voor jonge kinderen het extra belangrijk is om continuïteit en stabiliteit in hun opvoeding te garanderen, waarbij wordt verwezen naar CRC General Comment nr. 7 (implementing child rights in early childhood). Voor het Hof was hierbij belangrijk dat de sociale banden tussen X en zijn moeder zeer beperkt waren. Dit was voor een belangrijk deel te wijten aan de beperkte contacten die tussen X en zijn moeder hadden plaatsgehad. Het Hof noemt hierbij tevens dat de omgang die heeft plaatsgehad tussen moeder en X niet geleid heeft tot een betere band tussen hen en dat de moeder hierin geen positieve groei had doorgemaakt door de belangen van X op de eerste plaats te kunnen zetten. Ten tweede benoemt het Hof dat, hoewel na een adoptie de moeder geen recht meer had op omgang, de pleegouders van X hadden laten weten dat indien X daar behoefte aan zou hebben, zij omgang met zijn moeder zouden stimuleren. Ten derde onderstreept het Hof de kwetsbaarheid van X; een adoptie zou voor X betekenen dat hij zijn band met zijn pleegouders, die hij als zijn eigen ouders beschouwde, kon versterken en dat hij meer zekerheid over zijn toekomstperspectief zou verkrijgen. Ten slotte benadrukt het Hof dat de negatieve houding van de moeder ten opzichte van de kinderbeschermingsautoriteiten en haar voortdurende juridische strijd om X weer terug naar huis te krijgen niet bijdroegen aan een optimale ontwikkeling van haar zoon X, die hierdoor beïnvloed werd en schade opliep.

7. Bij deze inhoudelijke belangenafweging door de nationale autoriteiten werd ook ingegaan op de vergelijking met eerdere Noorse adoptiezaken waarover het Staatsburgse Hof besliste. In *Aune* ging het om een jongen die na zes maanden wegens ernstig letsel na kindermishandeling uit huis was geplaatst en op zijn twaalfde jaar door zijn pleegouders werd geadopteerd (*Aune* t. *Noorwegen*, EHRM 28 oktober 2010, nr. 52502/07, ECLI:CE:EHCR:2010:1028JUD005250207, «EHRC» 2011/16 m.nt. Bruning). Zijn ouders waren drugsverslaafden die bleven gebruiken na zijn uithuisplaatsing en zijn moeder werkte slecht mee aan de omgang met haar zoon. In deze zaak hadden de pleegouders laten weten dat zij omgang tussen de jongen en zijn moeder zou blijven stimuleren. Het Hof benoemt in de uitspraak dat in de zaak *Aune* de pleegouders meer openstonden voor contact tussen de zoon en zijn moeder dan in de onderhavige zaak, maar dat er desalniettemin voor X een opening bestond tot omgang met zijn moeder omdat zijn pleegouders lieten weten hiervoor open te staan als hij dat zou willen en dat dit werd meegewogen. Ook benoemde het Hof de voortdurende strijd van moeder Aune tegen de bevoegde autoriteiten en werd dit vergeleken met de juridische strijd van de moeder van X. De dissenters onderstrepen dat de bereidheid van de pleegouders van X tot omgang beduidend kleiner was dan die van Aune, terwijl in de zaak *Aune* sprake was van een slechtere relatie tussen de jongen en zijn moeder. Zij stellen dat dit door het Hof serieus had moeten worden genomen. X was immers nog maar drie en een half jaar oud, in tegenstelling tot de twaalfjarige zoon van moeder Aune, en voorlopig kon hij vanwege zijn jonge leeftijd dus nog maar moeilijk zelf aangeven hoe hij tegen omgang met zijn moeder aankeek. Het Hof had dit volgens hen moeten meenemen in de afwegingen. Daarbij was volgens de dissenters de kwetsbaarheid van X van een duidelijk andere orde dan die van de twaalfjarige jongen in de *Aune*-zaak. X was als pasgeborene direct met een spoedmaatregel uit huis geplaatst, samen met zijn moeder, en na twee maanden gaven deskundigenverklaringen aan dat hij functioneerde als een normale twee maanden oude baby. De jongen in de *Aune*-zaak daarentegen had ernstige schade opgelopen als slachtoffer van kindermishandeling toen hij op de spoedeisende hulp van het ziekenhuis werd binnengebracht. Volgens de dissenters is de kwetsbaarheid van X dan ook als veel minder ernstig te duiden en daarom zou terughoudender moeten zijn beslist over de adoptie van X. Ook in andere zaken heeft het Straatsburgse Hof echter laten zien dat snelle adoptiebeslissingen, ook als de situatie van de biologische ouders ondertussen is verbeterd, gelegitimeerd kunnen worden omdat ze het meest in het belang van een jonger kind kunnen zijn. Zo besliste het Hof in *Y.C.* t. *Verenigd Koninkrijk* dat de beslissing tot adoptie van een jongen die pas in zijn zevende levensjaar van zijn moeder en diens partner werd gescheiden en binnen tien maanden via een pleegzorgplaatsing geadopteerd werd, waarbij alle banden met zijn moeder werden doorgesneden, niet in strijd was met art. 8 EVRM aangezien alle relevante factoren bij de inhoudelijke belangenafweging door de nationale autoriteiten waren meegenomen (*Y.C.* t. *Verenigd Koninkrijk*, reeds aangehaald). In *Johansen* t. *Noorwegen* (EHRM 7 augustus 1996, nr. 17383/90, ECLI:CE:ECHR:1996:0807JUD001738390) concludeerde het Hof echter dat er onvoldoende reden was tot adoptie van een jong meisje aangezien de intensieve contacten met moeder positief verliepen (twee keer per week) en de situatie van moeder was verbeterd. Het door de bevoegde autoriteiten aangevoerde argument dat moeder niet wilde samenwerken met de bevoegde instanties was slechts gebaseerd op de situatie van haar oudere uit huis geplaatste zoon en was volgens het Hof onvoldoende reden om dit van toepassing te verklaren op de situatie van haar uit huis geplaatste dochter; de beslissing tot adoptie leverde een ongeoorloofde schending op van art. 8 EVRM.

8. Dit roept de vraag op of het belang van een kind om een juridische band te behouden met de biologische ouder(s) en bijvoorbeeld ook met jongere (half)broertjes en -zusjes en grootouders, wel voldoende serieus is genomen bij het afwegen van de verschillende belangen in de beslissing over adoptie. De dissenters zijn van mening dat in deze zaak dit duidelijk niet het geval is geweest. Zij zien dit als strijdig met bijvoorbeeld de uitspraak van het Hof in de *Mandet* t. *Frankrijk*-zaak (EHRM 14 januari 2016, nr. 30955/12, ECLI:CE:EHCR:2016:0114JUD003095512, «EHRC» 2016/76 m.nt. Florescu), waarin het Hof tegen de zin van een minderjarige in besliste dat er

een juridische band zou moeten worden gevestigd tussen het kind en de biologische, niet-verzorgende ouder die nooit betrokken was geweest bij de verzorging en opvoeding van het kind, aangezien een nieuwe partner van de biologische moeder het kind had erkend en hem opvoedde. Met deze beslissing wordt het belang van de biologische werkelijkheid benadrukt, terwijl in de onderhavige uitspraak juist wordt beslist tot het doorsnijden van de juridische banden met de biologische moeder en haar zoon. Ook in *Y.C.* t. *Verenigd Koninkrijk* is deze factor bij de belangenafweging niet (zichtbaar) meegenomen (zie hierover mijn annotatie in «EHRC» 2012/111). "Nowhere in the file does it emerge clearly that the domestic authorities considered the long-term effects on the child of the permanent and irreversible cutting of de facto and legal tie with his biological mother (...) severing such ties cuts a child off from its roots, which is a measure which can be justified only in exceptional circumstances", aldus de dissenters. Zelfs bij een procedurele benadering door het Hof waarbij enkel wordt getoetst of een zorgvuldige inhoudelijke belangenafweging is gemaakt, zou deze factor een rol moeten spelen. Ik ben het dan ook met de dissenters eens dat het een gemiste kans is dat dit ook in de onderhavige zaak niet is gebeurd. Hiermee is een belangrijk element van de belangen van het kind niet meegewogen. Worden bij dergelijke belangenafwegingen alleen de relevante factoren van de belangen van het kind meegewogen, dan wel expliciet gemotiveerd die in de beleidslijn van een nieuwe toekomst voor het kind passen? Dan is er ook een risico van tunnelvisie, waarbij factoren die in een andere richting wijzen, aan de kant worden gelegd. Juist bij de immer moeilijke en delicate afweging of de belangen van het kind nog in de richting van gezinshereniging, dan wel een nieuw opvoedperspectief wijzen, zouden alle factoren transparant benoemd moeten worden. Hierbij kunnen de Richtlijnen voor Kinderen in Alternatieve Zorg een rol spelen; daarin worden verschillende aspecten van de belangen van een uit huis geplaatst kind expliciet benoemd (*Guidelines for the Alternative Care of Children*, A/RES/64/142, 24 februari 2010).

9. Een ander opvallend onderdeel van de Hof-uitspraak is het belang dat wordt gehecht aan de strijdlustige houding van de moeder om haar kind weer thuis te krijgen. In dergelijke zaken zien we vaker dat ouders alle hoop en vertrouwen in betrokken kinderbeschermingsinstanties hebben verloren en zich vastbijten in alle mogelijke manieren om de beslissingen aan te vechten. Het kan dan gebeuren dat de belangen van het kind niet meer voorop worden gesteld en ouders zich als het ware in deze strijd verliezen. In de onderhavige uitspraak lijkt hier ook sprake van te zijn; de moeder kan zich niet goed inleven in de belangen van haar zoon X en stelt zich niet-empathisch op. Tegelijk geven de dissenters terecht aan dat de houding van moeder in deze zaak de beoordeling van haar capaciteiten beïnvloed heeft. Moeder zorgde zelfstandig voor een tweede kind en later werd nog een derde kind geboren waar zij ook zelf voor zorgde, zonder dat er zorgen waren over de opvoeding van deze kinderen. Hoe rijmt dit, zo geven de dissenters aan, met de conclusie van de nationale autoriteiten dat deze moeder weinig potentie voor verandering liet zien en haar opvoedkwaliteiten onvoldoende waren voor de kwetsbare X? Kunnen we nog spreken van een eerlijke procedure als de autoriteiten tegen wie de moeder voortdurend verweer voerde en de strijd aanging, zelf oordeelden over de kwaliteiten van deze moeder? In dergelijke situaties zijn extra waarborgen nodig, bijvoorbeeld door de inzet van niet-betrokken deskundigen, om de opvoedkwaliteiten van een ouder in kaart te brengen. Want van ouders kan mijns inziens niet gevraagd worden om de strijd te staken als het dierbaarst dat zij bezitten, hen wordt ontnomen.

10. In deze zaak wordt duidelijk dat "there is a marked preference in Norway for adoption rather than long-term foster care and that the former is considered in the best interests of the child" (*dissenting opinion*, par. 26). In Europa zijn we nog ver weg van consensus over de vraag wanneer er voldoende legitieme redenen zijn voor de overheid om in te grijpen in het gezinsleven tegen de wil van ouders en deze inbreuk zo ver door te trekken dat de juridische band tussen kinderen en biologische ouders met een adoptie wordt doorbroken. Evenmin bestaat er consensus over de vraag wanneer de balans omslaat van hereniging tussen ouder en kind naar *permanency planning* met een beslissing over het toekomstperspectief van het kind, hoe ingrijpend ook voor ouders, vooral als de gronden voornamelijk liggen in het verstrijken van de tijd voor een jong kind terwijl er bij de ouder sprake is van verbeterde omstandigheden. Dan rest slechts een toetsing van een inhoudelijke en transparante belangenafweging van alle relevante onderdelen van de belangen van ouder(s) en kind, waarbij duidelijk moet zijn dat inderdaad alle relevante factoren die de belangen van het kind bepalen, zijn meegenomen.

prof. mr. drs. M.R. Bruning, Hoogleraar Jeugdrecht, Universiteit Leiden

VOETNOTEN

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1 The complaints of the biological mother (the first applicant) and the child (the second applicant, X) who was the subject first of placement and then adoption proceedings were deemed admissible. The complaints by the first applicants' second child and her parents were deemed inadmissible (§§ 78-94 of the majority judgment). The first applicant's third child was not born until after the end of the adoption proceedings.

2 See, for example, *Gnahoré v. France*, no. 40031/98, § 54, CEDH 2000-IX; *Sahin c. Allemagne* [GC], no 30943/96, § 65, CEDH 2003-VIII and the authorities cite Section III below. Those authorities make clear that the margin narrows and the Court's scrutiny is strict as regards restriction or deprivation of access rights.

3 See, for example, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 70, ECHR 2001-V and the authorities cited in Section III below.

4 See *Görgülü v. Germany*, no. 74969/01, 26 February 2004, § 48; *Gnahoré v. France*, cited above, § 59, ECHR 2000-IX, or *Johansen v. Norway*, judgment of 7 August 1996, Reports of Judgments and Decisions 1996-III, § 78.

5 *Görgülü*,(emphasis added).

6 It was not disputed at domestic level or before the Court that the first applicant had considerable medical difficulties to surmount as a child, that these difficulties had consequences for her social and psychological development and that her feelings about the pregnancy were conflicted.

7 1.5 hour weekly sessions were reduced to six two-hour sessions per year and then further reduced to four two-hour sessions per year. For a brief period after the City Court had upheld the first applicant's claim, they had been extended to 3 hours 3 times weekly.

8 It is not disputed that, formally, the procedure before the Board (composition of the board, holding of an oral hearing, presence of the first applicant who was leg represented, number of witnesses heard – § 40 of the majority judgment) and the City Court (§ 47 of the majority judgment) complied with the implicit procedural requirements of Article 8 of the Convention (§§ 111 – 112 of the majority judgment). See further below, however, on the assessment of evidence.

9 See, in particular, §§ 102 – 110 of the majority judgment.

10 See note 2 above, *Görgülü*, cited above, § 50 or *Anayo v. Germany*, no. 20578/07, 21 December 2010, § 66.

11 See, for example, *K and T. v. Finland*, no. 25702/94, 12 July 2001, §§ 154-155; *Görgülü*, cited above, § 42, or *Johansen*, cited above, § 64. See also §§ 104 and 11(the majority judgment.

12 See, for example, *Y.C. v. the United Kingdom*, no. 4547/10, 13 March 2012, § 138, and §§ 102, 107 and 110 of the majority judgment which refer to the need for relevant and sufficient reasons.

13 See *Scozzari and Giunta v. Italy*, no. 39221/98, 13 July 2000, § 169 and *K. and T. v. Finland*, cited above, § 178. On the best interests of the child, see further bel(

14 *K. and T. v. Finland*, cited above, § 155.

15 See *Y.C.*, cited above, § 136.

16 See, variously, *Johansen*, cited above, § 78; *Gnahoré*, cited above, § 59, or *Pontes v. Portugal*, no. 19554/09, 10 April 2012, § 79.

17 *Görgülü*, cited above, § 41 and § 43.

18 See also *Johansen*, cited above, § 79. Indeed the majority judgment appears later to recognise this and relies on the legitimacy of placement in care as a basis for suggesting adoption could have legitimately been considered by the domestic authorities as preferable to continued, long-term foster care (§§ 121 and 123).

19 See, inter alia, *K. and T. v. Finland*, cited above, § 178.

20 In *Aune v. Norway*, no. 52502/07, 28 October 2010, §§ 76-78, where the Court referred to the domestic courts' findings regarding the "great, almost absolute, certainty" that the openness of the adoptive parents to contact would continue. That openness, which had already been established, meant that the biological mother was therefore not prevented from maintaining a relationship with her child.

21 See, for example, *I.D. v. Norway* (dec.), 4 April 2017 (visiting rights of 4 hours, 3 times a year); *T.S. and J.J. v. Norway* (dec.), no. 15633/15, § 5, 11 October 201((visiting rights of 4 hours, twice a year, albeit for a grandmother but one who had to travel from Poland to visit the child of her deceased daughter), or *J.M.N. and C.H. v. Norway* (dec.), 11 October 2016 (visiting rights of 2 hours, 3 times a year).

22 See, in this regard, *Görgülü*, cited above, §§ 46 and 48; *Pontes*, cited above, § 80; *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 102, CEDH 2000-I, or *Maire v. Portugal*, no 48206/99, § 74, CEDH 2003-VI.

23 See the facts described in Section II above and §§ 7 – 18 of the majority judgment.
24 Contrast with the clear description of the vulnerabilty of the adoptive child in *Aune*, cited above; the special needs of the child placed in care in *T.S. and J.J.*, cited above, § 5, or the vulnerability and special needs of both parents and child in *J.M.N. and C.H.*, cited above, §§ 3-10.
25 Contrast the statements of the Board, reproduced at § 41 of the majority judgment, with the reports from the family centre, § 10, the child psychiatry clinic, § 12 and the testimony of the family consultant, § 25.
26 See the assessment of the Court in *Görgülü*, cited above, §46: "that court does not appear to have examined whether it would be viable to unify [X] and the applicant under circumstances that would minimise the strain put on [X]. Instead, the Court of Appeal apparently only focussed on the imminent effects which a separation from his foster parents would have on the child, but failed to consider the long-term effects which a permanent separation from his natural father might have on [X]. The solution envisaged by the District Court, namely to increase and facilitate contacts between the applicant and [X], who would at an initial stage continue to live with his foster family, was seemingly not taken into consideration. The Court recalls in this respect that the possibilities of reunification will be progressively diminished and eventually destroyed if the biological father and the child are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur". See also *Ancyo*, cited above, § 71.
27 *Mandet v. France*, no. 30955/12, 14 January 2016, §§ 56-57.
28 See §§ 62-63 of the majority judgment.
29 See *Johansen*, cited above, §§ 83-84 and also *Pontes*, cited above, § 96 for the need to reconsider changed family circumstances.
30 See *I.D.*, cited above, § 65 (emphasis added).
31 See similarly *Pontes*, cited above, § 96 for a contradictory assessment of a family situation.
32 See *Görgülü*, cited above, § 48 and other authorities.
33 See § 51 of the majority judgment.
34 The fact that this conflict is unexceptional is also reflected in the fact that the first applicant can introduce a complaint on behalf of her biological child before a Court whose judgment confirms the ending of their social and legal relationship. As § 81 of the majority judgment recognises in the context of admissibility, citing *Scozzari and Giunta*, "minors can apply to the Court even, or indeed especially, if they are represented by a mother who is in conflict with the authorities and criticises their decisions and conduct as not being consistent with the rights guaranteed by the Convention."
35 For a depiction of similar opposing interests which also proved fatal to a biological parent's claim (although the circumstances of the case were very different) see *and H. v. the United Kingdom*, no. 35348/06, 31 May 2011, § 88: "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".
36 See, *inter alia*, the first applicant's submissions to the City Court, § 45 of the majority judgment.
37 See also the arguments of the applicant in *Johansen*, cited above, § 74.
38 See, for example, *Vojnity v. Hungary*, no. 29617/07, 12 February 2013, §§ 42-43, although the case concerned a complaint relating to Article 14 and 8 combined.
39 See, for example, *Kacper Nowakowski v. Poland*, no. 32407/13, 10 January 2017, § 89.