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

SECOND SECTION

DECISION

Application no. 277/20
J.B. and E.M.
against Norway

The European Court of Human Rights (Second Section), sitting on 11 July 2023 as a Committee composed of:

Jovan Ilievski*, President*,
Lorraine Schembri Orland,
Diana Sârcu*, judges*,

and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 277/20) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 20 December 2019 by Mr J.B., a Nigerian national, and Ms E.M., a Norwegian national ("the applicants"), who were born in 1990 and 1980 respectively and live in Sweden, and were represented before the Court by Mr D. Tønseth, a lawyer practising in Oslo;

the decision not to disclose the applicants' names;

the decision to give notice of the application to the Norwegian Government ("the Government"), represented by their Agent, Mr M. Emberland, of the Attorney General's Office (Civil Matters);

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The application relates to proceedings in which the foster care arrangement in respect of one of the applicants' children was replaced with adoption and concerns complaints lodged under Article 8 of the Convention and under Article 9 read in conjunction with Article 2 of Protocol No. 1.

2. The applicants – E.M., the mother, and J.B., the father – are former partners and the joint parents of two children, including X, who was born in January 2013.

3. When X was four months old a decision to place him in foster care on an emergency basis was taken by the child welfare services. A care order was issued in respect of X on 18 November 2013 by the County Social Welfare Board. X's foster parents were a same-sex couple.

4. From 2015 to 2017 proceedings were held on whether the care order could be lifted, in which both the Board and the City Court concluded that the parents' application to have it lifted could not be granted.

5. On 27 June 2018 the Board withdrew the applicants' parental responsibilities in respect of X and authorised his adoption by his foster parents.

6. On 2 January 2019 the City Court reversed the decision of the Board.

7. On 24 April 2019 the High Court concurred with the Board.

8. On 21 June 2019 the Supreme Court refused the applicants leave to appeal against the High Court's judgment.

9. The applicants complained that the decision to withdraw their parental responsibilities in respect of X and to authorise his adoption by his foster parents violated Article 8 of the Convention, and Article 9 taken together with Article 2 of Protocol No. 1 to the Convention.

THE COURT'S ASSESSMENT

10. The Court notes that the application relates to the proceedings which took place between 2018 and 2019 in which X's foster care was replaced by adoption. The applicants complained that those proceedings and the resulting decisions had entailed an unnecessary interference with their right to respect for their family life under Article 8 of the Convention and had violated their rights under Article 9 of the Convention taken together with Article 2 of Protocol No. 1 because the adoption applicants were a same-sex couple.

11. As to the applicants' argument to the effect that the adoption also violated their rights under Article 9 of the Convention taken together with Article 2 of Protocol No. 1, the Court notes that in the instant case, it is evident from the High Court's judgment that that court, in its balancing of interests, considered that replacing X's foster care with adoption would be especially difficult for the applicants to accept because the adoptive parents were a same-sex couple and homosexuality was illegal in the applicants' countries of origin. The High Court found nonetheless that decisive importance could not be attached to this factor in its assessment of what was required in respect of X's best interests. In line with the approach it recently took in *Abdi Ibrahim v. Norway* ([GC], no. 15379/16, §§ 141-42, 10 December 2021), the Court will likewise consider this to be a factor relevant to the necessity assessment under Article 8 § 2 rather than as a separate complaint to be decided under

Article 9 of the Convention taken together with Article 2 of Protocol No. 1. Against that background the Court does not find it necessary to examine the Government's objection of non-exhaustion of domestic remedies in respect of that complaint or their arguments relating to whether or not it was *stricto sensu* a matter of freedom of thought, conscience and religion, falling within the scope of Article 9.

12. The Court finds it established that the adoption authorisation at issue entailed an interference with the applicants' right to respect for their family life for the purposes of Article 8 § 1 of the Convention. That interference was in accordance with the law, namely the 1992 Child Welfare Act, which applied at the time. It pursued the legitimate aims of protecting X's "health" and "rights", in keeping with Article 8 § 2. The main legal issue arising is whether the interference was "necessary in a democratic society", within the meaning of that provision.

13. The general principles relevant to the necessity test under Article 8 § 2 of the Convention were extensively set out in *Strand Lobben and Others v. Norway* ([GC], no. 37283/13, §§ 202-13, 10 September 2019) and have since been restated in a number of cases, including *Abdi Ibrahim* (cited above, § 145). The Court reiterates in particular from those general principles that measures such as those complained of in the instant case – resulting in the parents' legal ties with their children being definitively severed – 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. It is thus incumbent on the Court to carry out a "stricter scrutiny" of whether the circumstances in the instant case were so exceptional that such measures were justified (see *Strand Lobben and Others*, cited above, §§ 207-09).

14. In that connection, the Court notes that on 24 April 2019, when the High Court gave what became the final judgment on the merits relating to the replacement of X's foster care with adoption, X had been in foster care for nearly six years, from the age of four months. It follows from the High Court's judgment that the applicants had had very limited contact with X, including not attending scheduled contact sessions after the care order had been issued. According to the judgment, E.M. had only met with X on two consecutive days in 2016 in connection with an expert assessment that was being carried out into whether X could be returned to the applicants and J.B had also met with X two times on two consecutive days in connection with the same expert assessment. Moreover, the Court notes the information in the judgment relating to what the High Court described as the applicants' "minimal interest" in X throughout the years, including never having called or requested any information about X. Furthermore, it appears from the judgment that J.B stated before the court that he would not visit X if he were adopted and that E.M. was evasive on that issue. Neither J.B nor E.M. lived in Norway, J.B.'s expulsion from Norway had been ordered and he had been

issued with a permanent re-entry ban. In addition, J.B and E.M. had separated and J.B had expressed that he wanted the daily care of X transferred to him, although he did not make any claim to that effect in the present proceedings before the Court. It also appears from other materials submitted to the Court that J.B. and X did not speak the same language.

15. The Court has thus far taken into account the particular circumstances of the case as they stood at the time when the domestic authorities decided to replace X's foster care arrangement with adoption and it considers that, when viewed in isolation, the reasons advanced by the High Court were both relevant and sufficient to justify that measure in the case. It takes into account that the High Court expressly sought to strike a balance between the competing interests in the case, including the applicants' particular interest in X's not being adopted by a same-sex couple, and finds that the High Court sufficiently justified that X's adoption could be considered "necessary" within the meaning of Article 8 of the Convention, owing to an overriding requirement pertaining to his best interests.

16. Nonetheless, in both the original application lodged with the Court and in their subsequent observations, the applicants placed great emphasis on various aspects of the proceedings which took place in 2013 relating to the emergency placement, those which took place from 2013 to 2014 relating to the decision to issue a care order, and those which took place from 2015 to 2017 relating to the possible discontinuation of the care order.

17. At this juncture, the Court emphasises that, in accordance with the provisions of Article 35 of the Convention, which provides for the six-month time-limit (applicable at that time) and the requirement that all domestic remedies be exhausted prior to lodging an application with the Court, its jurisdiction in the instant case is limited to the adoption proceedings and does not extend to the previous proceedings concerning X's foster care and the applicant's contact rights. Those previous proceedings may nonetheless be relevant as context (see, for example, *Strand Lobben and Others*, cited above, § 148) and the Court is particularly mindful that in recent years it has given several judgments involving the respondent State in which it has found that violations have occurred in connection with decisions to replace foster care with adoption, and in which it has taken into account whether such decisions have been taken in situations where, following a child's placement in care, only minimal parent-child contact had been allowed. Where the authorities are responsible for a situation of family breakdown because they have failed in their obligation to take measures to facilitate family reunification, notably by imposing a very strict visiting regime, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child (ibid., § 221; see also, for example, *Pedersen and Others v. Norway*, no. 39710/15, §§ 67-69, 10 March 2020; *M.L. v. Norway*, no. 64639/16, § 92, 22 December 2020; and *Abdi Ibrahim*, cited above, § 152).

18. However, in the instant case the Court has reviewed the material submitted to it relating to the previous proceedings in respect of X's public care and also taken note of other information concerning changes in the family's status from the time X had first been placed in care. The latter included J.B.'s expulsion in 2014 from Norway and his permanent re-entry ban and E.M.'s having moved abroad during that same year as well as their separation in 2015 and the fact that both of them now live in Sweden, each with their own families. The Court must view this in conjunction with the above information relating to J.B and E.M.'s lack of contact with and interest in X throughout his placement in care prior to the authorisation for adoption. The Court notes *inter alia* that the High Court gave importance to the fact that the parents had not shown up for scheduled contact sessions and had never called or asked about him (see paragraph 14 above). It thus notes that this lack of contact was not a result of the visiting arrangements fixed by the domestic courts. It has taken note of the High Court's evidentiary assessment to the effect that it was considered "very improbable" that there would be any contact between X and his parents in the future.

19. Against that background, the Court considers that there are significant differences in the facts of the instant case and those cited above in which violations were found (see paragraph 17 above). Moreover, given the existence of several factors such as those indicated in the previous paragraph, the Court is unable to consider that for any other reasons the instant case discloses a breach of Article 8 of the Convention on grounds such as that the authorities had insufficient regard to the aim of family reunification prior to the adoption decision or that they were for other reasons responsible for a situation of family breakdown (see, for example, *Strand Lobben and Others*, cited above, § 208).

20. In the light of the foregoing, the Court considers that the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 14 September 2023.

Dorothee von Arnim Deputy Registrar	Jovan Ilievski President