CHAPTER 9

# Norwegian Child Welfare Cases in the European Court of Human Rights – an Ethical Perspective on the Judgments

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**Abstract:** In this chapter, light is shed on one of the many Norwegian child welfare cases that have been handled by the European Court of Human Rights. The case is particularly important as a source of legal understanding of what the right to family life amounts to in such cases. The most important lesson domestic authorities can learn from the judgment is that substantial weight has to be placed on the goal of reunification between natural parents and a child who is in public care. The focus of the chapter is the moral basis of this goal. By scrutinising the judges' reasoning, I trace the family values and normative ethical approaches (duty, consequentialist and virtue ethical) that are expressed in the judgment. I conclude by pointing to a possible danger in the Court's emphasis on the value-based duty ethical principle of reunification, namely that other considerations of what is best for a child are overshadowed. I defend a virtue ethical approach to child welfare cases, characterised by holistic reasoning in deciding what is best for the child.

**Keywords:** ECHR Article 8, family life and child welfare, diverging family values, ethics of child welfare, the principle of reunification

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## Introduction

In the last two decades or so, the policy of Norwegian child welfare has attracted national and international attention and criticism (Skivenes, 2023, p. 93). The criticism has been primarily directed at the use of coercive measures like care orders (*omsorgsovertakelse*), adoption without consent of the biological parent(s) and restrictions on contact between the parent(s) and the child who is in public care. The legitimacy of Norway's use of such measures has in recent years been judged by the European Court of Human Rights (hereinafter 'the Court') in a substantial number of cases. From 2017 to June 2022, the Court handed down judgments in 25 cases raised by private parties against the state of Norway (HUDOC European Court of Human Rights, n.d.). In 64 per cent of the cases, the Court found that Norway had violated the human right to private and family life.[1]

There are important lessons to be learned from the Court's reasoning in the judgments. For example, that the goal of reunification is to be strengthened in cases where the child and the parents are separated, that the organised meetings between a child in public care and its parent(s) should be more frequent (as a means to ease reunification), and that coercive measures have to be better substantiated and justified. In the wake of the Court's handling of the cases, Norwegian authorities have followed up by adjusting the country's child welfare law and practices to accord with the judgments (Sandberg, 2020). In the present book, the chapter 'Children, Family, and State: Changing Relationships and Responsibilities' contains examples of how the Norwegian Supreme Court, in its handling of three specific cases, rests on the Court's judgments.

In the present chapter, the focus will be on the moral underpinnings of the Court's judgments. To my knowledge, this is a novel contribution to the debate about the Court's handling of Norwegian child welfare cases. So far, and for good reasons, the debate has focused on how the judgments are to be followed up by the Norwegian authorities. What I will do is to shed light on the family values that can be traced in the Court's reasoning and try to identify the normative ethical approaches – consequentialist, duty ethical or virtue ethical – that form the Court's understanding of what is best for a child.

1 For an account of the possible reasons for the high number of cases in which violations have been found, see the report published by the Norwegian National Human Rights Institution, *Why does the ECtHR find human rights violations in cases concerning the Norwegian Child Welfare Services* (2020).

To this end, I scrutinise one specific judgment made by the Court – in the *Case of Strand Lobben and Others v. Norway* (hereinafter the Strand Lobben case). I do so for three reasons. First, it has become a key case. As a key case, the judgment is particularly important as a guide to how similar issues are to be handled and judged, both by the domestic authorities and the Court itself. Second, it is particularly thorough and rich in content.[2] Third, the judgment is not unanimous and contains many statements from third parties. Thus, it is a rich source for tracing possible divergent views on family values and moral justifications of what is seen as best for the child.

For readers not familiar with the Court, I provide from the outset a short account of how the Court is organised, its aims and role. Next, the domestic proceedings of the Strand Lobben case will be accounted for, followed by a short summary of the case proceedings in the Court. Further, I provide a short account of the ethical lenses I have applied in the analyses of the judgment. I continue by discussing five questions: Is the Strand Lobben v. Norway case considered as a whole (that is, are relevant factors taken into consideration)? Does the judgment display underlying divergent family values? How does the Court apply 'the best interest of the child' principle? How does the Court account for the principles of reunification and maintenance of family ties? Are the measures taken in Norway based on a fair weighing up of the interests of the parties involved? This is followed by my conclusion.

## The European Court of Human Rights

In 1959, the Council of Europe, established in 1949, set up the European Court of Human Rights. The Court monitors the member states' respect for human rights as they are expressed in the *European Convention on Human Rights* (European Court of Human Rights, 1950) (hereinafter, 'the Convention'). The Convention applies to citizens of the countries that have ratified it. Individuals can apply directly to the Court to have their case heard. The formal requirement for getting a case accepted by the Court

2 The 98 page legal document contains the following: a 50 page account of the case in the Norwegian legal system; a 15 page account of the scope of the case and the proceedings before it was heard in the Grand Chamber, including the parties' submissions and comments; a 13 page consideration of the Court's general principles at hand for Article 8 cases, including how the principles are to be applied in the present case; and a conclusion. The last 20 pages consist of so-called separate opinions – in this case, the concurring opinion of six judges, the concurring opinion of one judge, the joint dissenting opinion of four judges and the joint dissenting opinion of two judges.

is that that all possible domestic legal proceedings have been exhausted. The Court's decisions are important, not only for individuals that pass the relatively high threshold to have their case heard, but also for the member states. The decisions are meant to direct domestic legislation and practices.

The Court consists of 47 judges who are elected for nine years by the Parliamentary Assembly of the Council. The judges are elected in respect of a state, but in hearings they act as individuals, not as representatives of the state (European Court of Human Rights, 2014).

The Court is organised in five sections. A section is an administrative unit in which a judicial establishment – a chamber – is formed. The sections consist of a president, a vice-president and 7–8 judges. Most cases are decided in a chamber, and a few, those considered to be important for reasons of principle, are heard by the Grand Chamber, consisting of 17 judges: the president, the vice-president, the president of each of the five sections, the national judge and other judges who are chosen by drawing of lots (European Court of Human Rights, n.d., Composition of the Court).

## The case of Strand Lobben v. Norway – domestic proceedings

In Norway, child welfare cases that are heard by domestic courts normally start with a coercive decision made by the County Social Welfare Board[3] (*Fylkesnemnda for barnevern og sosiale saker*). An appeal against the Board's decision is made to the district court (*tingrett*).[4] The subsequent appellate bodies are the Court of Appeal (*lagmannsrett*)[5] and, finally, the Supreme Court of Norway (*Høyesterett*).

I provide a resumé of the proceedings of the Strand Lobben case in the Norwegian courts in order to inform the reader about the background of the case. The account is based on the forementioned legal document *Case of Strand Lobben and others v. Norway (Application no. 37283/13) – Judgment* (European Court of Human Rights, 2019).

Prior to the processing of the Strand Lobben case in the Court, it had been pending in the Norwegian court system for 5 years. It started with

3 From 2023, the name of the Board was changed to the Child Welfare Tribunal (*Barneverns- og helsenemnda*). I use the former name here, as it appears in the Court's judgments.

4 I use the current official name district court. In the judgement, the former name City Court is used.

5 I use the current official name Court of Appeal. In the judgement, the former name High Court is used.

Trude Strand Lobben and her newborn boy X's stay at a parent-child institution in October 2008. The stay was agreed upon by the municipal Child Welfare Services and Strand Lobben prior to the birth. Strand Lobben had expressed concerns that her situation (no permanent place to live, some health issues due to epilepsy and a troublesome relation with the putative father of the child) would make it hard to take proper care of the child, and that she was in need of help to become a good mother (European Court of Human Rights, 2019, p. 3, paragraph 12). The Child Welfare Services, for their part, were worried about Strand Lobben's mental health and ability to take proper care of a child (European Court of Human Rights, 2019, p. 4, paragraph 15). For the first five days after the birth, Strand Lobben's mother stayed with her daughter and grandson at the parent-child institution. Three weeks after X was born, the Child Welfare Services decided to place him in an emergency foster home, and Strand Lobben was granted the right to visit him for one and a half hours per week. The background for the emergency placement was that Strand Lobben wanted to leave the parent-child institution and the staff were deeply concerned that she would not be able to take care of her son. During Strand Lobben and X's stay, the staff had observed what they took to be a lack of basic caring skills, and they were worried about X's condition and loss of weight.

When X had been in emergency foster care for one month, the County Social Welfare Board issued a care order upon the municipality's request, based on the assessment that Strand Lobben lacked the necessary skills to take care of a child's needs (European Court of Human Rights, 2019, p. 8, paragraph 31). In support of their decision, the Board assumed that X would grow up in a foster home, due to Strand Lobben's 'fundamental problems and limited potential for change' (European Court of Human Rights, 2019, p. 11, paragraph 43). The amount of contact between Strand Lobben and her son was fixed at two hours, six times a year. The Board evaluated whether this was too frequent, given the risk of disruption to the attachment process between X and his foster parents. The Board concluded, however, that there was room for improvement in the contact visits.

Strand Lobben appealed against the care order to the district court. The district court upheld her appeal, on the basis that there was insufficient evidence that Strand Lobben was not able to care for her son. At that time, X had lived with his foster parents for 10 months. The municipality then appealed to the next level, the Court of Appeal, which overturned the district court's decision, upholding the care order and reducing the

amount of contact to two hours, four times a year (Søvig & Vindenes, 2020, p. 178).

In April 2011, when X was three years old, Strand Lobben 'applied to the child welfare services for the termination of the care order or, in the alternative, extended contact rights with X' (European Court of Human Rights, 2019, p. 24, paragraph 81). At that time, she was pregnant with her second child, whose father she had married. Based on the child welfare services' advice, the County Social Welfare Board decided to uphold the care order, and – moreover – withdraw parental responsibility for X and allow for adoption. Strand Lobben's appeals against this decision were turned down by all levels in the court hierarchy: the district court, the Court of Appeal and, finally, the Supreme Court, meaning that all possible legal remedies were exhausted.

## The proceedings of the case in the Court – the human right at stake

Strand Lobben took the case to the Court in 2013, claiming that the continuation of the care order and the withdrawal of her parental responsibility were violations of her and X's right to family life, as stated in Article 8 of the Convention.

The Chamber that dealt with the case concluded in November 2017 by a majority (4–3) that the right to family life was *not* violated. In the beginning of 2018, Strand Lobben and X (who had been granted representation by Strand-Lobben), requested that the case be referred to the Grand Chamber. The request was granted. A hearing took place in October 2018, and the judgment was handed down in September 2019. By 13 votes to 4, the Court held that there *had been* a violation of Article 8, which reads as follows:

Right to respect for private and family life:

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.

The Court's judgment in the Strand Lobben case contains an account of how Article 8 is to be understood and applied by the Court. As can be seen in the second paragraph of the Article, a prerequisite for legitimate interference by a public authority is that the interference is 'necessary in a democratic society'. Since this principle is important to the discussion in this chapter and maybe somewhat complicated to grasp, I will explain how it is accounted for and applied in the Strand Lobben case, with reference to the judgment of the Grand Chamber (European Court of Human Rights, 2019):

> In determining whether [the interference fulfilled the condition 'necessary in a democratic society'] the Court 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. […]. The notion necessary further 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. (p. 65, paragraph 203)

This notion of 'necessary' implies that the case must been seen as a whole (meaning that all relevant factors must be taken into consideration), and from this holistic perspective judge whether the interference was relevant and sufficient to protect the parties' rights and freedoms. The Court's assessment of relevance and sufficiency is to be found in its reasoning over three principles (European Court of Human Rights, 2019, paragraph 204–209): the best interest of the child principle, the principle of reunification (that includes maintenance of family ties and temporality of a care order) and the principle of striking a fair balance between the interests of child and the natural parents.[6]

These principles express norms and values that, together with case law and other relevant human rights instruments (like the UN *Convention of the Rights of the Child*) shall guide the judges in their considerations and decisions.

Moreover, the Court must take domestic law into account in its legal practice. The 'margin of appreciation' is a doctrine developed within the Court's jurisprudence. The doctrine allows the member states of the Council of Europe a margin of self-determination concerning how a given human

6 I take 'natural parents' to mean 'a minor's biological or adoptive parent, and includes the minor's noncustodial parent' (Law Insider, *Natural parent* definition).

right is to be specified.[7] This implies that a human right regarding 'respect for family life' is open to a wide range of interpretations, which open a space for ethical considerations about what it means to enjoy that right.

In what follows, I discuss whether the Court succeeded in its ambitions to see the case as a whole, before analysing how the Court applied the forementioned principles in the present case.

## The ethical lenses applied in the analyses of the judgment

In normative ethics, it is commonly held that there are three main approaches to right action: consequentialist, duty ethical and virtue ethical. According to consequentialism, right actions are those that lead to the best outcome for the parties involved (Shafer-Landau, 2021, p. 126). In duty ethics, right actions are those that accord with moral norms and rules (Alexander & Moore, 2020). According to virtue ethics, right actions are to be decided upon on the basis of what would be virtuous to do under the circumstances (Hursthouse, 2022; Shafer-Landau, 2021, p. 273). While the first two provide action-guiding *principles* – either consequence or rule – virtue ethics does not. Virtue ethics tells us to reflect upon what virtues like courage, kindness, humility and patience guide us to do (Annas, 2011, p. 41; Shafer-Landau, 2021, p. 274), and to take the complexity of situations into consideration when deciding what will be best to do (Shafer-Landau, 2021, pp. 274–275).

In my reading of the judgment, I have looked for traces of these different ethical approaches in the judges' justification of their opinions. I do so because I believe it can inform us about how the Court's opinions and value statements are ethically supported.

## Was the Strand Lobben v. Norway case considered as a whole?

The Court's ambition to consider the Strand Lobben case 'in the light of case as a whole' is first and foremost a virtue ethical approach. As we shall see, the judges disagreed on whether the Court succeeded in

7 For a detailed account of the margin of appreciation doctrine, see the article 'The margin of appreciation' (Council of Europe, n.d.). https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

doing so. Moreover, they disagreed about what seeing the case as a whole demanded. I take the disagreement to reveal underlying diverging family values and ethical approaches. In what follows, I attempt to exemplify that.

The majority of 13 judges in the proceedings of the Grand Chamber stated that the scope of the case was delimited to only examine the part of Strand Lobben's application that the Chamber found admissible, meaning the part of the complaint that concerned the deprivation of parental responsibilities and authorisation of adoption (European Court of Human Rights, 2019, p. 52, paragraph 144). The majority maintained, however, that in their examination of these two issues, the Court had to put 'proceedings and decisions in context, which inevitably means that it must to some degree have regard to the former proceedings and decisions' (European Court of Human Rights, 2019, pp. 52–53, paragraph 148), meaning that they would have to take into consideration the parts of the case that, strictly speaking, were beyond their competence to decide upon: the issues concerning the care order(s), the frequency and duration of the meetings between Strand Lobben and X, as well as the assessments made of Strand Lobben's ability to take care of a child.

This willingness to see the case in the context of former decisions held to be beyond the Court's competence represents, again, a virtue ethical approach in which the complexity of a situation is important (Shafer-Landau, 2021, pp. 274–275). However, the holistic approach of the majority was attacked from two angles, one from within the majority itself – a group of six of the 13 judges who voted in favour of the finding that a violation of Article 8 had taken place – and one from the dissenting minority of four judges who did not vote in favour of that finding.

The first group did not criticise the holistic approach in itself. They actually supported the idea of considering the case as a whole, but they thought that the Court's majority did not fulfil that ambition. They did not see how decisions made prior to the adoption of X played a role in the Grand Chamber's judgment. In their separate statement, they explained that even if they had voted with the majority, since they supported the conclusion, they criticised the majority for insufficiently addressing the 'main issues which led to the case being referred to the Grand Chamber. […] the majority opted for an excessively narrow approach, entailing a very limited "procedural" violation' (European Court of Human Rights, 2019, p. 78, paragraph 1).

The first group contended, moreover, that the factors leading to adoption should have played a more important part in the Grand Chamber's considerations, meaning deciding whether the Norwegian authorities had given sufficient attention to the imperative (drawing on the Court's case law) that 'a care order should be regarded as a temporary measure, and in principle consistent with the ultimate aim of reuniting the natural parents and the child' (European Court of Human Rights, 2019, p. 78, paragraph 4). The group clearly stated that Norway had failed in regard to this – in their opinion – substantial point.

I trace here a mix of virtue ethical and duty ethical thinking. The group of six would have preferred more factors to have been taken into consideration (virtue ethical), but the factor they missed in the majority's considerations was the reference to the rule of reunification (duty ethical). This may imply that the six judges held the principle of reunification as being the most weighty in child welfare cases. A virtue ethicist would be wary of holding such a view, since he or she would be reluctant to apply firm principles to specific cases.

The importance of seeing the case as a whole was underlined in a separate opinion from one of the judges who voted in favour of the finding that a violation of Article 8 had taken place. He argued that it was important to take all parts of a case into consideration: all the domestic decisions that led up to the issue that was found admissible by the Court (European Court of Human Rights, 2019, pp. 85–86, paragraph 1–4). He concluded by suggesting that in the present case, it might be a coincidence that the Court had reached the decision that there had been a violation of Article 8 despite the fact that it was not examined as a whole. Moreover, he indicated that, had the Court seen the case as a whole, the judgments of Norway's handling of the case would have inspired a profound moral criticism of Norway's policy:

> Had the process in question been examined as a whole […], it would have been even more obvious that the fundamental problem dealt with in this case lies not only and not so much in the concrete circumstances of the applicant's case, but rather, to put it very mildly, in certain specificities of the Norwegian policy which underlies the impugned decisions and the process as a whole.
>
> It is hardly a coincidence that so many third party interveners have joined the present case. They include states whose authorities have had to deal with the consequences for their under-aged citizens of the decisions taken by Norway's *Barnevernet.* (European Court of Human Rights, 2019, p. 86, paragraph 5)

This harsh criticism of Norway's child welfare policy is consequentialist, as the judge contended that the Norwegian policy had negative consequences for children and state authorities outside Norway. This criticism may be read as a disapproval of Norwegian family values. This leads to the question of whether diverging family values can be traced in the judgment.

## Does the judgment display underlying divergent family values?

The judge that criticised the policy of *Barnevernet* did not specify which authorities he had in mind in his claim that authorities outside Norway had been subject to negative consequences, but he was probably referring to Eastern European countries, in particular Poland, as a substantial number of that country's citizens live in Norway. Due to the Norwegian Child Welfare Services' (*Barnevernets*) interference in Polish families' lives, people have demonstrated in the streets both in Norway and Poland. Moreover, Facebook groups have been established whose mission is to criticise the Norwegian child welfare system (Skivenes, 2023, p. 93).

Consider the following list of the judges' geographical affiliations:

- The minority of four judges who voted that there had not been a violation of Article 8 are from (in alphabetical order) Denmark, Finland, Norway and the Slovak Republic.
- The majority of 13 who voted that there had been a violation of Article 8 are from (in alphabetical order) Andorra, Armenia, Georgia, Greece, Hungary, Italy, Iceland, Liechtenstein, Lithuania, Luxembourg, Malta, San Marino and Ukraine.
- The group of six who voted with the majority since they supported the conclusion, but stated that the majority had not succeeded in seeing the case as a whole, are from (in alphabetical order) Armenia, Georgia, Hungary, Liechtenstein, Lithuania and Ukraine.
- The judge who voiced criticism of the entire Norwegian child welfare policy is from Lithuania.

Looking at a map of Europe, the picture that emerges is a demarcation line between the north and the south, or more precisely, between the Scandinavian countries in the north (with the exception of the Slovak Republic, which joined the Scandinavian countries) and the others that

are spread over the southern part of Europe – and from the west to the east. This is probably not a coincidence.

I will not go into a discussion of why it is so, other than suggest some possible interrelated explanations: Scandinavian family values imply that, in child welfare cases, less weight is given to ties between natural parents and children than is the case in other European countries; Scandinavian countries grant children more rights and autonomy compared to the other countries (Skivenes, 2023, p. 96); Scandinavian countries' welfare systems are strong in the sense that they provide more benefits and care for their citizens over a citizen's lifespan than the other countries do; Scandinavian countries have a lower threshold than the other countries to interference in the inner life of families.

Research on these topics is rare, but a recent study by Marit Skivenes (2023) sheds light on English, Norwegian, Polish and Romanian citizens' views on restricting parental rights in order to protect children from neglect or abuse (specified as unsatisfactory care, alcohol misuse, mental illness and intellectual disability). She found that citizens in these four countries have quite similar views on child welfare intervention. Skivenes' findings do not confirm an assumption that differences in family values can explain '… the flood of criticism in the mass media and social media' (Skivenes, 2023, p. 103).

Skivenes' research indicates that, among citizens, there are no traces of different family values when it comes to child welfare. There are, however, traces of such differences among the judges in the Strand Lobben case. Consider the following criticism levelled by the minority (the four judges who voted that there had not been a violation of Article 8), against the majority's justification of their vote:

> … it is hard to avoid the conclusion that the majority dislike [sic.] the outcome of the case at the domestic level and have sought to address the substantive objections or misgivings under the guise of procedural shortcomings. *Yet the underlying value judgments and preferences deserve to be ventilated with greater transparency*. (European Court of Human Rights, 2019, p. 91, paragraph 18) (author's italicisation)

Here, the minority accused the majority of deliberately hiding substantial objection under the cover of procedural objection to Norway's handling of the case. As evidence of the accusation, the minority of four pointed to what they took to be the majority's explanation for their vote, namely '… that the domestic authorities "focused on the interest of the child" and

did not "seriously contemplate" the child's reunification with his biological family' (European Court of Human Rights, 2019, p. 90, paragraph 14. See also paragraph 16).

This indicates that the minority and the majority displayed diverging family values, in the sense that children's interests have a stronger position in the Scandinavian countries than in the other countries. Let us examine the Court's reasoning about children's interests in more detail.

## How does the Court apply 'the best interest of the child' principle

Fundamental to the Court's handling of Article 8 cases is the best interest of the child principle. The child's best interest is paramount in decisions of domestic child welfare cases, and the principle is well-established in domestic and international law (European Court of Human Rights, 2019, p. 65, paragraph 204).

The principle is complicated. The problem is not support of the principle itself, but on agreeing what the best interest of the child means in general and in a particular case. Moreover, there is the question of what standards should be applied in the assessment of what is best. That question is hard to answer, due to the fact that what is considered best for a child varies according to cultural, historical, religious and ethical views on children and family, views that constitute the background conditions of the judgments of any court that has to decide in child welfare cases.

The Court admits these difficulties. After stating that the best interest of the child is of crucial importance, the Court maintains that it is up to the domestic authorities to decide what is best for the child. The following statement, that I take to express a virtue ethical approach, is worth noting:

> 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. (European Court of Human Rights, 2019, p. 68, paragraph 210)

The Court's cautiousness in relation to holding and applying specific ideas about what is best for a child in given circumstances is, in many

respects, good. For one thing, the Court has not, as the domestic authorities may have, direct access to all the persons involved in a case (European Court of Human Rights, 2019, p. 68, paragraph 210) and to the details of it. Moreover, such cautiousness shows a respect for the competence of national law and practices. It also shows an understanding that the financial and practical resources to implement measures may vary.

Certainly, one can agree that the best interest of the child principle is of high moral value for the child. The Court is very clear in stating so, but the disagreement among the judges in the Strand Lobben case illustrates the point mentioned above, that it is hard to decide what exactly is in the best interest of a child.

The extent of permitted national self-determination varies, however, with types of measures. According to case law in child welfare cases, the Court allows the contracting states a wide margin of appreciation in questions concerning taking a child into care. In other but related questions, the Court allows the domestic authorities a narrower margin. Such related questions concern, for instance, the parents' right to meet their child when it is in public care. Contact arrangements and other measures should – as clearly stated in the judgment – be arranged on condition that a care order is temporal. This leads us to scrutinise the Court's account of reunification as a principle.

## How does the Court account for the principles of reunification and maintenance of family ties?

As previously mentioned, an important guideline for the Court's work is that the domestic authorities should always (except in extreme cases) work for a reunification between the natural parents and a child who is in public care: '… a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit' (European Court of Human Rights, 2019, p. 66, paragraph 205, p. 67, paragraph 208). An important means for bringing about reunification, is the maintenance of family ties by facilitating contact between the child and its parents. The Court criticised both the frequency and the arrangements of the contact visits between Strand Lobben and her son, and the Court made this alleged wrongdoing an important point in its judgment against Norway (European Court of Human Rights, 2019, p. 72, paragraph 221).

The principle of reunification builds on the idea that children somehow belong to their parents. To say that a child is 'mine' – not anyone else's – is to say that the child belongs to me, the natural parent, and that it is my moral right and duty to care for it.[8] Such an idea of belonging expresses deep-rooted family values, it is easily morally supportable and it is supported by national and international law. Likewise, intervening when caring duties are seriously neglected is held to be morally legitimate. However, an accusation against parents for neglecting their caring duties may be perceived as an attack on their entire identity as moral persons, and may explain why state intervention often provokes fear and anger. With deep-rooted family values at stake come serious moral dilemmas that are at the core of child welfare work: to decide what circumstances oblige the state to interfere with the inner life of a family and to decide which measures to take.

In the light of deep-rooted family values that emphasise strong ties between natural parents and children, it is understandable that the Court stresses what I will call the reunification principle.

This principle should, however, be critically examined. I do so by discussing four questions. First, is the reunification principle in accordance with the Court's own allowance of a wide margin of appreciation for state members to decide what is best for a child? In a sense, no. By stressing that reunification is (almost) always a goal, the Court restricts domestic authorities' self-determination in that respect.

Second, connected with the first, is there a danger in holding reunification as a 'first principle'? One should not underestimate the force of this principle in assessments of what is best for a child. By holding reunification as a grounding principle, there is a risk that other important principles and interests receive too little attention, for instance, the child's own opinion. Thus, there is a danger that, as a principle, reunification becomes a too powerful factor in the assessment of what is best for a child.

Third, what implications does the principle of reunification have for measures connected to a child in public care? If the aim is (almost) always to reunify, measures like the frequency and quality of contacts between the child and the natural parents should certainly be aimed at achieving that goal. In the Strand Lobben case and other similar cases, the Court has criticised Norway for its practice of only allowing infrequent contact,

8 This idea of belonging is close to what has come to be called the biological principle. I avoid using that notion since it has connotations to biological ties only.

making reunification more difficult. In the wake of these cases, Norway has followed up by changing its practices in this respect. One can hardly criticise a practice that aims to strengthen an assumed important relation, but one should be aware that contact is not always in a child's best interest.

Fourth, what kind of normative ethical thinking does the reunification principle express? By holding reunification as a principle, the Court takes a duty ethical stance: reunification is a rule that should (almost) always be followed. How does this approach accord with the Court's ambition to see a case as a whole – a virtue ethical ambition where all relevant factors should guide decision makers when deciding what will be best for a child? What can be traced here, I believe, is that the Court does not quite live up to its holistic virtue ethical ambition. By stressing reunification as a rule, all relevant factors in a case will somehow be considered in light of that rule.

Among the important relevant factors in a case are the interests of the involved parties. Let us now move to the Court's assessment of whether Norway took sufficient regard to the parties in the Strand Lobben case.

## Are the measures taken in Norway based on a fair weighing up of the interests of the parties involved?

From both a legal and a moral point of view, the idea of considering the involved parties' interests in judgments and decisions is sound, and supportable by the various normative ethical approaches. To take the involved parties' interests into consideration fits well with a holistic virtue ethical approach. From a utilitarian consequentialist point of view, where what counts is to maximise the happiness of the involved parties, weighing up of interests makes a lot of sense. From a duty ethical perspective, to consider the involved parties' interests is to acknowledge that the rights (legal or moral) of the parties entail a duty to consider those rights. In child welfare cases, weighing up the parties' interests is of the utmost importance. Strong interests and important values are at stake. The Court (the majority of 13 judges) contended that Norway did not strike a fair balance between the interests of the parties in the Strand Lobben case.

In support of that claim, the majority pointed to the alleged failure not to seriously consider Strand Lobben's caring skills, especially in light of the fact that she was found able to care for her new child at the same time that

the Norwegian authorities, by allowing for the adoption of X, had decided to cut all bonds between her and X (European Court of Human Rights, 2019, p. 73, paragraph 225). The Court criticised Norway for not, at that stage, having provided an updated expert report on her caring skills. It is worth noting that the Court did not go so far as to say that Strand Lobben should have been reunified with X because she was found able to care for her new child. The Court limited itself to criticising the lack of an updated report, which might be reasonable given that caring skills for one child do not grant sufficient caring skills for another. However, having sufficient caring skills for one child may increase the probability of being able to care for another.

The probability of becoming a caring parent has to do with the potential for developing moral qualities and the ability to act morally good. In virtue ethics, these are central topics. Among virtue ethicists, there is a belief that moral character is developed by practicing (Annas, 2011, pp. 1–2; Aristotle, ca. 350 BCE/1992, pp. 250–251; Shafer-Landau, 2021, p. 276). This idea fits well with the policy of the Child Welfare Services in Norway and elsewhere. The service mainly consists of offering help and guidance, and other measures that can ease difficulties in a family. However, given the fact that Strand Lobben had another child that was not taken into public care, one can only speculate whether the Strand Lobben case indicates too little confidence among Norwegian authorities that parents can develop sufficient moral qualities and agency to care for a child.[9]

Too little confidence in Strand Lobben's potential or not, what can be read from the Court's report of the proceedings of the case in Norway is uncertainty regarding her caring skills for X. The decision to allow for adoption, due to Strand Lobben's '… fundamental problems and limited potential for change' (European Court of Human Rights, 2019, p. 11, paragraph 43), indicates a precautionary approach. Precaution, as a principle, is typically applied when we are to make decisions associated with uncertainty about what will happen in the future. In child welfare cases where

9 Note, however, that in the domestic proceedings there was some disagreement in the matter. As mentioned, Strand Lobben appealed against the care order to the district court when X was 10 months old. The district court upheld her appeal. They decided that there was insufficient evidence to show that Strand Lobben was not able to care for her son. However, the municipality's appeal to the next level, the Court of Appeal, resulted in overturning the previous judgment. The Court of Appeal upheld the care order and reduced the amount of contact to two hours, four times a year. Moreover, there was disagreement between the experts concerning Strand Lobben's caring skills (European Court of Human Rights, 2019, p. 32, paragraph 105).

authorities consider imposing coercive measures, thorough justifications are required if a precautionary principle is to be applied. If not, the authorities do not take seriously the fact that child welfare measures have to do with deep-rooted emotions and values.

Connected with help, guidance and measures that can ease family difficulties is the role of the extended family of the child. At an early stage in the domestic proceedings of the Strand Lobben case, Strand Lobben suggested that

> … she and X could live together at her parents' house, arguing that her mother stayed at home and was willing to help care for X, and that she and her mother were also willing to accept help from Child Welfare Services. (European Court of Human Rights, 2019, p. 6, paragraph 23)

The County Social Welfare Board did consider Strand Lobben's suggestion to move to her parent's house and to be supported by her mother, but concluded that this would not provide sufficient security for X. As support for this claim, the Board argued that Strand Lobben's mother, during her stay at the parent-child institution together with her daughter and X, did not express any concern with respect to her daughter's care of X (European Court of Human Rights, 2019, p. 7, paragraph 26).

This reasoning indicates that the interests of what might be called the natural family were insufficiently taken into account. (Strand Lobben's extended family is not a formal party to the case but may be seen as a party from a moral point of view). If the conclusion regarding living with Strand Lobben's parents is based on the single observation that Strand Lobben's mother did not express concern about her daughter's caring skills, it seems that there was little interest from the Norwegian authorities to properly consider the potential important role of the extended family. Thus, the Court may have good reason to criticise Norway in this respect.

The possible role of the extended family is, however, important in Norwegian child welfare. According to official guidelines, the child's network and extended family are to be involved if it is in the best interest of the child. The assessment of whether involvement is in the child's best interest has to be assessed in each case (The Norwegian Directorate for Children, Youth and Family Affairs, 2023, p. 26), a condition that first and foremost expresses a virtue ethical approach characterised by taking the special features of a case as a point of departure.

## Conclusion

Through its judgment in the Strand Lobben v. Norway case, the Court sent Norway the message that a care order should be regarded as a temporary measure, and that reunification of the natural parents and the child should always, except in extreme cases, be an aim. This notion of reunification expresses that the bond between parents and children is a deep-rooted human value. By stressing reunification as a rule, the Court set a duty ethical frame for the Court's judgments. This message to Norway has resulted in adjustments to the country's child welfare law and policy. Even though we are in the legal realm here, the message is moral. Norway has been told that its practices have had moral shortcomings concerning respect for important family values.

This conclusion holds, I believe, even if the Court allows domestic authorities' a wide margin of appreciation in questions concerning child welfare. The court allows for, for instance, national self-determination concerning care orders due to the fact that domestic authorities have more insight into the details of a case than the Court has, and due to respect for cultural variation when it comes to family values. As a result of the allowance of a wide margin of appreciation, the Court opens up for variation in how the best interest of the child principle is to be specified. However, through the Court's strong focus on the principle of reunification, a firm framework for how to specify the best interest of the child principle is established.

From a moral point of view, the idea to uphold the bonds between the parents and a child in public care is easily supportable – not only because children somehow belong to their parents and should be raised by them in a nurturing atmosphere, but also because good family bonds are of great emotional and practical value in many people's lives. However, there is reason to worry if the focus on reunification becomes too strong. The danger is that other considerations lose too much significance, resulting in too little attention to a child's needs. That is a moral problem.

In the judgment of the Strand Lobben case, the goal of taking a holistic perspective on the case is clearly expressed. There was, however, disagreement among the judges as to whether the Court succeeded in that respect. But taken together, the judgment may be seen as an effort to adopt a more holistic perspective than the Norwegian authorities allegedly did.

Seeing a case as a whole is to consider those things that should be taken into account in a judgment, which is a hallmark of virtue ethics. To put it in the words of Rosalind Hursthouse (2022), the application of moral norms '… requires situational appreciation – the capacity to recognise, in any particular situation, those features of it that are morally salient'. In judgments concerning child welfare, when the best interest of the child is at stake, the Court has to consider relevant legal sources and the relationship between national and international law. My account of the judgment of the case shows the complexity of such cases. Moreover, the account shows that the separate opinions of various judges are underpinned by morally grounded divergent views of family values. The account also demonstrates that the Court's judgments are justified by a mix of virtue ethical, duty ethical and consequence ethical approaches. The virtue ethical overall ambition is striking in the Court's emphasis on seeing the case as a whole. The duty ethical approach is visible in the justification of reunification as a grounding principle, while the consequentialist approach is traceable in the arguments for why reunification between natural parents and a child who is in public care leads to the best consequences for the involved parties.

## Author biography

**Grethe Netland** is a philosopher, appointed as an associate professor at Inland Norway University of Applied Sciences (INN) where she primarily works with research ethics. In addition, professional ethics and human rights are among Netland's areas of interest and among the topics that feature in her publications. Her work experience includes a period as Head of Department at the Department of Social Work and Guidance at INN.

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