SUPREME COURT OF NORWAY

On 8 November 2018, the Supreme Court gave judgment in

HR-2018-2133-A, (case no. 2017/2179), civil case, appeal against judgment

A B C D	(Counsel Torbjørn Kolås Sognefest)
v.	
The state represented by the Immigration Appeals Board	(The Office of the Attorney General represented by Anne Hesjedal Sending)

(1) Justice **Kallerud:** The case questions the validity of an administrative decision to revoke a temporary residence permit because the basis for the permit had ceased. The issue is whether such revocation is an interference with the respect for privacy and family life under Article 102 of the Norwegian Constitution and Article 8 of the European Convention of Human Rights (the Convention).

(2) B was, together with her daughter C, registered as an asylum seeker in Norway on 7 October 2011. C was then seven years old. B maintained that she had fled from in Afghanistan together with her husband, A, and their common child, C. They had been forced to leave their home country due to threats from the relatives of a man to which B had been married by force. The family lived in Teheran for three years before travelling on to Norway. On their way from Greece to Norway, A became lost from B and the child.

(3) On 19 January 2012, the Norwegian Directorate of Immigration (UDI) granted temporary residence permits with refugee status to B and C. The permits had a duration of three years. As the child's residence permit was linked to that of her mother, I will only consider the decision concerning B. The basis for the refugee status was stated to be her well-founded fear of persecution covered by one or more of the grounds for persecution

listed in section 28 subsection 1 (a) of the Immigration Act. What were the actual grounds for granting the permit has been subject to dispute. However, the court of appeal's findings of fact, which will not be reviewed by the Supreme Court, showed that B's residence permit had been granted because she was a single Afghan woman without a male network in Afghanistan. According to custom at the time of the decision, women in her position were not returned to Afghanistan.

(4) B eventually regained contact with A, and he came to Norway on 15 November 2013. UDI rejected A's application for asylum on 4 February 2014. On the same day, UDI notified B of the revocation of her refugee status and temporary residence permit. The reason was that the circumstances as a result of which she had been recognised as a refugee were no longer present since her husband had come to Norway.

(5) On 8 March 2014, B and A had a son, D. The asylum application for D was also rejected.

(6) After having notified the appellants in advance, UDI decided on 27 march 2014 to revoke B's and her daughter's temporary residence permit and refugee status. The reason was that B was no longer a single woman without a network in Afghanistan, and that the family could safely return to Afghanistan. On 27 June 2105, the Immigration Appeals Board (UNE) rejected the appeals from all the family members. The family was ordered to leave Norway within a month. Instead of leaving, the family requested that UNE's decision be set aside. The request was refused in a decision of 9 September 2015.

(7) The appellants brought an action in December 2015, and filed at the same time a petition for preliminary injunction to prevent implementation of UNE's decisions. In accordance with practice, UNE considered the action and the grounds given, but decided on 26 January 2016 to uphold its previous decisions.

(8) On 27 May 2016, Oslo District Court concluded as follows:

> **"1. The Immigration Appeals Board's decision of 26 January 2016 to refuse asylum and the previous decisions are invalid.**
>
> **2. The state represented by the Immigration Appeals Board is to pay costs to B and A of NOK 216 000 – twohundredandsixteenthousand, within 2 – two – weeks of service of the judgment.**
>
> **3. The petition for preliminary injunction is closed.**

(9) The district court concluded that UNE's decision was invalid because it was made on inadequate grounds. As opposed to the immigration authorities, the district court considered it proven that the appellants' asylum statements were generally correct. It was accepted that if their statements were taken into account, UNE's decisions to revoke the residence permits and to refuse asylum would be invalid. Against this background, it was not necessary for the court to consider the other aspects of the case.

(10) The state represented by the Immigration Appeals Board appealed to Borgarting Court of Appeal, which on 3 November 2017 concluded as follows:

> **"1. Judgment is given for the state represented by the Immigration Appeals Board.**

2. B, A, D and C are jointly and severally to pay costs of NOK 181 750 – onehudredandeightyonethousandsevenhundredandfifty – to the state represented by the Immigration Appeals Board within two weeks of service of the judgment."

(11) Firstly, the court of appeal found that B, A and their two children were not entitled to asylum in Norway. In the court of appeal's view, their statements were not sufficiently credible. The conditions for asylum were thus not met, and the refusals were valid for all four.

(12) Secondly, the court of appeal found that UNE was entitled to revoke B's and C's residence permit. Like UNE, the court concluded that A's arrival in Norway had the effect that B was no longer in need of protection as a single Afghan woman without a male network. The protection of family life under Article 8 of the Convention was not relevant, as the decisions in the case would not result in the family being split. According to the court, the right to respect for private life had not been interfered with either. The court did not consider whether B and C were "settled migrants" because it was clear under any circumstance that the conditions for interference under Article 8 (2) was met.

(13) Thirdly, the court of appeal found that UNE's refusal to grant asylum on humanitarian grounds was valid. The court stated that neither the information on C's health nor the duration of her residence and her attachment to Norway could give grounds for setting aside UNE's decision based on the best interest of the child.

(14) A, B, C and D appealed the court of appeal's judgment to the Supreme Court. The appeal was against the application of the law, the procedure and the findings of fact.

(15) On 5 February 2018, the Supreme Court decided that the appeal would not be considered until a judgment had been given in case HR-2018-572-A. On 24 May 2018, the Supreme Court's Appeals Selection Committee granted leave to appeal against the application of the law in the question whether the decisions interfere with the right to respect for private and family life. Otherwise, leave was refused. Because the Supreme Court has only agreed to hear the appeal against the application of the law, and the respondent has not objected to the court of appeal's findings of fact, the court of appeal's description of the factual circumstances will be used as a basis for the Supreme Court's ruling. Except for the Appeals Selection Committee's decision to refer only a part of the appeal, the case is mainly similar to that before the court of appeal.

(16) The appellants – *A, B, C and D* – contend:

(17) The decision to revoke the residence permits for B and C is invalid. The refusals of asylum for A and D are linked to the decision concerning B and C, and are invalid as a consequence of the errors committed.

(18) B and C are protected under Article 8 of the Convention and Article 102 of the Constitution. Their lawful residence in Norway is in itself sufficient to consider them settled migrants and thus, as a starting point, covered by the protection of private life in Article 8. The fact that the permits were temporary is irrelevant. They had established a private life in Norway within the meaning applied by the European Court of Human Rights. Revoking the residence permits for B and C was thus a measure to be considered under Article 8 (2) of the Convention.

(19) The measure lacks a clear legal basis since the conditions for revocation in the invoked section 37 subsection 1 (e) of the Immigration Act, considered in conjunction with the decision, do not meet the requirement that the law must be accessible and understandable. Under section 37 subsection 1 (e), one may only revoke a permit if "the circumstances as a result of which the foreign national was recognised as a refugee … are no longer present". The decision only states that "one or more" of the grounds for persecution in section 28 subsection 1 (a) are met. Hence, it was not possible for B to foresee her legal position.

(20) The revocation of the residence permits was also disproportionate. The assessment must be focused on the period from the arrival in Norway until the final decision in January 2016. During this period – four years and four months – the mother and daughter had established themselves in Norway. They were well integrated in the local community, C went to kindergarten and school and they learned Norwegian. In addition to C's attachment to Norway during crucial growing up years, it must be considered that C has had health problems and is likely to suffer retraumatisation if returned to her home country.

(21) The court of appeal's assessment is inadequate in several respects, also when it comes to the family's network in Afghanistan and the difficulties they will face with regard to work, education and health care. In the alternative, the judgment of the court of appeal must be set aside.

(22) A, B, C and D have submitted this prayer for relief:

> **"Principally:**
> **I**
> **The following decisions and by the Immigration Appeals Board are invalid:**
> **a) For B:**
> **Decision of 27 June 2015, decision of 9 September 2015 and decision of 26 January 2016.**
>
> **b) For C:**
> **Decision of 27 June 2015, decision of 9 September 2015 and decision of 26 January 2016.**
>
> **c) For D:**
> **Decision of 27 June 2015, decision of 9 September 2015 and decision of 26 January 2016.**
>
> **d) For A:**
> **Decision of 27 June 2015, decision of 9 September 2015 and decision of 26 January 2016.**
>
> **II**
> **B, C represented by guardians B and A, D represented by guardians B and A, and A, alternatively the public authorities, are to be awarded costs in the court of appeal and the Supreme Court.**
>
> **In the alternative:**
> **I The judgment of the court of appeal is to be set aside.**

II B, C represented by guardians B and A, D represented by guardians B and A, and A, alternatively the public authorities, are to be awarded costs in the court of appeal and the Supreme Court."

(23) The respondent – *the state represented by the Immigration Appeals Board (UNE)* – contends:

(24) UNE's decisions are valid.

(25) Article 8 of the Convention is not applicable because the family has not established a protected family life in Norway the way this expression is interpreted in Convention case law. None of the appellants is a "settled migrant". Nor are there other special grounds for considering them protected under Article 8.

(26) In the alternative, the state contends that if Article 8 is applicable, the conditions for interference under Article 8 (2) are met.

(27) The legal basis for revocation in section 37 of the Immigration Act is clear, and the reason for the measure is legitimate. The fact that the original administrative decision contains errors does not preclude the possibility of revoking.

(28) The measure is not disproportionate. The lawful period of residence is relatively short and based on temporary residence permits. After an excess of two years in Norway, the basis of residence was weakened even further by the notice of revocation and the actual revocation. The family appears to be well integrated, but no special circumstances exist beyond what is normal for asylum seekers. Nor the consideration for the child's best interests is particularly prominent in this case. The opposing concerns are weighty, including the immigration authorities' interest in reserving the asylum institute for persons in genuine need of protection.

(29) Article 102 of the Constitution has not been violated either, since it has the same content as Article 8 of the Convention.

(30) The state represented by the Immigration Appeals Board has submitted this prayer for relief:

"The appeal is to be dismissed."

(31) *I have concluded* that the appeal must be dismissed.

(32) As the Supreme Court has only agreed to hear the appeal against the application of the law in the question whether the decisions interfere with the right to respect for private and family life – the central issue is the validity of the revocation of the residence permit for B and C. I will not go further into the decisions regarding A and D, as it is clear that they cannot be declared invalid on the basis heard by the Supreme Court.

(33) I also conclude, like the court of appeal and the parties, that no issues arise with regard to the right to respect for family life since the decisions are based on the family leaving the country together. The question is rather whether B and C have established a private life in Norway that is protected under Article 102 of the Constitution and Article 8 of the Convention. What I have in mind here – and in what follows – are the decisions by the

immigration authorities. Other aspects pertaining to the respect for private life are not relevant in this case.

(34) I will start by looking at *the relevant provisions in the Immigration Act* and *how they are applied towards B and C.*

(35) As mentioned, the residence permit for B and C with refugee status was granted with a legal basis in section 28 subsection 1 (a) of the Immigration Act. Under this provision, a foreign national is entitled to be recognised as a refugee if he or she has a well-founded fear of being persecuted "for reasons of ethnicity, origin, skin colour, religion, nationality, membership of a particular social group or for reasons of political opinion". It is also a condition that the foreign national cannot obtain protection in his or her home country.

(36) In accordance with section 60 subsection 1 of the Immigration Act, it was expressly stated that B's residence permit was temporary. The permit was of a maximum duration of three years. If no new facts had emerged that would result in discontinuance or revocation, B could have applied for a renewal of the permit under section 61 of the Immigration Act. After three years on a temporary residence permit, she would have been entitled to permanent residence under section 62 of the Immigration Act if specific conditions, including on self-support, were met. I interpret the regulations and case law to mean that, when a temporary permit is about to expire, it must be assessed whether the basis for the permit is still present. Hence, an extended or permanent residence permit is not automatically granted upon expiry of the first permit.

(37) The possibility of revoking a residence permit is less limited for temporary permits such as those granted to B and her daughter, than for permanent permits. Under section 37 subsection 1 (e) of the Immigration Act, a residence permit granted under section 28 can be revoked if the foreign national "can no longer refuse to avail himself or herself of the protection of the country of nationality, because the circumstances in connection with which he or she was recognised as a refugee under section 28 … are no longer present". As for the further interpretation of this provision, I refer to the Supreme Court judgment HR-2018-572-A paragraph 25 et seq. In paragraph 27, it is stated that section 37 subsection 1 (e) must be interpreted in the same way as Article 1 C (5) of the Refugee Convention on cessation of refugee status. The Supreme Court judgment Rt-2010-858 also establishes that changes in personal affairs fall within the scope of Article 1 C (5).

(38) However, if B and her daughter had been granted a permanent residence permit, the permit could only have been revoked under the more limited section 63 of the Immigration Act. To revoke a permanent permit, "the foreign national [must have] knowingly given incorrect information or failed to disclose matters of material significance for the administrative decision". The permit can also be revoked under "general rules of administrative law". Thus, a permanent residence permit cannot be revoked even if the need for protection that made basis for the temporary permit ceases, see Norwegian Official Report 2004: 20 page 275 and Proposition to the Odelsting No. 75 (2006–2007) pages 243 and 248. The provision is also discussed in the Supreme Court judgment HR-2016-2017-A.

(39) The differences I have mentioned between a temporary and a permanent residence permit are significant for the application of Article 8 of the Convention. I will revert to that after

I have examined whether *the immigration authorities were entitled under the Immigration Act to revoke the decision concerning B and C*.

(40) Following the court of appeal's judgment it must – as I have already accounted for – be concluded that B was granted the residence permit because she was a single Afghan woman without a male network in Afghanistan. The basis for establishing persecution in B's case was thus the option in section 28 subsection 1 (a) of the Immigration Act on "membership of a particular social group". However, the decision only stated that she had a well-founded fear of being persecuted that could be linked to one or more of the grounds listed in section 28 subsection 1 (a). Hence, B could not know from the decision which of the options in section 28 subsection 1 (a) had given her the right of residence. This was unfortunate, particularly because a temporary permit cannot be revoked unless the reasons for persecution have changed, see my comments with regard to section 37 subsection 1 (e) of the Immigration Act.

(41) The state has acknowledged this weakness in the decision and announced that practice has been changed. Today, the specific reasons for persecution are stated in accordance with section 25 of the Public Administration Act.

(42) Section 37 subsection 1 (e) of the Immigration Act was undoubtedly the legal basis for the revocation. The fact that B's husband was found and reunited with the family had the effect that "the circumstances in connection with which the foreign national was recognised as a refugee" were no longer present. In the revocation order and subsequent decisions, the grounds were, exactly, that B's status as a single woman had ceased once her husband had come to Norway. Considered in isolation, the revocation contains no errors.

(43) In my view, the weakness of the original decision does not dictate whether the permit can be revoked under section 37 subsection 1 (e). I emphasise that the decision is based on correct factual circumstances clearly covered by the wording in section 37 subsection 1 (e). Also, it was clear from the decision on which provision the permit was based. The grounds were neither completely absent nor incorrect or misleading. Finally, I mention that B, based on the decision, could quite easily have been advised which of the options in the provision had been applied and on the possible consequences thereof.

(44) However, I endorse the court of appeal's statement that in such a situation, it must be up to the state to demonstrate the specific grounds for the permit. According to the court of appeal, this burden of proof had been fulfilled by the state.

(45) The conclusion is that B's and C's residence permits were revoked with sufficient legal basis in the Immigration Act.

(46) I will now turn to the question whether *B and C have established a private life in Norway that is protected under Article 102 of the Constitution and Article 8 of the Convention*. The Supreme Court has full jurisdiction to review this issue.

(47) Nothing in the case at hand raises the question whether the protection of private life under Article 102 of the Constitution differs from under Article 8 of the Convention, see previous comments on this in Supreme Court judgment HR-2017-2376-A paragraph 53

with further references. I will therefore start with the extensive case law from the European Court of Human Rights (the Court) on the interpretation of Article 8.

(48) In line with the Supreme Court's plenary judgment Rt-2012-1985 (*long-staying children I*) I assume that the validity of the decisions must be reviewed according to the circumstances at the time of the immigration authorities' last decision, i.e. on 26 January 2016. The significance of the time that has since passed and of any new aspects is primarily to be reviewed by the immigration authorities in connection with the request for a reassessment, which has already been filed according to information provided.

(49) In a number of judgments, the Court has emphasised that the states are entitled to control the entry of foreign nationals into their territory and their residence there, see for instance paragraph 100 of the Grand Chamber judgment 3 October 2014 *Jeunesse v. The Netherlands*. Hence, the Convention does not give a right to either entry or residence.

(50) However, through its case law on Article 8 of the Convention, the Court has established that a foreign national may have developed such strong bonds to the state of residence that his or her private life becomes protected under this provision.

(51) Article 8 of the Convention no. 1 reads:

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

(52) The term "private life" is wide. It may comprise personal and social bonds between a foreign national and the community in which he or she is living, see for instance the Court's Grand Chamber judgment 18 October 2006 in *Üner v. The Netherlands* paragraph 59, presented in more detail in the Supreme Court judgment Rt-2012-2039 paragraph 70 et seq (*long-staying children II*).

(53) According to the Court's case law, the protection under Article 8 concerns primarily settled migrants. The expression "settled migrants" – in French "*les immigrés installés*" or "*les immigrés établis*" – makes one think of foreign nationals who have come to the host country to settle down indefinitely, and where this has been accepted and formalised. Such an interpretation corresponds well with the overall impression of the Court's extensive case law: In principle, it is only when a foreign national has developed such bonds to the country that he or she has become "settled" as a "migrant" that his or her private life may be protected under the Convention. For instance, paragraph 59 of the *Üner judgment* emphasises "the totality of social ties between settled migrants and the community in which they are living". Similar wordings are used in a number of subsequent judgments.

(54) I have not been able to find an actual definition of the term "settled migrants" in any of the Court's judgments. In paragraph 104 of the *Jeunesse judgment*, settled migrants are referred to as "persons who have already been granted formally a right of residence in a host country". But the statement appears in a context where the Court distinguishes the relevant case – the foreign national had never had an ordinary residence permit – from cases with settled immigrants. Similar statements are found in subsequent judgments, such as judgment 30 June 2015 *A.S. v. Switzerland* paragraph 45 and judgment 26 April 2018 *Hoti v. Kroatia* paragraph 115. The Supreme Court has also expressed itself in a similar manner, see judgment Rt-2013-449 paragraph 95 with a further reference to Rt-

2012-2039. From the context, it seems clear that the Court of Human Rights has intended to distinguish persons without formal residence from immigrants who are settled in the country. Therefore, the statements are not an exhaustive demarcation of "settled migrants". They rather show, considered in conjunction with other case law, that if the residence has not been formalised, it will take a lot for the Court to accept that a private life is established under the Convention. Having a formal status as a refugee is therefore a necessary, but not sufficient, condition.

(55) The question is then how the situation is assessed if the residence has been formalised, but the permit is expressly temporary. As far as I am aware, there is no judgment by the Court that gives direct guidance to our case, i.e. a relatively short residence on a temporary permit. However, case law gives the general impression that also formalised residence requires some form of long-term perspective. There are examples of foreign nationals on temporary permits obtaining protection under Article 8, but the periods of residence have then been very long, see for instance judgment 12 January 2017 *Abuhmaid v. Ukraina* paragraphs 102-103. The applicant had been living in the country for more than 20 years, initially as a student and later on temporary residence permits. An assessment of cases where several temporary permits have been given over a long period of time is not relevant to the case at hand.

(56) Against this background, it must be concluded that ordinary temporary permits of a limited duration will normally not give right to protection under Article 8. A natural starting point in this regard would be what I have previously emphasised on the fact that the Convention does not give any one a right to residence. If also a temporary permit granted for a particular purpose should give a basis for establishing a private life protected by the Convention, it would have had a radical impact of the states' right to regulate immigration.

(57) Based on my presentation of Convention case law and the more general views I have expressed, the *basis for the judgment under Norwegian law* is:

(58) A temporary residence permit granted under section 60 of the Immigration Act to foreign nationals with status as refugees is normally not sufficient for establishing a private life protected under Article 8. The same applies to renewals on the same basis under section 61. As for the section 61 cases, it may be different if the period of residence on temporary permits is long, but as the case now stands, I will not go further into this.

(59) The primary reason for constructing such a starting point for Norwegian law is the system itself and the background for this type of permits: Residence is granted based on a specific need for protection. If the need for protection ceases, the permit may be revoked under Article 1 C no. 5 of the Refugee Convention and section 37 subsection 1 (e) of the Immigration Act. Although, of course, foreign nationals residing in the country on this basis may establish an attachment to the community they are living in, a private life within the meaning of Article 8 has not necessarily been established.

(60) The situation is different if a permanent residence permit is granted under section 62 of the Immigration Act. As I have demonstrated, the residence permit may then not be revoked even if the need for protection has ceased and the basis for residence has changed. Foreign nationals with a permanent residence permit are more naturally referred

to as "settled migrants". The application of Article 8 of the Convention when the residence is based on permanent permits will not be considered further here.

(61) I will now turn to *B's and C's situation* in particular. Their residence permits were granted under section 60 of the Immigration Act, and it was explicitly stated that they were temporary and limited to a duration of three years. After an excess of two years, the permit was revoked. From then on, they could not have had any legitimate expectation of staying in Norway.

(62) The bonds the family has developed to the local community and Norway during the four years and four months included in the assessment are probably rather typical. No information has been given – or asserted – on any extraordinary circumstances that might change this assessment, neither for the children nor for the adults.

(63) Against this background, I conclude that B and C – at the time of the immigration authorities' last review of the case – had not developed such bonds to Norway that they constituted a private life protected under Article 8 of the Convention. The same must apply to the other family members who arrived later and who have not obtain any formal residence permits. Hence, no interference has taken place within the meaning of the Convention towards the family, and no questions arise as to whether the conditions in Article 8 (2) have been met.

(64) Consequently, the appeal must be dismissed. The state has not claimed costs in the Supreme Court.

(65) I vote for this

J U D G M E N T :

The appeal is dismissed.

(66) Justice **Bergh:** I agree with the justice delivering the leading opinion in all respects and with his conclusion.

(67) Justice **Ringnes:** Likewise.

(68) Justice **Bårdsen:** Likewise.

(69) Justice **Indreberg:** Likewise.

(70) Following the voting, the Supreme Court gave this

J U D G M E N T :

The appeal is dismissed.