



SUPREME COURT OF NORWAY

J U D G M E N T

given on 1 September 2021 by the Supreme Court composed of

Justice Jens Edvin A. Skoghøy
Justice Aage Thor Falkanger
Justice Ragnhild Noer
Justice Per Erik Bergsjø
Justice Arne Ringnes

HR-2021-1774-A (case no. 21-062245STR-HRET)
Appeal against Borgarting Court of Appeal's judgment 29 December 2020

A (Counsel Halvard Helle)

v.

The Public Prosecution Authority (Counsel Erik Førde)

(1) Justice **Ringnes:**

Issues and background

- (2) The case concerns the scope of the exemption for “humanitarian assistance” under section 108 subsection 6 of the Immigration Act, and raises issues regarding sentencing for violations of the Immigration Act and the Customs Act.
- (3) The appellant – A – was born in Iraq and came to Norway for family reunification in 2002. After studies and various jobs, he took over the shop X in Oslo in May 2019.
- (4) On 25 June 2020, A was indicted for violations of the Immigration Act and the Customs Act. The indictment reads:

I Section 108 subsection 4 (a) of the Immigration Act, cf. section 15 of the Penal Code

for intentionally having helped a foreign national to reside unlawfully in the realm or in another country participating in cooperation under the Schengen Agreement.

Grounds:

On Wednesday 4 December 2019 at 12.00 a.m. on 00 --- street in Oslo, on the premises of X, he let B, born 00.00.1992, (DUF 000) and C, born 00.00.1989 (DUF 000) reside despite being aware that they did not have lawful residence in Norway.

II Section 108 subsection 3 (a) the Immigration Act section 108 subsection 3 (a), cf. section 15 of the Penal Code

for intentionally or with gross negligence having made use of a foreign national’s labour when the foreign national did not hold the permit required under the Act.

Grounds:

On Friday 8 May 2020 at 10.48 a.m. on 00 --- street 00 in Oslo, he let C, born 00.00.1989 (DUF 000) work for him at X despite C’s lack of a work permit in Norway.

III Section 16-1, cf. section 16-4, of the Customs Act, cf. section 15 of the Penal Code

for having concealed, sold, entrusted to others or acquired goods that had been imported or disposed of in violation of provisions made by or under the Act, or contributed to the same.

Grounds:

a)

On Friday 8 May 2020 at 10.48 a.m. on 00 --- street 00 in Oslo, on the premises of X, he kept 62 packs of Marlboro undeclared cigarettes, marked ‘duty free sale only’.

b)

On Friday 8 May 2020 at 10.48 a.m. on 00 --- street 00 in Oslo, on the premises of X, he kept 8 packs Marlboro undeclared cigarettes.”

- (5) The two persons mentioned in count I, B and C, are also from Iraq. The Court of Appeal wrote in this regard:

“A stated before the Court of Appeal that he received a phone call from an acquaintance who asked if A could ‘house’ the two. They had no place to stay, as the flat they lived in was to be used by the lessor. A did not know them, but he knew that their families knew each other. A also leased the shop’s basement, where it was possible to stay overnight. According to his statement, he therefore said yeas on the condition that the ‘housing’ last for a maximum of seven days.

A was aware that the previous owner of the shop had ‘housed’ people in the basement. Customers had told him this, and the previous owner confirmed it upon request. He was warned against having people live there. He himself had recently approached the lessor to terminate the lease of the basement to save money. As of today, the basement is sublet to ‘people in the furniture business’.

A told the Court of Appeal that he assumed that B and C did not have lawful residence in Norway. It did not matter to him; this was an act of courtesy normal for his culture. He would have done the same again.

The fact that the two and D was living in the basement was disclosed after three days, on 4 December 2019, when the police came to examine the premises. They met B there.”

- (6) On 8 July 2020, Oslo District Court ruled:

- “1. A, born 00.00.1992, is acquitted on count I of the indictment.
2. A, born 00.00.1992, is convicted of violation of section 108 subsection 3 (a) of the Immigration Act and section 16-1 cf. section 16-4 of the Customs Act, cf. section 79 (a) and (b) of the Penal Code, and sentenced to imprisonment for a term of fifteen days.

He is also sentenced to a fine of NOK 20 000, alternatively to imprisonment for a term of 30 days, see section 55 of the Penal Code.

The execution of the prison sentence is suspended for a term of two years, see section 34 of the Penal Code.

3. In accordance with section 69 subsection 1 (b) of the Penal Code, 70 packs of cigarettes as mentioned in count III of the indictment are confiscated.”

- (7) A was acquitted on count I of the indictment because the act was covered by the exemption from criminal liability for humanitarian assistance in section 108 subsection 6 of the Immigration Act.
- (8) The Public Prosecution Authority appealed against the application of the law and the findings of fact in the question of guilt in count I, and against the sentence. The appeal against the findings of fact proceeded to a hearing. The appeal against application of the law and the sentence was put on a hold, see section 326 of the Criminal Procedure Act.
- (9) On 29 December 2020, Borgarting Court of Appeal ruled as follows:

- “1. A, born 00.00.1992, is sentenced under section 108 subsection 4 (a) of the Immigration Act and section 108 subsection 3 (a) and section 16-1, cf. section 16-4 of the Customs Act, cf. section 79 (a) and (b) of the Penal Code, to imprisonment for a term of 30 days.
 2. In accordance with section 69 subsection 1 (b) of the Penal Code 69, 70 packs of Marlboro cigarettes are confiscated.”
- (10) The Court of Appeal disagreed on the issue of exemption from criminal liability for humanitarian assistance. The majority – the professional judges and four lay judges – found that there was no basis for exemption under section 108 subsection 6.
- (11) A has appealed to the Supreme Court against the application of the law – the question of exemption from criminal liability under section 108 subsection 6 – and the sentence. In its decision to grant leave to appeal, the Supreme Court’s Appeals Selection Committee referred to the fact that A was acquitted on count I in the District Court, but convicted in the Court of Appeal. Thus, leave to appeal may only be refused if the Committee finds it clear that the appeal cannot succeed, see section 323 subsection 1 third sentence of the Criminal Procedure Act.
- (12) The case in the Supreme Court is conducted as a remote hearing in accordance with section 3 of the temporary Act of 26 May 2020 no. 47 on adjustments in the procedural set of rules due to the Covid-19 outbreak etc.

My opinion

The “humanitarian assistance” requirement in section 108 subsection 6 of the Immigration Act

- (13) Section 108 subsection 4 (a) of the Immigration Act provides that “any person who helps a foreign national to reside unlawfully in the realm or in another country participating in cooperation under the Schengen Agreement” may be punished by a fine or imprisonment for a term not exceeding three years. Contribution is an offence under section 15 of the Penal Code.
- (14) Section 108 subsection 6 provides an exemption from criminal liability for contributors providing *humanitarian assistance* to the foreign national who is unlawfully residing in the realm. The provision reads:
- “A person who provides humanitarian assistance to a foreign national who is unlawfully residing in the realm shall not be liable to a penalty for aiding and abetting unlawful residence unless
- (a) the person in question has intended to help the foreign national to evade the obligation to leave the realm, and
 - (b) the assistance has made it more difficult for the authorities to implement removal of the foreign national.”
- (15) I will first comment on the legislative history.
- (16) In the previous Immigration Act 1988, section 47 subsection 3 (a) included a penal provision with the same content as section 108 subsection 4 (a), but the guilt requirement was a purpose

of obtaining a gain. When the current Immigration Act was adopted, the guilt requirement was changed to intent.

- (17) The amendment was implemented in connection with the removal in 2005 of the requirement of a purpose of obtaining a gain when assisting in unauthorised *entry*, to adjust to a new Schengen Directive – Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence. The amendment is mentioned in Proposition to the Odelsting no. 4 (2004–2005) page 3. The Directive states that appropriate sanctions must be adopted if the assistance to unauthorised entry is intentional. At the same time, Article 1 (2) states that any Member State may decide not to impose sanctions when the “the aim of the behaviour is to provide humanitarian assistance to the person concerned”.
- (18) In line with this, the amendment in 2005 introduced a limited exemption from criminal liability for assisting in unauthorised entry. According to section 108 subsection 4 (b) of the Immigration Act, an exemption may be granted if the intention has been to help a foreign national recognised as a refugee under section 28 to enter the first safe country.
- (19) The Directive’s provision on humanitarian assistance applies to unauthorised *entry*, but the Ministry considered it natural to remove the requirement of a purpose of obtaining a gain also for contribution to unlawful *residence*. However, this resulted in a significant extension of the criminal liability, which could lead to criminalisation and prosecution of the helpers. When the case was discussed in the Storting, a majority of the Local Government and Administration Committee found that “one [had to] clarify the distinction between lawful humanitarian assistance to foreign nationals without residence and criminal contribution”, see Recommendation to the Storting no. 42 (2007–2008) page 29. The Government was then asked to draft bills.
- (20) The bill on the introduction of exemption from criminal liability for persons providing humanitarian assistance to a foreign national unlawfully residing in the realm, was presented in Proposition to the Odelsting no. 22 (2008–2009) on the completion of a special section of the Penal Code, and adopted by Act of 19 June 2009 no. 74. As it took time to implement the Penal Code, the bill was presented anew in Proposition 141 to the Storting (2010–2011), and section 108 subsection 6 entered into force on 1 February 2012.
- (21) The interpretation issue in the case concerns the content of the requirement of humanitarian assistance. The following is set out in Proposition to the Storting 141 (2010–2011) page 22:
- “The provision clarifies that only in particular cases, it is considered an offence to provide humanitarian assistance to a foreign national unlawfully residing in the realm. First, it is laid down as a requirement for contributory liability that the person providing the assistance acts with the purpose of helping the foreign national in evading the obligation to leave Norway. Secondly, the assistance must have made it more difficult for the authorities to implement removal of the foreign national. The proposed provision clarifies among other things that humanitarian organisations that openly offer assistance to unlawfully residing persons in the form housing known to the authorities, food, medical care etc., are not covered by the provision on aiding and abetting unlawful residence.”
- (22) These are examples of humanitarian assistance provided by humanitarian organisations. However, the exemption from criminal liability is not limited to this. Assistance provided by individuals is also covered by the exemption.

- (23) As mentioned, the humanitarian assistance requirement has its origin in an EU Directive. My citations from the preparatory works give no further guidance on the interpretation of “humanitarian” and “assistance”.
- (24) The word “humanitarian” suggests that the assistance is provided to cover human needs, and “assistance” indicates that it involves help without any expectations in return. In my view, “humanitarian assistance” may be described as selfless help to cover life necessities and related human needs.
- (25) Karl Harald Søvig expresses a similar interpretation in his article *Straffansvar og straffeforfølgning av humanitære hjelpere ved ulovlig opphold* [criminal liability and prosecution of humanitarian helpers in connection with unlawful residence] in Johansen, Ugelvik and Aas (red.) *Krimigrasjon? Den nye kontrollen med fremmede*, [Crimmigration? The new control of foreigners] 2013, page 166.
- (26) Health and care services, food and clothing, as well as housing, are all covered by “humanitarian assistance”.
- (27) A key factor is that the assistance is selfless. If the assistance is provided in return for either money, work or services from the foreign national, it cannot be considered “humanitarian assistance”, at least not if the consideration is not insignificant. Where to draw the lines depends on an individual assessment.
- (28) The condition in the preparatory works that the assistance is provided “openly” and is “known to the authorities”, cannot be interpreted as a requirement for “humanitarian assistance”, but it is relevant when assessing whether the conditions for exemption from criminal liability in (a) and (b) are met.

The Court of Appeal’s application of the law in count I of the indictment

- (29) Regarding the objective and subjective requirements for criminal liability under section 108 subsection 4 (a) of the Immigration Act, the following is set out in the Court of Appeal’s judgment:

“After the presentation of evidence during the hearing, the Court of Appeal is convinced that the defendant wilfully has acted as described in the indictment. It is undisputed that A gave B and C the opportunity to stay in the basement. These two did not have lawful residence in Norway, and based on A’s own statement, he acted with indirect intent (*dolus indirectus*).

By placing his basement at disposal for housing, A helped the two to reside unlawfully in the realm. It is also undisputed that the objective and subjective requirements for criminal liability are met.”

- (30) The Court of Appeal also concluded that B and C lived in the basement for three days.
- (31) As mentioned, the Court of Appeal’s majority found that the stay in A’s basement was not covered by the exemption for “humanitarian assistance” in section 108 subsection 6. An important passage in the Court of Appeal’s reasoning reads:

“As mentioned, the majority does not find that A in the individual case provided humanitarian assistance to B and C exempting him from criminal liability. Here, the majority has placed significant emphasis on A’s own statement to the Court of Appeal. It appeared that his motivation for helping them was mainly that he did not want to turn down a request relating to family or acquaintances. The majority cannot see that such goodwill needs to be culturally determined. What is important is that the goodwill appears to be the key motivation; we are in fact dealing with an act of friendship. Thus, the humanitarian aspect become less prominent.”

- (32) In my view, on this point the Court of Appeal commits an error in law. The personal relationship between the person providing the assistance and the foreign national is not relevant for whether the assistance is covered by the exemption from criminal liability. Nor should the defendant’s subjective motivation be decisive. “Acts of friendship” may also be “humanitarian assistance”, as long as it objectively concerns selfless help to cover life necessities and related human needs.
- (33) In the next paragraph, the majority continues:
- “The majority’s view is supported by A’s failure to find alternative solutions for the two. According to the statement by senior adviser to the Directorate of Immigration, E, both could have reported to their respective asylum centres and stayed there. There, they would also have been entitled to NOK 1 930 per month in support. Staying for several days in A’s basement was thus not necessary for humanitarian reasons. A knew that returning to the asylum centres was an option. However, he stated before the Court of Appeal that B and C had told him that they did not want to.”
- (34) I find that this part of the reasoning, also, is based on an error in law. The majority seems to rely on the principle of necessity, under which alternative acts must be given weight in the assessment, see section 17 of the Penal Code. However, section 108 subsection 6 of the Immigration Act provides an independent exemption extending beyond the principle of necessity.
- (35) It may not be entirely clear whether housing of a foreign national is covered by the exemption from criminal liability, as that such assistance may indeed make it more difficult for the authorities to implement removal. The limitation on the exemption follows from section 108 subsection 6 (a), which requires that the person providing the assistance “has intended to help the foreign national to evade the obligation to leave the realm”. Moreover, the Court of Appeal’s approach would make the exemption for assistance in the form of housing more or less illusory.
- (36) The majority then discusses the issue of returning a service, although this – I quote – “has not been decisive for the majority’s assessment”. Reference here is made to the observance of C, on 8 May 2020, coming out of the shop carrying a box of vegetables. He was also seen near the shop on 21 August 2020, and on 25 November 2020, he was observed sorting vegetables.
- (37) I cannot see that these acts qualify as favours in return, depriving the housing of the character of “humanitarian assistance”. It must be assumed the foreign national’s favours in return are made in connection with the stay, but the work in this case was performed so much later that the link between the assistance and the possible favour in return is remote. Moreover, it cannot be read from the judgment that the other foreign national, B, has done anything in return for being allowed to stay in the basement for three days.

- (38) Against this background, the Court of Appeal has incorrectly convicted A on item 1 of the indictment.
- (39) As the Supreme Court does not have sufficient basis to acquit, the Court of Appeal's judgment and hearing are set aside as concerns the conviction on count 1 of the indictment, see section 345 subsection 2, cf. section 347, of the Criminal Procedure Act.

The sentence

- (40) Against this background, the Supreme Court is to determine the sentence for the offences finally established by the District Court's judgment, cf. section 348 subsection 2, of the Criminal Procedure Act.
- (41) Crucial to the sentence is the violation of section 108 subsection 3 (a) the Immigration Act, as A on Friday 8 May 2020 at 10:48 had C working for him at X despite knowing that C lacked a work permit in Norway.
- (42) The District Court describes the situation as follows:
- “Based on A's and police officer F's statements, the Court finds it clear that A has committed the acts for which he is indicted. As for the objective factors, the Court notes that C has neither a work permit nor a residence permit, and that A has stated that C's presence on the relevant day was necessary for his shop to stay open while A was out for some hours. A further explained that C did not receive any payment, but that he could take some products from the shop. However, it is not a requirement that compensation is offered for the work. In any case, the Court finds that the proven circumstances qualify as '[making] use of a foreign national's labour' under the Immigration Act. The Court also finds it clear that A did this with intent.”
- (43) The District Court found it clear that A had failed to verify whether C had a work permit, and that this was grossly negligent of him.
- (44) The requirement in section 55 of the Immigration Act that a person needs a residence permit to take up employment, is central to Norwegian immigration policy, and the Immigration Act's prohibition against the use of unlawful labour is there to maintain important immigration-policy considerations, see HR-2021-797-A paragraph 31. Considerations of general deterrence have been crucial in the sentencing process.
- (45) In my view, the offence should be sanctioned by a noticeable fine. I base myself on the fining directive applicable to the police districts Oslo, East, Southeast, Southwest and Agder. The starting point under this directive is that one day of illegal work with a professional employer is sanctioned by an enterprise penalty of NOK 50 000. For private work, the starting point is a fine of NOK 10 000.
- (46) This case involves a single and very short work assignment, and does not have the characteristics of exploitation.
- (47) The fine should then be lower than the starting point for enterprise penalty imposed on professional employers. Considered in isolation, it should amount to around NOK 25 000.

- (48) A fine must also be measured for the offence described in count III of the indictment, concerning the sale of 1 400 undeclared cigarettes. The fining directive stipulates a fine of NOK 6 100 for importation of up to 1 600 cigarettes, which gives some guidance.
- (49) I find that the fine in aggregate should be set to NOK 30 000, alternatively that A is sentenced to imprisonment of a term of 30 days.

Conclusion

- (50) My conclusion is that the Court of Appeal's judgment and hearing must be set aside as concerns the conviction on count I the indictment, and that A, for the offences finally established by the District Court's judgment, is sentenced to a fine of NOK 30 000, alternatively to imprisonment of a term of 30 days.
- (51) I vote for this

J U D G M E N T :

1. The Court of Appeal's judgment for violation of section 108 subsection 4 (a) of the Immigration Act and the hearing are set aside.
2. In the District Court's judgment item 2 the change is made that A is sentenced to a fine of NOK 30 000, alternatively to imprisonment of a term of 30 days.

- (52) Justice **Bergsjø**: I agree with Justice Ringnes in all material respects and with his conclusion.
- (53) Justice **Falkanger**: Likewise.
- (54) Justice **Noer**: Likewise.
- (55) Justice **Skoghøy**: Likewise.
- (56) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The Court of Appeal's judgment for violation of section 108 subsection 4 (a) of the Immigration Act and the hearing are set aside.
2. In the District Court's judgment item 2 the change is made that A is sentenced to pay a fine of NOK 30 000, alternatively to imprisonment of a term of 30 days.