SUPREME COURT OF NORWAY

J U D G M E N T

given on 6 December 2022 by a division of the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Henrik Bull
Justice Knut H. Kallerud
Justice Per Erik Bergsjø
Justice Kine Steinsvik

HR-2022-2329-A, (case no. 22-066378SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 7 March 2022

A	(Counsel Karsten Alexander Anfinsen)
v.	
The State represented by the Immigration Appeals Board	(The Office of the Attorney General represented by Ida Thue)

(1) Justice **Steinsvik:**

Issues and background

(2) The case concerns the validity of the Immigration Appeals Board's rejection of an application for a residence permit for a spouse. The application was rejected based on the 24-year age requirement for family establishment, see section 41 a of the Immigration Act. The question is whether the decision violates the right to family life in Article 8 of the European Convention on Human Rights (ECHR) or the prohibition of discrimination in Article 14.

(3) A was born on 00.00.1999 and is a citizen of Kosovo. In October 2017, she married B, born on 00.00.1996. He is a Norwegian national and resident in Norway. His parents are originally from Kosovo.

(4) The married couple met for the first time in November 2016 in Kosovo, and became engaged in March 2017. In July 2018, A travelled to Norway on a visa and stayed here until November 2018. She became pregnant during her stay in Norway and applied for a new visa in February 2019. The application was rejected. She travelled to Norway nonetheless, and the couple's child was born on 00.00.2019. The child is a Norwegian national.

(5) On 5 November 2019, the Norwegian Directorate of Immigration (UDI) gave A notice of possible expulsion, but decided on 18 November 2019 not to expel her. At the same time, she was advised to apply for a temporary residence permit as soon as possible. An application was submitted on 25 November 2019, and the case was referred to examination on its merits.

(6) By a decision of 6 April 2020, UDI rejected the application on the ground that both spouses were under the age of 24. UDI did not find any basis for granting an exemption from the age requirement in section 41 a subsection 2 of the Immigration Act. According to this provision, an exemption may be granted if it is "obvious that the marriage or cohabitation is voluntary".

(7) Following an appeal from A, the Immigration Appeals Board (UNE) upheld the rejection in a decision of 29 January 2021. A subsequent request for a reversal has been suspended pending a final judgment.

(8) A filed a writ of summons and applied for an injunction in Oslo District Court on 10 March 2021. She contended that the decision was invalid due to incorrect application of the exemption rule in section 41 a and due to procedural errors, and that it constituted a violation of Article 102 of the Constitution, cf. Article 8 of the ECHR and Article 98 of the Constitution, cf. Article 14 of the ECHR.

(9) On 15 March 2021, UNE decided not to grant suspensive effect.

(10) On 30 September 2021, Oslo District Court ruled as follows:

> "IN THE JUDGMENT
> 1. The Court finds in favour of the State represented by the Immigration Appeals Board.
> 2. Each of the parties carries its own costs.

IN THE ORDER:

1. The application for an injunction is not granted.
2. Each of the parties carries its own costs."

(11) A and B had their second child in January 2022.

(12) A appealed to Borgarting Court of Appeal, which, on 7 March 2022, ruled as follows:

> "1. The appeal is dismissed.
>
> 2. Costs in the District Court of NOK 93 525 are to be paid by A within two weeks of service of this judgment.
>
> 3. Costs in the Court of Appeal of NOK 83 200 are to be paid by A within two weeks of service of this judgment."

(13) A appealed to the Supreme Court. The appeal challenged the Court of Appeal's findings of fact and individual application of the law in determining whether it is obvious that the marriage is voluntary, see section 41 a subsection 2 of the Immigration Act, and whether the provision and the exercise thereof are compatible with Articles 8 and 14 of the ECHR and the corresponding provisions in Articles 102 and 98 of the Constitution.

(14) On 1 July 2022, the Supreme Court's Appeals Selections Committee granted leave to appeal for the part concerning the application of the law.

(15) The part of the appeal concerning the application of section 41 a of the Immigration Act was abandoned during the preparatory stage. The Supreme Court is therefore only to consider whether the decision violates the invoked provisions of the ECHR. Apart from that, the circumstances of the case are the same as in the Court of Appeal.

The parties' contentions

(16) The appellant – *A* – contends:

(17) According to section 40 of the Immigration Act, A has a legal right to a residence permit based on her marriage with B.

(18) The decision to reject the application constitutes a violation of Article 8 of the ECHR. The purpose of the age requirement in section 41 a of the Immigration Act, which is to prevent forced marriage, must be balanced against A's right to family life.

(19) When assessing whether the measure is necessary in a democratic society, one must assume that the prevalence of forced marriage is highly uncertain, and that the age requirement may not be suitable at all to prevent it. Genuine victims of forced marriage may also be subjected to further abuse if they are retained in the country of origin until the required age is reached. The way the rule is formulated and applied, it also affects a large number of voluntary marriages. Therefore, the interference with the right to family life goes too far to obtain an uncertain effect.

(20) The age requirement in section 41 a and the possibility of exemption are also in conflict with the prohibition of discrimination in Article 14 of the ECHR. Although the provision is neutrally worded, it is in practice the applicant's ethnicity and country of origin that determine whether a residence permit should be granted under the exemption rule.

(21) A asks the Supreme Court to rule as follows:

> "1 UNE's decision of 21 January 2021 is invalid.
> 2 The state is awarded costs in the Supreme Court.
> 3 A is awarded costs in the District Court and the Court of Appeal."

(22) The respondent – *the State represented by the Immigration Appeals Board* – contends:

(23) The rejection of the application for a residence permit is valid, and the decision does not violate A's rights under Articles 8 and 14 of the ECHR.

(24) As a clear starting point, Article 8 of the ECHR does not confer a right to family establishment. There are no "exceptional circumstances" in the case that may give a right to residence. The married couple is also free to establish and enjoy family life in the applicant's country of origin. The State's margin of appreciation is wide, also in the light of the age requirement in section 41 a of the Immigration Act that secures fundamental rights and freedoms of others.

(25) Nor does the decision violate the prohibition of discrimination in Article 14, cf. Article 8, of the ECHR. The rejection is not based on the applicant's ethnic origin. Although the prevalence of forced marriage varies with the applicant's background, it is the arrangement itself that is relevant to the assessment of whether an exemption from the age requirement should be granted. Moreover, knowledge on the prevalence of forced marriage is only one of several factors in an individual assessment of whether it is obvious that the marriage is voluntary. The decision thus entails no difference in treatment based on ethnicity or nationality. Nor are persons from areas with or without occurrence of forced marriage in an analogous situation.

(26) Under any circumstances, a possible indirect difference in treatment as a result of the strict standard of proof for demonstrating that the marriage is voluntary, pursues a legitimate purpose and is proportionate.

(27) The State asks the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
> 2. The state represented by the Immigration Appeals Board is awarded costs in the Supreme Court."

My opinion

Issues and further discussion

(28) As the case stands in the Supreme Court, it must be trusted that UNE's decision is in accordance with section 41 a of the Immigration Act. The issue in dispute is whether the 24-year age requirement and the application thereof interfere with of A's right to family life

under Article 8 of the ECHR and/or the prohibition of discrimination in Article 14 of the ECHR.

(29) Before I discuss the issues related to the ECHR, I will give an account of the rules in the Immigration Act concerning residence permit for spouses. Next, I will consider the background to the special 24-year age requirement for family establishment, which was included in the Immigration Act by an amendment in 2016. Since the purpose of the rule is to prevent forced marriage, I will also give a brief account of the Norwegian authorities' work to counteract forced marriage and of the international obligations Norway must observe in this area.

The rules in the Immigration Act on family establishment based on marriage

(30) According to section 40 of the Immigration Act, an applicant who is the "spouse" of a sponsor with necessary connection to Norway, is entitled to "a residence permit" for the realm. A sponsor means the person with whom the applicant wishes to be reunited to establish family life. Subsection 1 (a) to (d) specifies which residence status the sponsor must have before the spouse is entitled to a residence permit. In our case, the conditions in section 40 subsection 1 (a) are met, since B is a Norwegian national who resides here. Also a spouse of a foreign national with lawful residence who has or may be granted a permanent residence permit, is entitled to a residence permit, see (b) and (c).

(31) It is a condition for residence based on marriage that both parties are aged 18 or over, see section 40 subsection 2. In cases involving family establishment – as opposed to reunification of spouses with an established cohabitation before the first of them came to Norway – the age requirement is, however, stricter. According to section 41 a subsection 1 of the Immigration Act, it is a condition for residence that "both parties are aged 24 or over". An exemption may be granted under subsection 2, which reads:

> "Exceptions to this requirement may be made if it is obvious that the marriage or cohabitation is voluntary."

(32) I will return to the further implications of section 41 a, but as mentioned, the purpose of the age requirement is to prevent involuntary marriage.

(33) I also mention section 51 subsection 2 of the Immigration Act, which makes exceptions from the right to family immigration, including if the sponsor "does not consent to the applicant being granted a permit, or if it is likely that the marriage has been entered into against the will of either party". This provision, which applies regardless of the applicant's age, is also to prevent that a permit is granted based on forced marriage. The way the provision in section 51 subsection 2 is worded, it is stricter when it comes to the justification for the rejection than section 41 a subsection 2, in that it must be "likely" that the marriage is involuntary.

Forced marriage – prevalence, regulation and measures

(34) The report "Global Estimates of Modern Slavery – Forced Labour and Forced Marriage, September 2022" prepared among others by the International Labour Organisation (ILO) and

the Organisation for Migration (IOM), gives up-to-date information on the prevalence of forced marriage worldwide. The phenomenon is introduced as follows in the report:

> "Forced marriage is a complex and highly gendered practice. Although men and boys are also forced to marry, it predominantly affects women and girls. Forced marriages occur in every region of the world and cut across ethnic, cultural, and religious lines. The many drivers of forced marriage are closely linked to longstanding patriarchal attitudes and practices and are highly context specific."

(35) The report sets outs that an estimated 22 million people are currently living in forced marriage and that the problem is increasing. In most cases, the force is exercised by family members, primarily the parents, but also other relatives.

(36) According to the report, migration is one of several circumstances surrounding forced marriage. Although many voluntarily migrate for marriage, the report also states that migration may create situations of vulnerability for certain groups. Several examples are mentioned, including girls and women from high-income countries that are forced to marry foreign men for cultural reasons or to secure another persons' entry into the country.

(37) Forced marriage is a serious human rights violation. At the same time, the right to marry of one's own free will is also a right protected by convention. The purpose of several international conventions that Norway has ratified is partially to secure the right to marry, without coercion, and partially to prevent forced marriage.

(38) In this regard, I mention Article 23 of the International Covenant on Civil and Political Rights (ICCP), Article 16 of the UN Convention on the Elimination of All Forms of Discrimination against Women, Article 1 of the UN Convention on Consent to Marriage and Article 12 of the ECHR. I also mention Article 37 of the Council of Europe's Convention 11 May 2011 on preventing and combating violence against women and domestic violence – the Istanbul Convention. According to this provision, the Parties undertake to criminalise actions forcing a person into to enter into a marriage or luring a person abroad to enter into a forced marriage there.

(39) The international obligations are complex and impose the authorities to take measures to prevent forced marriages that, on one hand, are sufficient to provide effective protection. On the other hand, the measures must not be so far-reaching as to conflict with fundamental rights to marry voluntarily and exercise the right to family life.

(40) The State has referred to the large number of measures taken by Norwegian authorities to prevent forced marriage. Apart from the age requirement for family establishment in the Immigration Act, which this case concerns, and section 51 subsection 2 of the Immigration Act, both the Marriage Act and the Penal Code contain rules that are meant to protect against forced marriage.

(41) Also, Norwegian authorities have since 1998 taken a number of measures to prevent forced marriages through adopted action plans. Among them is the presentation of measures in Proposition to the Storting L (2015–2016) page 100 for the period up to 2016. This work has continued also after 2016. The applicable action plan for the period 2021–2024 presents five priority areas with a total of 33 measures. The responsibility for execution is distributed among seven ministries with subordinate agencies.

(42) On these grounds, Norwegian authorities have chosen a high level of protection. A broad spectrum of different measures are, in aggregate, meant to prevent such marriages.

The background to the 24-year rule in section 41 a of the Immigration Act

Introduction

(43) An increase of the age requirement for residence based on family establishment has been considered by the legislature in several rounds. With the adoption of the Immigration Act 2008, a proposal was made to set an age limit on 21 years, but was not followed up. The current 24-year age requirement was introduced in connection with a later amendment to the Immigration Act in 2016. I will now examine the deliberations forming the basis for the current status of the law.

The proposal to introduce a 21-year age requirement upon the adoption of the Immigration Act 2008

(44) Upon the adoption of the current Immigration Act, measures to prevent forced marriages were assessed in connection with the drafting of new rules on family immigration. The Committee issuing Norwegian Official Report 2004: 20 emphasised, in item 2.1.4, that family immigration must to a large extent be permitted for humanitarian reasons, but that one should consider more closely measures for the protection of victims of forced marriage. The problem was primarily deemed to be linked to family establishment, see page 23 of the report:

> "When it comes to family establishment, the forced marriages in particular have been the focus of the public debate lately. There is consensus that that forced marriage should be prevented. When it comes to practical measures to prevent it from occurring – and here, one must be aware that Norwegian authorities have few possibilities to prevent such marriage from being entered into abroad – it is, however, a problem that many of the measures do not have a clear effect. An age requirement, for instance that the spouses must have reached the age of 21 before the person who does not have a permit may be granted one, may indeed increase the age of marriage in some cases so that those concerned may have an education and generally more maturity and independence towards the family before marriage can be considered. However, it may seem as if many of the most obvious cases of forced marriage take place as a 'coup' during a 'holiday stay' in the country of origin where the person to be married away has no idea about the plans upon departure. It is unlikely that such forced marriages may be prevented by an age limit, but may instead have the effect that the person married away is retained in the parents' country of origin until the age requirement is met.
>
> The Committee has nonetheless proposed an age limit of 21, which was also allowed for in the EU Directive on family immigration from 2003, but stresses that there is reason to monitor the actual effect of such a requirement."

(45) The Committee also proposed a rule in line with the current section 51 subsection 2, under which a residence permit may be refused if it is likely that the marriage is entered into against the will of one of the parties, or if the spouse already residing here does not consent to the grant of a permit. Concrete measures were also proposed to prevent the so-called 'coup situations' mentioned in the quote.

(46) The background to the proposals is detailed in item 8.5.4.8 of the Report, where different forms of arranged marriage are discussed. The Committee denied any intention to propose immigration law measures "generally aimed at any marriage entered into based on a tradition for arranged marriage". It was "particularly important" to take measures "to prevent persons from being pressured into marriage against their will", see the Report pages 241–242. The Committee mentioned that towards "people that young who are often involved in arranged marriage, the authorities must take a clear responsibility to find reasonable measures not only to prevent coercion, but generally to prevent that people are subjected to severe pressure to marry someone against their will".

(47) The Committee also mentioned the lack of reliable information as to the actual extent of the problem related to coercion or severe pressure, and the likelihood of significant dark figures due to the family's role in situations with latent pressure, see the report page 244. The justification for the proposal to increase the age requirement for family establishment is provided on page 247:

> "A measure that has become particularly relevant with regard to preventing forced marriages is the introduction of an increased age requirement for family immigration. The idea behind such an increased age requirement is that older parties, due to personal maturity as well as a more independent position in the family, have a greater chance to oppose pressure from the family when it comes to crucial choices in life."

(48) The Committee mentioned that Denmark, in 2002, had introduced a 24-year requirement both for family reunification and family establishment, and that the EU's Directive on the right to family reunification allows for the Member States to lay down a requirement for family immigration that the parties are aged 21 and over. Various arguments against an increased age requirement were then discussed, and the Committee concluded that a rule corresponding to the Danish one would "be too invasive" and potentially have too many unintended consequences. The final proposal of a 21-year age limit was justified as follows on page 247:

> "After a balancing of the considerations and interests that emerge, the Committee still finds that there is reason to introduce a higher age limit than the current 18-year limit for the right to family establishment. In the Committee's view, the age limit should in any case not exceed what the new EU Directive allows in the EU countries' national legislation, which is 21. An increase of the age limit to 21 creates a larger likelihood for the parties to have acquired more maturity and independence towards their family, which makes them better equipped to claim their own interests and wishes also contrary to the family's will."

(49) The Immigration Act Committee's proposal was not followed up by the Ministry in Proposition to the Odelsting No. 75 (2006–2007). Before the Proposition was advanced, the Ministry had, in the autumn of 2006, carried out separate discussions regarding adjustments and supplements to the proposed 21-year requirement. On page 203 of the Proposition, it is set out that the Ministry found that the relevant proposals in the consultation paper, including the 21-year requirement, "might contribute to reducing the occurrence of coercion and undue pressure, but based on an overall assessment, the Ministry has concluded that, instead, other measures should be taken than age limit and connection requirement".

The introduction of the 24-year requirement in 2016

(50) The current age limit for family establishment was proposed in Proposition to the Storting 90 L (2015–2016) Amendments to the Immigration Act etc. The Proposition contained several tightenings of family immigration rules, including the introduction of a 24-year age requirement for family establishment. The purpose was still to combat forced marriages. The following is set out on page 98:

> "The proposal is to protect young persons from marriage entered into under coercion, but also under less severe pressure and persuasion from next of kin. … The idea behind the 24-year requirement is that older parties, due to personal maturity as well as a more independent position in the family, have a greater possibility to oppose pressure from the family when crucial choices in life are to be made. An exemption from the 24-year requirement may be granted if it is obvious that the cohabitation is voluntary."

(51) Before the Proposition was presented, extensive discussions were held, also this time, and a number of bodies entitled to comment gave their feedback.

(52) The proposal is further explained in item 7.3.2 et seq of the Proposition. This time, also, there were no certain figures showing the extent of coercion and undue pressure. The Ministry mentioned that the Institute for Social Research had prepared a report commissioned by UDI, concluding that, based on entirely objectively verifiable factors, there were indications "that the individual risk of forced marriage through transnational marriage has been considerably reduced". However, the Ministry mentioned the large methodical challenges in disclosing coercion, and pointed out that UDI "suspected coercion in far more cases than the number they reject on these grounds". The background to this suspicion was primarily the number of inquiries to the support agencies.

(53) Many bodies entitled to comment were reluctant to introduce an increased age requirement. The Proposition contains a thorough presentation and discussion of the objections made. Some bodies were more positive, and the Ministry mentioned among other things the statement from the Police Directorate. The Directorate referred to the comments from Oslo Police District that has significant practical experience with cases involving forced marriage:

> "Oslo Police District handles many cases involving family establishment and has broad experience with the challenges and the balance between arranged marriages and forced marriages. Their experience is that age and personal maturity are central factors suited to prevent forced marriages. … Whether an age requirement is an effective means to prevent forced marriages is, according to the consultation paper, not documented. However, Oslo Police District can confirm that family pressure is often strong in the selected applicant groups, and particularly suited to affect young applicants. The experiences from the Oslo Police District imply that the age requirement will cover a particularly vulnerable group. However, since the proposal may have unintended effects, there will be a need to grant an exemption from the 24-year requirement."

(54) Despite the objections and the lack of clear documentation of the effects, the Ministry upheld the proposal with these arguments:

> "The Ministry finds, however, that one should nonetheless take measures whose effect one trusts, although the problem is difficult to document. An increase of the age limit creates a larger likelihood that the parties have obtained sufficient maturity and

> independence towards their own family. Increased maturity and independence will give them more strength to claim their own interests and wishes against the family's will."

(55) The Ministry also stated that "forced marriages must be combated on a wide scale with a large number of different measures", and that a 24-year age limit may not "prevent all such marriages, but some". When the age limit was proposed at 24, and not 21 as in previous proposals, this was based on changes in the marriage pattern, as well as information that the support agencies were contacted also by persons over 21.

(56) The significance of the age requirement affecting voluntary marriages was also discussed. The following is stated in the Proposition on page 112:

> "Based on the total scope of family establishment that may be affected, the Ministry finds that the number of those who are unintentionally affected is not so big that it in itself must be considered disproportionate. The consequence for those who have been unintentionally affected is that they must postpone the time for taking residence in Norway. Parties who wish to marry and move in together before the age of 24, may still do it, but they must take up residence in a different country, most likely the applicant's country of origin."

(57) The Proposition also contains, in item 7.3.9.3, a relatively thorough assessment of the application of Article 8 of the ECHR and the anti-discrimination provision in Article 14, to which I will return.

Exemption when it is "obvious that the marriage is voluntary"

(58) As mentioned, the proposed provision allowed for exemption in cases where it is obvious that the marriage is voluntary. Also, the possibility of exemption was mentioned during the consultation, and several of the bodies entitled to comment found that the consultation paper prescribed "too strict an interpretation of the exemption provision". Some, including UDI, also mentioned that the exemption provision could be problematic in relation to the prohibition of discrimination, as it brought to light issues of discrimination based on ethnic origin. This was particularly relevant if an exemption was to be granted after a "general assessment based on the group's cultural background", combined with the fact that it would be "nearly impossible" to establish, with a sufficient certainty, that a marriage was not entered into under coercion or pressure.

(59) The exemption provision is further discussed in item 7.3.9.2 of the Proposition. In the light of the feedback from the consultation rounds, the Ministry proposed a relaxation and a "more liberal interpretation" than the consultation paper prescribed. First, the Ministry stated that an exemption should be granted if the parties are not in a risk group for forced marriage. Then it is stated on pages 112-113:

> "The requirement that it must be 'obvious that the cohabitation is voluntary' requires a discretionary assessment by the immigration authorities. The Ministry considers it obvious that the cohabitation is voluntary if the marriage is entered into between two parties originating from countries or areas where Europe has no experience with the occurrence of forced marriage. Also, if only one of the parties comes from such a country or area, it will generally be obvious that the marriage is voluntary. It will also be obvious that the cohabitation is voluntary if the parties originate from countries or areas where Europe has experience with forced marriage, but the marriage is obviously against the

> norms in the relevant cultures, so that it is completely unlikely that the family or others have forced any preferred spouse upon the other…
>
> In other cases where both parties originate from countries or areas where Europe has experience with forced marriage, it will be hard to establish that the marriage is obviously voluntary. It suffices that both parties vow towards the immigration authorities that the marriage is voluntary. The parties may be pressured into doing that, and it will be nearly impossible for the immigration authorities to establish with a high level of certainty that it must be considered 'obvious' that the marriage is not a result of coercion or pressure. The Ministry thus concludes that, in the vast majority of these cases, no exemption from the 24-year requirement will be granted, although most of these marriages are probably voluntary. The Ministry finds, however, that this practice is necessary for the 24-year requirement to be effective."

(60) The possibility of exemption was also commented on by the Committee of Local Government and Public Administration in Recommendation to the Storting 391 L (2015–2016) on page 75:

> "Another majority, the members from the Labour Party, the Conservative Party, the Progress Party, the Christian Democratic Party, the Centre Party and the Liberal Party, point out that an exception is proposed 'if it is obvious that the cohabitation is voluntary' and supports this proposal. In accordance with applicable public administration practice, the assessment of whether the exception becomes applicable must be individual and depend on the concrete circumstances in the individual case."

(61) A majority of the Committee supported the introduction of the age requirement.

(62) The preparatory works show that the age requirement in the family establishment cases was thoroughly assessed by the legislature, both upon the adoption of the Immigration Act and upon the adoption of section 41 a in 2016. The assessments were based on the knowledge available on the occurrence of involuntary marriage and on information from support agencies, among others, indicating considerable dark figures. The proposals were in both rounds sent for consultation, and the feedback was thoroughly assessed and commented on. An effect of the consultation in 2016 was an adjustment of the possibility of exemption, as it was stressed in both the Proposition and the Recommendation that the exception issue had to be decided after an individual assessment, based on the specific circumstances in the case. The application of the ECHR was also assessed, based on available case law from the ECtHR.

(63) The possibility of exemption from the 24-year requirement is expected to be narrow, and the standard of proof is strict with the word "obvious". There is also no doubt that the country of origin and the experience with forced marriage from the relevant area are weighty factors in the assessment. However, the rule is not absolute. As the wording and the clear statements in the preparatory works indicate, each case requires an individual assessment of whether it is obvious that the marriage voluntary.

(64) An administrative decision from UNE has been presented, which, in my view, substantiates that the rule is generally applied in accordance with these ideas. The decisions show that the individual assessments are made based on the specific circumstances. There are examples of exemption being granted for spouses originating from areas where forced marriage is a problem, although the arrangement does not conflict with traditional norms. An overview of the number of rejections and grants under the exemption rule during the period 2017–2022 sorted by the applicant's country of origin, supports the same. Applications from Kosovo, for

example, have been rejected in 48 cases, while exemption has been granted in nine cases during the same period. However, for some countries such as Afghanistan, no exemption is granted for the same period.

The individual assessment of the exception in the case at hand

(65) UNE's rejection in the case at hand is based on an individual assessment of whether it was obvious that the marriage was voluntary. The Board took as its starting point that "the threshold for what is considered obvious is high". It also emphasised the fact that A came from a country where forced marriages are known to occur, and that it could not be considered obvious that the marriage was voluntary. This assessment included the information provided by the parties regarding the marriage, their age and how they met. Presented photos of the parties were also examined, but not given decisive importance.

(66) Also, the Court of Appeal, which was fully competent to review the exemption condition, has carried out a thorough and balanced assessment of the circumstances under which the marriage was entered into.

(67) After a presentation of the occurrence of involuntary marriage in Kosovo based on evidence presented in the Court of Appeal, the Court discusses whether it could be considered "obvious" that the marriage was voluntary. The assessment is individual and based on the information emerged during the appeal hearing, including statements from both parties on how they met and the extent of contact before the marriage. According to the Court of Appeal, it weighed against a voluntary marriage that the parties became engaged at only 17 and 20, respectively, after a short period where they had seen each other only a few times during a two-week period and hardly spent any time on their own. Furthermore, the Court of Appeal emphasised that A, at the time of the ceremony, had only completed nine years at school, was living at home with her parents and was economically dependent on them. The Court of Appeal therefore agreed with UNE that the criteria for granting an exemption from the 24-year requirement was not met "after an individual assessment of all aspects of the case". In its conclusion, the Court of Appeal stated:

> "The prevalence of arranged marriages in Kosovo has only been a starting point for the assessment. Most of all, the Court of Appeal has carried out an overall assessment of the individual circumstances described above."

(68) Against this background, I will now discuss whether the decision constitutes a violation of A's rights under the ECHR, starting with the right to family life.

The application of the ECHR – the scope of the review

(69) The Supreme Court is fully competent to review whether the refusal of a residence permit violates the invoked rights in the ECHR.

(70) When determining the scope of the protection afforded by the ECHR, Norwegian courts must make an independent interpretation of the relevant provisions based on the method used by the ECtHR. I refer to the Supreme Court judgment HR-2019-1206-A paragraph 104, in which the further premises for the interpretation are clarified. With reference to the Supreme Court

judgment in Rt-2005-833 paragraph 45, which in turn is based on the principles drawn up in the plenary judgment in Rt-2000-996 *Bøhler,* the following is set out:

> "Norwegian courts must thus adhere to the convention text, ordinary considerations of purpose and the ECtHR's rulings. However, it is primarily the ECtHR's task to develop the convention. And if there is any doubt as to the understanding, Norwegian courts must, in the balancing of various interests or values, be able to include value priorities forming the basis for Norwegian legislation and perception of the law."

(71) When balancing the various interests in the constitutional review, it is also significant whether the legislature itself has struck such a balance when creating the set of rules, and underway assessed the application of the ECHR, see *Bøhler* page 1008.

(72) The ECtHR confers on the States a margin of appreciation, including in the assessment of whether interference with a convention right is justified. Since the entry into force of Protocol 15 Article 1, this is set out in the ECHR's preamble, which now clarifies that it is the States that – in accordance with the subsidiary principle – "have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto", and that the States "in doing so […] enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights".

(73) In the Supreme Court judgment HR-2022-718-A *cabin quarantine* paragraph 89, is set out that the margin of appreciation conferred by the ECtHR is not "transferable to a domestic court's review of measures imposed in that state". At the same place, however, it is clarified that the Supreme Court will nonetheless "based on Norwegian law, exercise restraint in reviewing assessments that are largely medical or the result of a complex balancing of social considerations". This applies in particular to balancing of legitimate considerations made by political authorities, see HR-2018-1958-A paragraph 86.

(74) The parties agree that Articles 102 and 98 of the Constitution afford no protection beyond the provisions in the ECHR for the issues raised in the case at hand, and I therefore find no reason to elaborate on these provisions.

Is the decision in conflict with Article 8 of the ECHR?

Starting points

(75) There are no rulings from the ECtHR considering whether an increased age requirement as a condition for family establishment constitutes a violation of the right to family life. However, through extensive case law, the ECtHR has issued guidelines on in which cases the States must respect entry with the aim of enjoyment of rights in Article 8 of the ECHR. In my view, this case law is highly relevant to our case. This must apply although the interests that the State protects through the 24-year requirement relates to the protection of rights and freedoms of others, and not directly to immigration control. It is undisputed that the prevention of involuntary marriages is a legitimate purpose in itself.

(76) I also note that "family life" must be taken to exist within the meaning of Article 8. UNE has not finally established whether the marriage between the parties is entered into under coercion or undue pressure, which would question whether a protected family life exists at all. The parties live together with their children in Norway, and have in fact enjoyed family life since

A illegally entered the realm in 2019. The State also has not challenged the requirement of a family life.

(77) When an application for a residence permit for family establishment is rejected, it may also be questioned whether we are facing an "interference" with the right to family life, or the extent of the Contracting State's positive obligations. I find no reason to elaborate on this. As set out in HR-2019-2286-A paragraph 66, ECtHR case law does not always distinguish between the positive and negative obligations of the States. In several cases, it is stated that the relevant principles in any case are the same. The central point is whether the authorities after an overall assessment has struck a "fair balance" between the competing interests of the individual and of the community as a whole, see for example the ECtHR's Grand Chamber judgment 3 October 2014 *Jeunesse v. The Netherlands* paragraph 106.

The scope of the protection

(78) When assessing the extent of the protection in Article 8, I base myself on the ECtHR's Grand Chamber judgment 9 July 2021 *M.A v. Denmark.* The case concerned a refusal of a residence permit for the wife of a man from Syria who had been granted "temporary protection" in Denmark. A three-year waiting period applied under Danish law, which meant that family reunification could not be granted unless the sponsor with temporary protection had lived in Denmark for more than the three last years. The application was denied with a reference to this rule. The ECtHR found a violation of Article 8 in a 16-1 ruling.

(79) In this judgment, the ECtHR accounts for the general principles on State's obligations to admit to its territory relatives of persons residing there. Paragraphs 130–132 reiterate the principles from earlier ECtHR case law in that a State is entitled to control the entry of aliens into its territory. Also, where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couples' choice of country for their matrimonial residence or to authorise family reunification, or a general obligation to grant applications for family reunification on its territory. The States' obligations under Article 8 require a balance to be struck between the interests involved. In paragraphs 132 and 133 this is clarified as follows:

> "Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest and is subject to a fair balance that has to be struck between the competing interests involved. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control.
>
> Finally, there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance. Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight."

(80) In the next paragraphs, the ECtHR discusses factors that according to its case law are central in the balancing of interests.

(81) In paragraph 134 (i-iv) the ECtHR states that it has been reluctant to find that there was a positive obligation to grant family reunification when the family life was created at a time when the persons involved were aware one of them had a "precarious" immigration status. In such a situation, a removal of the non-national family member will constitute a violation of Article 8 only in "exceptional circumstances". Further factors exempting a State from a positive obligation are that the applicant has limited ties to the host country, that there are no "insurmountable obstacles" in the way of the family living in the country of origin of the applicant, or that the sponsor cannot demonstrate ability to provide for the basic cost of subsistence.

(82) In paragraph 135 (i-v) the ECtHR mentions circumstances that – if several of them are cumulatively present – generally mean that the State has a positive obligation to grant family reunification. These circumstances are that the person requesting family reunification has established strong ties with the host country, that family life had already been created when the sponsor was granted residence in the host country, that both parties are already staying in the host country, that children are involved since their interests must be afforded significant weight, or that there are insurmountable or major obstacles in the way of the family living in the applicant's country of origin.

(83) With these circumstances in mind, I will now turn to the individual assessment of whether UNE's decision constitutes a violation of Article 8 when the application for family establishment is rejected in this case. As already mentioned, it is a distinctive feature in this case that the State's interests do not lie in general immigration control, but in the continuation of a measure to prevent forced marriage. This does not change the assessment of whether the private party has a legitimate interest in creating family life in Norway. But, when considering the weight of the State's interests, the relevant measure must be assessed on more individual terms than in cases where the State's interests lie in the consideration of immigration control.

The individual proportionality assessment

(84) I trust that A's application for family establishment with her husband was submitted at a time when her immigration status was uncertain. She had married a Norwegian citizen, and therefore had a legitimate interest in creating family life with him as soon as possible. Her young age implied, however, that section 41 a of the Immigration Act prevented a residence permit if the condition for being granted an exemption was not met. As I have demonstrated, the possibility of exemption is narrow.

(85) At the time of the decision, the parties had had a child, and the consideration of the best interests of the child strengthens A's legitimate interest in obtaining a residence permit. However, no exceptional circumstances have been asserted imposing an obligation on the State to grant a residence permit. Also, A's stay in Norway until the rejection was not long-term.

(86) Both parties originate from Kosovo, although B is a Norwegian citizen and born and raised here. No information has been provided demonstrating the existence of insurmountable obstacles in the way of family life in Kosovo.

(87) A may apply for a residence permit based on the marriage as soon as she meets the age requirement. In other words, it is a temporary delay of the possibility of a residence permit for family establishment.

(88) The purpose of the age requirement in section 41 a is to combat forced marriages. This is a legitimate purpose, as the goal is to protect the rights and freedoms of others. Forced marriages are a large problem worldwide, and the State is committed, under several international conventions, to take measures to prevent involuntary marriage. As my presentation of the preparatory works to the current rule has shown, there is no reliable information on the scope in Norway, but information from the support agencies suggests that the dark figures may be considerable.

(89) In both consultation rounds, the opinions on the effect of the measure have differed to some extent. Nonetheless, the Ministry found that the measure had to be implemented as one of several tools, and no circumstances have emerged suggesting that the assessment of the measure's suitability was based on false premises. Norwegian authorities have chosen to carry out joint measures to ensure a high level of protection. The courts should be reluctant to review the legislature's chosen level of protection.

(90) Objections put forward have been considered and balanced by the legislature. The unintentional effect that the age requirement may have on voluntary marriages has also been discussed, but the legislature has found that the purpose that the age requirement is meant to fulfil is so important that the exemption rule in the Act is not disproportionate.

(91) After an overall assessment of all relevant factors, my conclusion is that the refusal to grant A's application for family establishment is based on a fair balance struck between the interests of the individual and those of the community in general. Hence, the decision does not constitute a violation of Article 8 of the ECHR.

Is the decision in conflict with the prohibition of discrimination in Article 14 of the ECHR?

The law

(92) The next question is whether the decision violates the prohibition of discrimination in Article 14 of the ECHR, which reads:

> "Art 14. Prohibition of discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

(93) The provision is a so-called accessory prohibition of discrimination, which means that the prohibition only affords protection against discrimination in the exercise of other rights and freedoms laid down in the ECHR. In our case, the parties agree that the 24-year requirement affects rights within the scope of Article 8 of the ECHR. I rely on this. The application of Article 14 does not necessarily presuppose the violation of one of the other rights guaranteed by the ECHR, see for example the ECtHR's Grand Chamber judgment 24 May 2016 *Biao v. Denmark* paragraph 88.

(94) The bases for discrimination invoked by A are "race" and "national origin", which are both covered by the provision.

(95) A is not contending that the age requirement in section 41 a of the Immigration Act entails a direct discrimination. The question is therefore whether there is indirect discrimination in conflict with Article 14 when the age requirement is viewed in context with the practising of the exemption for "obviously voluntary" marriages. In *Biao v. Denmark* paragraph 103, the following definition of such difference in treatment is given:

> "The Court has accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group (see, for example, Hugh Jordan v. The United Kingdom, no. 24746/94, section 154, 4 May 2001). Such a situation may amount to 'indirect discrimination', which does not necessarily require a discriminatory intent (see D.H. and Others v. The Czech Republic, cited above, section 184)."

(96) Discrimination only occurs if persons who are in an analogous, or relevantly similar, situation are treated differently, see paragraph 89. For such difference in treatment to be lawful, it must have an objective and reasonable justification. This denotes a requirement of an objective basis, and of proportionality between the means employed and the aim sought to be achieved, see paragraph 90:

> "A difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

(97) Paragraphs 93 and 94 detail to some extent some of the bases for discrimination, stating that if a difference in treatment is based exclusively on the ground of nationality, the State must put forward very weighty reasons. The following is set out in paragraph 94 on difference in treatment based on ethnic origin:

> "No difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society. Discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination…"

(98) The applicant must demonstrate a difference in treatment, while it is for the Government to show that it was justified, see paragraph 92.

Individual assessment

(99) A contends that although the age requirement in section 41 a is neutrally worded, the provision conflicts with the prohibition of discrimination. Applicants from countries that have "European experience" with forced marriages are treated more poorly than ethnic Norwegians and applicants with a western cultural background. In practice, applicants from certain countries and certain peoples are denied residence without individual assessments being made, while applicants with a western background are granted exemptions from the age requirement. I will first discuss whether the practical effect of the age requirement is that persons in analogous situations are treated differently. A natural place to start would be to see

whether foreign spouses seeking family establishment with persons with immigration status in Norway receive equal treatment.

(100) At the outset, the requirement that both parties must have reached the age of 24 applies regardless of the applicant's ethnicity or country of origin. But, as mentioned, the applicant's country of origin and the experience with forced marriages in the country are weighty factors for determining whether there is a basis for granting an exemption.

(101) During the legislative process up to the adoption of the 24-year requirement, the application of the prohibition of discrimination was also discussed, see Proposition to the Storting 90 L (2015–2016) pages 114–115. The Ministry initially stated that the exception for obviously voluntary marriages "means that the age requirement will particularly affect couples from countries or areas where, according to European experience, forced marriage occurs". Next, a number of countries are listed as example, before it is stated that "ethnic Norwegians and others with a typically Western cultural background" not will be affected.

(102) I agree with the appellant that the way the Ministry expresses itself may seem unfortunate when viewed in isolation. The wording may give the impression that what alone is decisive for granting an exemption is the applicant's country of origin and cultural background. In my view, such an application of the exemption rule will create challenges when it comes to Article 14 of the ECHR. I reiterate the ECtHR's statement in *Biao v. Denmark* paragraph 94, that differentiation based "exclusively or to a decisive extent" on a person's ethnic origin, can hardly be justified.

(103) However, the preparatory works must be viewed in context, and a broader assessment shows that the legislature did not intend for the exemption rule to be applied in such a manner, see my previous account of the legislative process. I reiterate the statement by the Committee of Local Government and Public Administration in Recommendation to the Storting 391 L (2015–2016) page 75 that "the assessment of whether the exemption rule becomes applicable must be individual and depend on the concrete circumstances in the individual case". During the processing of an application for family establishment where at least one of the parties is under the age of 24, it is not sufficient to base a rejection of the applicant's country of origin or cultural background alone, balanced with the prevalence of forced marriages in the party's country of origin. An individual assessment is required by law, and the issue for consideration is whether it is obvious that the marriage is voluntary. Administrative case law supports that the rule is applied in line with these presumptions.

(104) The reason why it is nonetheless harder, in practice, for applicants from countries where forced marriages occur to be exempted from the age requirement, is that the purpose of the rule is to prevent forced marriages. The various levels of risk and the prevalence of such marriages in the applicants' countries of origin will therefore necessarily be relevant in the individual case. The standard of proof set by the word "obvious" is also strict, with the result that it is in fact more difficult for persons from these countries to prove that it is met.

(105) I have somewhat doubted whether the actual conditions for persons originating from areas where forced marriages are known to occur and the conditions for persons from areas where they are not, are sufficiently similar to establish a difference in the treatment of persons in analogous situations, but I see no reason to take a final stand on this. The reason is that the difference in treatment possibly resulting from the application of the exemption rule, in my view, has an objective and reasonable justification, and must therefore be considered lawful.

(106) I find it clear that the age requirement and the practising thereof pursue an objective and legitimate purpose, and I refer to my previous statements in this regard. Moreover, the purpose of combating forced marriage is rooted in clear international obligations.

(107) Also, the purpose of the possibility of exemption is, in itself, objective and legitimate. Granting an exemption when it is obvious that the marriage is voluntary contributes to a more targeted measure and to a reduction in voluntary marriages affected by the age requirement. The rights of the parties to marry voluntarily should not be interfered with more than necessary. Thus, the rule is more nuanced than an absolute age requirement without any possibility of exemption. The Norwegian provision also does not apply to family reunification, which falls outside of the age requirement in section 41 a.

(108) The age requirement and the application thereof through the possibility of exemption after an individual assessment also meet the requirement of *proportionality.*

(109) The measure is appropriate as older persons have normally obtained more maturity and independence, and may more easily resist coercion and pressure into involuntary marriage.

(110) The exemption that may be granted when it is obvious, after an individual assessment, that the marriage is voluntary prevents the difference in treatment from going further than necessary. The standard of proof that lies in "obvious" may have the effect that also voluntary marriage is covered, but is considered necessary to ensure the effect of the rules. As mentioned, the legislature has considered forced marriages for to be a serious problem and wished for a high level of protection. The Immigration Act presupposes that individual assessments are made in each case, and also the individual discretionary assessment of whether the exemption condition is met must be within the scope of Article 14 of the ECHR.

(111) Finally, in the proportionality assessment, it carries some significance that the age requirement for persons that are not exempted, and therefore must wait with establishing a family in Norway, will apply until both parties reach the age of 24.

(112) Overall, the age requirement and the application of the exemption rule in section 41 a of the Immigration Act, in my view, based on an objective justification. The difference in treatment resulting from the fact that the possibility of exemption depends on whether or not the applicant is in a risk group for forced marriage, is also proportionate and does not go further than necessary to achieve the legitimate purpose of preventing forced marriages.

(113) Also in A's case, the rejection based on an individual assessment of whether the condition for being exempted from the age requirement is met. The rejection is not based solely on A's nationality or ethnic origin, but on a number of individual and concrete circumstances that jointly suggest that the marriage may not have been voluntary. Then, there is no basis for concluding that the decision constitutes a violation of the prohibition of discrimination in Article 14 of the ECHR.

Conclusion and costs

(114) Against this background, I have concluded that UNE's refusal to grant a residence permit violates neither the right to family life under Article 8 of the ECHR nor the prohibition of discrimination in Article 14.

(115) The appeal must therefore be dismissed.

(116) The State has won the case and is entitled to full compensation for costs in all instances under section 20-2 subsection 1 of the Dispute Act. However, the age requirement in section 41 a of the Immigration Act has not previously been reviewed by the Supreme Court, and the State has an interest in obtaining clarification of the application of the ECHR, also with regard to the administrative procedure in future cases. In the light of this and of the fact that the case is important for the appellant's welfare, see section 20-2 subsection 3 (c) of the Dispute Act, I find that there are weighty reasons for exempting the appellant from liability for costs. The state is therefore not awarded costs in any instance.

(117) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. Costs are not awarded in any instance.

(118) Justice **Bergsjø:** I agree with Justice Steinsvik in all material respects and with her conclusion.

(119) Justice **Bull:** Likewise.

(120) Justice **Kallerud:** Likewise.

(121) Chief Justice **Øie:** Likewise.

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

J U D G M E N T :

1. The appeal is dismissed.

2. Costs are not awarded in any instance.