



SUPREME COURT OF NORWAY

J U D G M E N T

given on 3 May 2022 by a division of the Supreme Court composed of

Justice Jens Edvin A. Skoghøy
Justice Wilhelm Matheson
Justice Knut H. Kallerud
Justice Arne Ringnes
Justice Espen Bergh

HR-2022-883-A, (case no. 21-142136SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 9 July 2021

Jehovah's Witnesses – Ski Congregation (Counsel René Stub-Christiansen)
(Assisting counsel: Anders Christian Stray
Ryssdal)

v.

A (Counsel Per Danielsen)

(1) Justice **Bergh:**

Issues and background

- (2) The case concerns the validity of a religious community's decision to exclude – to disfellowship – a member and also a claim for aggravated damages due to the disfellowshipping. The case further raises the issue of the courts' power to review such decisions.
- (3) A was born in 1971 and baptised as a Jehovah's Witness in 1987. During the last years until 2018, she affiliated with Jehovah's Witnesses – Ski Congregation. Her mother and her children are also members of Jehovah's Witnesses. A was previously married to another member, but they were separated in 2016 and divorced in 2018.
- (4) Jehovah's Witnesses is a religious community stating to have more than 12 000 members in Norway and more than 8.6 million worldwide. Each congregation has a council of elders composed of a number of members referred to as "the elders". The elders chair the religious meetings, among other things.
- (5) On 10 March 2018, A met a man she knew at a hotel in Oslo. The man was affiliated with a different congregation of Jehovah's Witnesses. The two of them had dinner together and drank alcohol. After the meal, A went along to the man's hotel room. At some point, A lay down on the bed and fell asleep. When she woke up the next morning, at around 11:30, she was naked. She realised after a while that the man had performed oral sex on her while she was asleep. The details of the events at the hotel room are essential to the case, and I will return to them later.
- (6) On 13 March 2018, A sent a text message to one of the elders in Ski Congregation, B, in which she expressed that she needed to talk with the elders. When asked what this was about, she replied:
- "It is about something that happened while I was asleep. Whether or not I am guilty of crossing the line for porneia."
- (7) "Porneia" is a Biblical term for sexual immorality.
- (8) On 18 March 2018, a meeting was held between A, B and another one of the elders, C. B and C then discussed the information they had received from A with the other elders in the congregation.
- (9) The elders decided that the information was so serious that it required the forming of a judicial committee. The judicial committee consists of three elders from the congregation whose task is to assess whether a serious sin has been committed, and whether the person exercises biblical repentance. A judicial committee also has power to disfellowship a person from Jehovah's Witnesses.
- (10) A met with the judicial committee on 22 March 2018. The committee found that A's story gave a basis for disfellowshipping her. The decision was communicated to her orally on the same day.

- (11) A brought the disfellowshipping decision before the appeal committee. This committee is convened by the regional supervisor of Jehovah's Witnesses and consists of three elders from other congregations. On 2 April, the appeal committee upheld the judicial committee's decision.
- (12) During a meeting of 10 April 2018 in Jehovah's Witnesses – Ski Congregation, it was announced that "A is no longer a Jehovah's Witness". A made several futile attempts to be readmitted.
- (13) In February 2019, A took legal action and filed a complaint to the Conciliation Board against Jehovah's Witnesses – Ski Congregation. On 5 June 2019, the Conciliation Board of Ås ruled as follows:
- “1. The disfellowshipping of A from Ski Congregation of Jehovah's Witnesses is invalid.
 2. Jehovah's Witnesses – Ski Congregation is to pay aggravated damages of NOK 100 000 to A within two weeks of the service of this judgment.
 3. Jehovah's Witnesses – Ski Congregation is to cover A's costs within two weeks of the service of the judgment.”
- (14) On 30 August 2019, Jehovah's Witnesses – Ski Congregation filed a writ of summons to Follo District Court. On 8 November 2019, after having conducted a separate hearing of the issue of admissibility, the District Court ordered that the case proceed. The appeal against this order was dismissed by Borgarting Court of Appeal on 6 February 2020.
- (15) On 27 February 2020, Follo District Court ruled as follows:
- “1. Jehovah's Witnesses – Ski Congregation is not liable.
 2. Costs are not awarded.”
- (16) A appealed to Borgarting Court of Appeal, which ruled as follows on 9 July 2021:
- “1. Jehovah's Witnesses' decision to disfellowship A is invalid.
 2. Jehovah's Witnesses – Ski Congregation is to pay non-economic (aggravated) damages of NOK 100 000 to A within two weeks of the service of this judgment.
 3. Jehovah's Witnesses – Ski Congregation is to cover A's costs of NOK 512 063.50 in the Court of Appeal within two weeks of the service of the judgment.
 4. Jehovah's Witnesses – Ski Congregation is to cover A's costs of NOK 512 063.50 in the District Court, including costs in the Conciliation Board, within two weeks of the service of the judgment.”

- (17) The judgment was given with dissenting opinions. One judge was in favour of dismissing the appeal.
- (18) Jehovah's Witnesses – Ski Congregation has appealed to the Supreme Court. The appeal challenges the findings of fact and the application of the law. The circumstances of the case are mainly similar to those in the previous instances.

The parties' contentions

- (19) The appellant – *Jehovah's Witnesses – Ski Congregation* – contends:
- (20) The case is inadmissible. The courts' refraining from interference with religious affairs is an absolute and fundamental human rights principle. This forms the basis for the Supreme Court ruling in Rt-2004-1613. An action involving matters of great significance for a person's wellbeing may only be heard by the courts if the case does not require an assessment of religious issues.
- (21) According to section 1-3 subsection 1 of the Dispute Act, an action may be brought only if it constitutes a *legal claim*. A's claim does not arise from legal rules, but is aimed at the congregation's decision regarding her religious status as a Jehovah's Witness. The disfellowshipping has no legal effects for A.
- (22) The provision in section 10 of the Religious Communities Act 1969 is not a legal basis for admissibility in court. The statements by the Nonconformist Act Committee, which prepared proposals for this Act, were inconsistent and, in any case, do not reflect the legislature's view.
- (23) Nor does A have a genuine need to have the claim decided, see section 1-3 subsection 2 of the Dispute Act. Joining and resigning from a religious community are not legally binding acts, as it only involves religious affairs. A judgment can also not be enforced towards Jehovah's Witnesses.
- (24) In the alternative – if the case proceeds – the courts are not competent to hear it. The case involves religious issues with which the courts cannot interfere. A court's review of a religious decision will amount to an infringement of the congregation's rights under Article 16 of the Constitution and Articles 9, 10, 11 and 14 of the European Convention on Human Rights (ECHR). Reference is made to case law from the European Court of Human Rights (ECtHR) and from the national courts of other countries.
- (25) In any case, no error has been made in the disfellowshipping procedure. A denied before both the judicial committee and the appeal committee that she had been raped. She did not bring up the issue of rape until later.
- (26) There is no basis for awarding aggravated damages. The disfellowshipping was not suited to damage A's dignity or reputation. There exists no basis for liability, and no unlawful statement has been made.

(27) Jehovah's Witnesses – Ski Congregation asks the Supreme Court to rule as follows:

“Principally:

1. The action challenging the validity of a disfellowshipping decision is inadmissible
2. Jehovah's Witnesses – Ski Congregation is not liable for non-economic damages.

In the alternative:

3. Jehovah's Witnesses – Ski Congregation is not liable for any claims.

In both cases:

4. Jehovah's Witnesses – Ski Congregation is awarded costs in Follo District Court, Borgarting Court of Appeal and in the Supreme Court.”

(28) The respondent – A – contends:

- (29) The action constitutes a legal claim. The claim arises from legal rules and has significance for A's legal status, see section 1-3 subsection 1 of the Dispute Act. The criterion according to case law is that it is natural and fair to allow the case to be heard by the courts. This criterion is fulfilled.
- (30) A appreciates that the court must refrain from hearing claims that require interpretation of religious doctrines. However, the court may review procedural errors and the validity of decisions to detect possible violations of fundamental standards of due process.
- (31) Section 10 of the Religious Communities Act 1969 covers exclusion, and such decisions may thus be reviewed by the courts. This interpretation is supported by the preparatory works to the Act. The review covers the extent to which the congregation's rules and decisions are within the limits of “general law and decency”, whether procedural errors have been made and whether the decision is directly offensive to our sense of justice.
- (32) A's rights are protected under Articles 8, 9 and 11 of the ECHR. The provisions in Articles 9 and 11 confer rights to freedom of religion and freedom of assembly and association, both on the congregation and on A. The provisions also confer on Norwegian courts a wide margin of discretion to review the validity of the disfellowshipping decision. Article 8 protects A's integrity – her name and reputation – and implies that Jehovah's Witnesses carries the burden of proving that the decision was made on a correct factual basis.
- (33) When it comes to the individual assessment, the decision suffers from procedural errors and contravenes fundamental standards of due process.
- (34) The Elders' Handbook contains rules of procedure, and the court may review whether these have been followed.
- (35) The conditions for disfellowshipping a person for “porneia” are not met. A had no intention of committing a sexual act and was probably exposed to “sleep rape”. The decision is made on a materially incorrect factual basis.

- (36) A gave no confession to justify the forming of a judicial committee. She was not informed that disfellowshipping was a possible outcome of the meeting with the judicial committee.
- (37) Witness statements from the members of the judicial committee and the appeal committee show that the key element of the accusation – “porneia” – has not been considered, only superficially at best. The facts have not been clarified, and the decision is therefore invalid due to the violation of fundamental standards of due process.
- (38) In any event, the decision is contrary to general decency and is offensive to our ordinary sense of justice.
- (39) The disfellowshipping of A is a “statement” under section 3-6 a of the Compensatory Damages Act, which is suited to damage her dignity and reputation. An illegitimate exclusion has been carried out, and the conditions for awarding aggravated damages are met. When measuring the damages, the gravity of the decision and its effects on A must be taken into account. A serious accusation of sexual immorality has been made, despite the fact that she has been raped. In practice, she is now shut out from all congregations of Jehovah’s Witnesses worldwide.
- (40) A asks the Supreme Court to rule as follows:
- “1. The appeal is dismissed.
 2. Jehovah’s Witnesses – Ski Congregation is liable for A’s/the public authorities’ costs in the Supreme Court.”

My opinion

The freedom of religion and the freedom of assembly

- (41) Article 16 first sentence of the Constitution gives all inhabitants a right to “free exercise of their religion.”
- (42) The provisions in the ECHR are more complementary. Article 9 on *the freedom of thought, conscience and religion* reads:
- “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”
- (43) Article 11 concerns *the freedom of assembly and association*. The provision’s item 1 reads:
- “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”

(44) Article 11 (2) is largely equivalent to Article 9 (2). These provisions set out that a protected right may only be restricted when it is prescribed by law, pursues a legitimate purpose and is “necessary in a democratic society”. The condition that the interference must be “necessary in a democratic society”, must be interpreted as a proportionality requirement, see for instance the Supreme Court ruling in HR-2020-661-S paragraphs 75 and 76.

(45) Article 9 and Article 11 together afford a high level of protection for religious communities against interference by the State. This is described for instance in the ECtHR Grand Chamber judgment of 9 July 2013 *Sindicatul Păstorul cel Bun v. Romania* paragraphs 136 and 137:

“The Court reiterates that religious communities traditionally and universally exist in the form of organised structures. Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associations against unjustified State interference. Seen from this perspective, the right of believers to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. Were the organisational life of the community not protected by Article 9, all other aspects of the individual’s freedom of religion would become vulnerable. ...

In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones. Similarly, Article 9 of the Convention does not guarantee any right to dissent within a religious body; in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual’s freedom of religion is exercised through his freedom to leave the community. ...”

(46) The following is set out in the ECtHR judgment of 14 June 2007 *Syvato-Mykhaylivska Parfiya v. Ukraine* paragraph 150:

“The Court reiterates that religious associations are free to determine at their own discretion the manner in which new members are admitted and existing members excluded. The internal structure of a religious organisation and the regulations governing its membership must be seen as a means by which such organisations are able to express their beliefs and maintain their religious traditions. The Court points out that the right to freedom of religion excludes any discretion on the part of the State to determine whether the means used to express religious beliefs are legitimate.”

(47) The individual issues in these cases differed from ours, but what I have quoted deals with the general starting points. The ECtHR emphasises that the State has limited power to interfere with the relationship between a religious community and its individual members. The community is free to determine who may be admitted, and consequently whom they exclude. It is also stressed that the freedom of religious practice for individuals, which is also protected by Article 9, is ensured through the right of the individual to leave a religious community. The freedom of religion does not give any person a right to become or to remain a member of a specific religious community.

- (48) The ECHR applies as Norwegian law with precedence over other legislation, see section 2 (1), cf. section 3 of the Human Rights Act. The further assessment of this case based on Norwegian sources of law must thus be carried out in the light of the ECHR's requirements for the protection of freedom of religion and association. As I will return to, I believe that the principles laid down in Norwegian law, which are primarily based on case law, meet the requirements of the ECHR.

The consequences for A of being disfellowshipped from Jehovah's Witnesses

- (49) Jehovah's Witnesses has presented a report to the Supreme Court titled "How disfellowshipping is an act of love". An extract reads as follows:
- "Family members may show the congregation and the disfellowshipped person love by respecting the decision. ...
- Everyone in the congregation may show love by shunning the disfellowshipped. ... That increases the effect of the correction given by Jehovah through the elders. The elders may also show the family of the disfellowshipped extra love and attention. The family is in great pain and must not have the feeling that they, too, have been excluded from contact with the brothers and sisters."
- (50) In other words, the obligation imposed on family members, including children and parents, to avoid contact with a disfellowshipped person is described as a form of "love".
- (51) The County Governor of Oslo and Viken decided on 27 January 2022 to refuse Jehovah's Witnesses governmental grants for 2021. One of the reasons is that the religious community has a practice that prevents its members from freely leaving the congregation. In the decision, which has been appealed, the County Governor states the following after having read descriptions given by Jehovah's Witnesses:
- "The consequence of leaving the congregation is that the person may no longer have contact with family and friends within the congregation. The religious community makes it clear that members must not have contact with disfellowshipped members. As we see from the above paragraph, this also applies to members who have resigned. This practice may pressure the members to remain in the religious community."
- (52) A has stated that she has lost virtually all contact with her family and friends within the congregation due to the disfellowshipping. Based on what I have pointed out, this is in accordance with the guidelines practiced by Jehovah's Witnesses. Thus, there is no doubt that the disfellowshipping has severe personal consequences for A.

Is the action inadmissible?

- (53) Jehovah's Witnesses – Ski Congregation contends that the action is inadmissible.

- (54) The conditions for bringing an action to court are set out in the section 1-3 of the Dispute Act and reads:

“The subject matter in dispute, the parties’ connection to the dispute and the dispute situation

- (1) An action may be brought before the courts for legal claims.
- (2) The claimant must demonstrate a genuine need to have the claim decided against the defendant. This shall be determined based on an overall assessment of the relevance of the claim and the parties' connection to the claim.”

- (55) The question in this case is primarily whether it constitutes a *legal claim*, see subsection 1. It must be assessed whether there is “a defined and disputed legal issue between the parties to the case that may be decided on the basis of legal rules”, see the Supreme Court ruling in HR-2021-639-A paragraph 35 with further references.

- (56) A religious community is an association within the meaning of the law. In which cases the exclusion from an association may constitute a legal claim are discussed in the Supreme Court ruling HR-2021-639-A paragraph 50:

“If there is doubt whether the claim that is brought must be considered a legal claim, it may be natural to start by identifying the claimant’s need to have the claim decided by a court. Aspects to consider will be how invasive the decision is, and whether it has a large impact on the claimant’s wellbeing. In the overall assessment, it should also be emphasised whether it would be fair and natural, based on considerations of due process, to bring the dispute before the courts.”

- (57) The fact that it involves a religious community raises particular issues. The Supreme Court ruling in Rt-2004-1613 concerned membership in an Islamic cultural centre and admission to an affiliated mosque. In paragraph 31, Justice Lund emphasises the freedom of religion enshrined in the Constitution and the ECHR. The significance of this freedom for the right to have an action heard by the courts is explained in paragraph 32:

“The right to form autonomous religious communities must imply that the community itself has the full power over religious affairs associated with its activities. The courts cannot in any way interfere with the religious community’s faith. This has the procedural consequence that actions against the community that require an assessment of religious issues must be ruled admissible.”

- (58) In my view, the principles forming the basis for this ruling from 2004 are in accordance with ECtHR case law. It is clear that a religious community’s handling of religious issues cannot be reviewed by the courts.

- (59) However, this cannot have the effect that issues concerning membership in a religious community can never be reviewed by the courts. The distinction is described as follows by the Supreme Court in Rt-2004-1613 paragraph 34:

“Although the faith element is essential in a religious community, refusal of membership and other burdensome sanctions may be justified by circumstances detached from religious issues. Such decisions may also have been made without compliance with the rules of procedure laid down by the religious community itself. The decisions may be

based on incorrect facts, and fundamental standards of due process might be breached, see section 10 of the Religious Communities Act, which limits the possibility to pressure someone to join or resign from the community. As long as it concerns a decision with a large impact on the person's wellbeing, and the action does not require an assessment of religious issues, it must in my opinion proceed. As I have pointed out, the extent to which the action requires such an assessment depends on the nature of the claims, and on the claimant's arguments in support of the claims."

- (60) I cannot see that subsequent case law, neither in Norway nor from the ECtHR, gives a legal basis for setting aside the principles applied by the Supreme Court in the above ruling.
- (61) In the case at hand, it is clear that the disfellowshipping decision, as I have described, has a large impact on A's wellbeing. I also find it clear that the action is not limited to claims that require an assessment of religious issues. A contends that the disfellowshipping violates fundamental standards of due process, and that the decision is made on a materially incorrect factual basis. Therefore, there is no basis for ruling the action inadmissible in the absence of a legal claim. Whether or not parts of the claim concern religious issues, which would limit the review, must be determined as a step in the discussion of the merits of the case.
- (62) In addition, there can be no doubt that A has a genuine need to have her claim decided. The possibility that the claim could not be enforced does not limit her right to bring an action to contest the validity of the disfellowshipping decision.
- (63) Against this background, the conditions in section 1-3 of the Dispute Act are met, and the case proceeds to a hearing on its merits.

The scope of the review

- (64) The Supreme Court ruling in Rt-2004-1613 primarily concerned admissibility. At the same time, paragraph 34, which I have quoted, presents certain elements that a court's review of a decision by a religious community may cover. The Supreme Court states that a court may examine whether established rules of procedure have been followed, whether the decision is based on a materially incorrect factual basis, and whether fundamental standards of due process have been set aside.
- (65) The scope described here is a long way in line with what commonly applies to the review of decisions by an association, see for instance Skoghøy, Dispute Resolution, 3rd edition page 32-33. However, the review of decisions by a religious community is subject to particular limitations, since it cannot cover religious issues. It is debated whether a decision by an association may be set aside by the courts on the basis of being strongly unreasonable, see Skoghøy *op. cit.* page 33 and Woxholth, Association Law, 2020, page 311-313. In my view, it follows in any case from the freedom of religion that a decision made by a religious community on religious grounds cannot be set aside by the courts solely because it is strongly unreasonable. It is not necessary for me, in this case, to consider the scope of the review if a decision may conflict with other human rights.
- (66) A contends that disfellowshipping decisions may be reviewed under section 10 of the Religious Communities Act of 13 June 1969 no. 25, which still applied when she was disfellowshipped. This provision, which is also mentioned in Rt-2004-1613 paragraph 34, read:

“No one may employ improper arguments, promises or threats or proceed by other questionable means for the purpose of persuading another person to join or resign from a religious community.”

- (67) No similar provision is found in the current Religious Communities Act, which entered into force on 1 January 2021.
- (68) I cannot see the relevance of this provision for a court’s review of a disfellowshipping decision. According to a general linguistic understanding, making a person leave a religious community “by questionable means” does not cover cases where the religious community itself has made the decision. Nor is such an interpretation suggested in the preparatory works to the provision. The Supreme Court’s reference to the provision in Rt-2004-1613 paragraph 34 is part of a discussion that is not limited to exclusion.
- (69) The Religious Communities Act of 1969 was based on a proposal from the Nonconformist Act Committee, which issued its recommendation in 1962. The Committee stated the following on page 29 regarding the relationship between the State and religious associations:
- “The freedom of religion presupposes that religious associations are extensively self-governed, that they may impose such rules on themselves as they wish and enforce the discipline on their members as they deem fit. This implies that they may impose an extensive duty of obedience on their members, and in connection with threats of excommunication and thus perhaps eternal perdition, exercise severe mental force. Such religious communities are also present in our country. We have religious communities that demand tithes and extensive service as a duty, and we have communities that forbid their members to marry anyone outside of their restricted circle. If they do, they will abandon the only narrow path to salvation.
- However, all the State can do in this regard is to establish that anyone has a legal right to leave any religious community to which he belongs. The State cannot take on the task of resolving the moral and religious issues.”
- (70) In other words, the State cannot interfere with a religious community’s enforcement of its own rules towards its members, even if the rules appear unreasonable and will affect individual members harshly.
- (71) At the same time, the Committee states the following on page 46 regarding the courts’ power to review decisions on exclusion:
- “If a person finds himself to be incorrectly excluded, he will be entitled to have the courts review, under ordinary principles, whether the exclusion is rightful under the laws of the religious community. He may also claim that any provisions be set aside that might be directly offensive to our sense of justice. However, it is likely that the courts, in that case, will be reluctant not to base its ruling on the religious community’s own laws, even if they are most undemocratic.”
- (72) In other words, the Committee allows for setting aside a religious community’s rules if they are “directly offensive”. Read together with the Committee’s statements elsewhere in the recommendation, it is unclear how this should be interpreted. Nonetheless, it must be clear that the freedom of religion currently prevents the courts from examining whether rules or practices based on religious beliefs are offensive to our ordinary sense of justice.

- (73) Consequently, I find that a court’s review of a disfellowshipping decision by a religious community must be limited to the aspects emphasised in the Supreme Court ruling in Rt-2004-1613 paragraph 34.
- (74) First, the review may cover *the procedure*. The courts must always be able to examine whether *basic requirements for a proper procedure* are met, for instance in terms of proper clarification of the case and both sides’ right to be heard. If a religious community has bylaws that contain specific and clear rules of procedure, the courts may also examine whether these have been followed.
- (75) Furthermore, the courts may examine whether a decision is based on *materially incorrect facts*. The *materially* requirement must relate to the error’s significance for the decision – has an error been committed in the assessment of the facts that is of such a nature that it might have influenced the content of the decision?
- (76) Next, I will assess the validity of the decision in the case at hand based on the scope of review I have outlined.

Is the disfellowshipping decision invalid?

Execution and the basis for the decision

- (77) The decision to disfellowship A was made by the judicial committee on 22 March 2018. From a form that was filled out later, it appears that the basis for the decision was “porneia”. It is also ticked off for the disfellowshipping being based on “confession”.
- (78) During the legal proceedings, a manual has been presented – referred to as “the Elders’ Handbook” – with the title “Shepherd the Flock of God”. The handbook is distributed to the congregation’s elders for use in their service. It is not published and is not available to the other members of the congregation.
- (79) In chapter 5 of the Elders’ Handbook, a description of “porneia” is provided. The description is worded with references to the Bible and reads:
- “5. Porneia: (Lev. 20:10, 13, 15, 16; Rom. 1:24, 26, 27, 32; 1 Cor. 6:9, 10) Porneia involves immoral use of the genitals, whether in a natural or in a perverted way, with lewd intent. There must have been another party to the immorality — a human of either sex or a beast. Willing participation incurs guilt and requires judicial action. It is not a casual touching of the sex organs but involves the manipulation of the genitals. It includes oral sex, anal sex, and manipulation of the genitals between individuals not married to each other. (w06 7/15 pp. 29, 30; w04 2/15 p. 13; w00 11/1 p. 8 par. 6; w83 6/1 pp. 23-26: lvs p. 120). Porneia does not require skin-to-skin contact, copulation (as in penetration), or sexual climax.
 6. Self-abuse, or masturbation of oneself, is not porneia.
 7. One who was raped would not be guilty of porneia. Discernment is needed in considering claims of rape, taking into consideration such factors as the mental

disposition of the person, the circumstances that led up to the incident, and any delay in reporting. _w03 2/1 pp. 30-31; it-1 pp. 862-864; w83 3/15 p. 30 fn.

8. In all cases involving the possibility of porneia, it is the responsibility of the judicial committee to use the Scriptures to weigh carefully the facts in each case. This responsibility is especially serious when it involves the Scriptural freedom to remarry. (Mal. 2: 16a) In situations in which the elders are uncertain or divided on their conclusions, it is best to write the branch office.”

- (80) A gave a statement before the judicial committee. In connection with the subsequent procedure in the appeal committee, the judicial committee prepared a report on the content of what A had said. The report read:

“A sent a text message stating that she might be guilty of porneia. Based on initial talks with her, a judicial committee consisting of C, D and B will be formed.

A says that she had agreed with a brother from Nittedal to go out for a meal. A little later in the evening, they went to a hotel room that the brother from Nittedal had rented for the occasion. Even more alcohol was drunk and they had embraced each other. According to A’ story, she no longer remembers what happened. A fell asleep and woke up naked in bed. They had breakfast the following day and went their separate ways. They also had some telephone contact during the days after the incident.

A believes that since she fell asleep and does not remember anything, she is not guilty of porneia. The committee asked her if she felt raped or subjected to abuse, which she consistently denied. A said that they talked about the episode the following day and that “everyone can make mistakes”. A and the brother from Nittedal do not appear to be enemies. This situation has clearly not affected their relationship. They are still in contact and talk on the phone. A called her separated husband some days after the committee meeting and told him he is free to remarry.

Both A and the brother from Nittedal were separated at the time of the incidence, but are not biblically free to remarry.”

- (81) The report is silent on how A realised that the man had performed oral sex on her in her sleep. A transcript of A’s statement in the District Court has been presented to the Supreme Court. Here, she stated that when they left the hotel room the next morning, the man had said that he had a very bad conscience for having “crossed the line for porneia”. In a telephone conversation, which according to A took place on the same evening or the day after, he had told her that he had performed oral sex on her. I trust A’s statement before the judicial committee in this regard was essentially the same as her subsequent statement before the District Court.
- (82) On 25 March 2018, A brought the disfellowshipping decision before the appeal committee. Now, she had prepared a comprehensive written statement. As I understand the statement, she did not primarily challenge the judicial committee’s conclusion that she had committed “porneia”, but wanted a new hearing to explain her situation in a better way. She wrote among other things:

“In my experience, I did not get the chance to express how I see the whole matter and to give a statement regarding my repentance and despair over my sins.”

- (83) The meeting of the appeal committee was held on 2 April 2018. Before this meeting, the appeal committee met with the judicial committee. A gave a statement before the appeal committee. The judicial committee was present as audience during her statement. At the end of the meeting, the appeal committee announced to A orally that the disfellowshipping was upheld.
- (84) Two of the members of the judicial committee and two from the appeal committee testified in the District Court and the Court of Appeal about the procedure and the basis for the disfellowshipping. Copies of their statements have been submitted to the Supreme Court, and both parties have invoked them to some extent.
- (85) However, these statements were given long after the disfellowshipping had been decided. In my view, when assessing the procedure and the basis for the disfellowshipping, particular emphasis must be placed on the written statement that the judicial committee prepared prior to the hearing in the appeal committee. This is contemporaneous evidence, signed by all the members of the judicial committee. There is nothing to suggest that A's statement before the appeal committee was materially different from that before the judicial committee, or that the appeal committee assessed the case in a materially different manner than the judicial committee.

The procedure

- (86) A contends that the Elders' Handbook contains rules of procedure that the congregations are obliged to follow, and that the courts may examine whether these rules have been followed. In that respect, she has pointed out that the Elder's Handbook states that a judicial committee may only be formed if there is evidence that "a disfellowshipping offense has actually been committed".
- (87) In my view, the courts cannot examine whether certain rules in the Elders' Handbook have been followed. As emphasised, this book is exclusively for the use of the elders of the congregations and is not available to the members. It is to function as advice to the elders, based on the Bible, on how they should act in various contexts. Although it also contains rules of procedure, I cannot see that they are of such a nature that the courts may review whether they have been complied with.
- (88) The review is thus limited to whether the congregation has handled the matter in accordance with basic requirements for a proper procedure.
- (89) I have given an account of the procedure of the judicial committee and the appeal committee. During both hearings, A gave a free, oral statement. The hearing in the appeal committee was also based on an extensive, written appeal from A. Nothing suggests that she did not have full opportunity to present her view of the events and of what the consequences should be. The decision reached by the judicial committee and the appeal committee must be assumed to be based on A's own statement. Thus, as I see it, the basic requirements for the hearing of both sides and for proper clarification of the case were met.
- (90) A contends that she was not aware that disfellowshipping could be the outcome of the meeting in the judicial committee. I find that unlikely. At the time of disfellowshipping, she had been a member of Jehovah's Witnesses for many years and was well aware of the

congregation's practices, including the fact that "porneia" could lead to disfellowshipping. Before the meeting in the judicial committee, she met with two of the elders in the congregation. When, after this initial meeting, she was summoned to a new, formal meeting, she must have realised that this was a judicial committee that might decide to disfellowship her. I also emphasise that A did not express in her appeal to the appeal committee that she was unaware that the meeting in the judicial committee could lead to disfellowshipping.

- (91) The only reason given in the decision is that "porneia" had been committed. However, I cannot see that the lack of reasoning in itself amounts to a breach of basic requirements for a proper procedure.
- (92) Against this background, I conclude that the handling of the disfellowshipping matter does not conflict with basic requirements for a proper procedure.

Is the decision based on materially incorrect facts?

- (93) A's position is that she was subjected to rape, and that the disfellowshipping decision is thus based on materially incorrect facts.
- (94) According to section 291 of the Penal Code, a person can be punished for sexual assault if he "engages in sexual activity with a person who is unconscious or for other reasons incapable of resisting the act". Oral sex without prior consent with a sleeping person will therefore constitute sexual assault – rape – within the meaning of the Penal Code.
- (95) The judicial committee's decision, which was upheld by the appeal committee, is based on A having committed "porneia". As mentioned, this is a biblical term, and the courts cannot review the congregation's assessment of whether a particular way of behaving falls under the term "porneia". This applies despite the rule in the Elders' Handbook that someone who "was raped would not be guilty of porneia". What the court on the other hand may examine are the facts forming the basis for the committees' conclusion that "porneia" had been committed. In accordance with what I have emphasised, the quoted statement from the judicial committee must be central in determining the facts on which the decision is based.
- (96) The second paragraph of the report contains A's statement regarding the course of events. As I understand, it is not disputed that this description corresponds to what A told the judicial committee, and it corresponds in all material respects to what A has stated later.
- (97) Third paragraph opens by repeating A's statement that she fell asleep. The judicial committee has thus undoubtedly been aware of her story on this point. In my view, the judicial committee's report must also imply that the committee assumes that A fell asleep in the hotel room, and that she cannot remember that the man performed oral sex on her while she was asleep.
- (98) The judicial committee continues: "The committee asked her if she felt raped or subjected to a sexual assault, which she consistently denied." As I understand A, she agrees that this presentation of what she told the committee is essentially correct. Before the District Court, she stated that she answered no when asked by the judicial committee if she had been raped "because [she did] not want to accuse anyone without having a good basis for it".

- (99) Later, A changed her position on this issue. The first time she expressed that she had indeed been raped was in an SMS on 18 June 2018 to B. She has not reported the man to the police.
- (100) A question that may be raised is whether A, when asked whether she felt raped, perceived rape as an act involving violence and intercourse. In that case, it would be correct to answer no, even if she found that she had been assaulted in her sleep. To me, still, nothing suggests that A's answer could be interpreted in this way. Both the judicial committee's report and A's statement before the District Court show that the rape issue was dealt with by repeated questions from the committee. The report states that A was also asked if she felt "subjected to an assault", and that this too was denied. In any case, if A believed that she had been subjected to a sexual assault, it would, in that very situation, have been natural for her to express this clearly to the judicial committee and the appeal committee.
- (101) The facts available to the judicial committee and the appeal committee, and on which their decision was based, included that the man had performed oral sex on A while she was asleep, but also that she did not consider herself to be subjected to a sexual assault. As I see it, the conclusion that she had committed "porneia" must then be based on an overall assessment of her behaviour – before she fell asleep and after she woke up. As I have stressed, the courts cannot review the assessment of whether a particular way of acting constitutes "porneia". From what I have pointed out, there is no basis for establishing that the decision was based on incorrect facts.
- (102) As I have concluded that the disfellowshipping is not based on an incorrect factual basis, A's contentions relating to the protection of her integrity under Article 8 of the ECHR cannot succeed.

Aggravated damages

- (103) According to section 3-6 a subsection 1 of the Compensatory Damages Act, "[a]ny one who makes a statement capable of infringing another's sense of honour or reputation" is liable for aggravated damages for non-economic loss. According to subsection 2, a statement does not entail liability under subsection 1 "if it is considered justified after a balancing of the considerations justifying freedom of expression". In assessing this, it must be determined, among other things, whether the statement "rests on an adequate factual basis".
- (104) As I have discussed, the decision to disfellowship A is based on an assessment of the religious term "porneia". I have concluded that the decision is not based on materially incorrect facts. The information to the congregation that she was no longer a Jehovah's Witness was also correct. Against this background, the statement that the disfellowshipping constitutes, and the announcement of the same to the congregation, must be considered justified and cannot provide a basis for aggravated damages.

Conclusion and costs

- (105) As I have explained, the disfellowshipping clearly has severe consequences for A. It will be offensive to most people that she, because she is found to have committed "porneia", is in practice deprived of contact with her immediate family.

- (106) However, I have also stressed the importance of the freedom of religion and association as enshrined in the Constitution and the ECHR. The courts' power to review internal affairs in a religious community is limited. I find, within the limited scope of review allowed, there is no basis for setting the decision to disfellowship A aside as invalid. This means that the action is lost, and that Jehovah's Witnesses - Ski Congregation is not liable.
- (107) When the congregation is found not liable, it has won the case. I find nonetheless that there are weighty reasons for exempting A from liability for the congregation's costs, see section 20-2 subsection 3 of the Disputes Act. I emphasise the impact of the case on A's wellbeing and the unequal relative strength between her as an individual member and Jehovah's Witnesses. The fact that Ski Congregation is of a limited size and must be assumed to have limited funds cannot be emphasised when the case is so strongly linked to Jehovah's Witnesses as a large international organisation. Each of the parties is then to carry its own costs in all instances.
- (108) I vote for this

J U D G M E N T :

1. Jehovah's Witnesses – Ski Congregation is not liable.
2. Costs are not awarded in any instance.

- (109) Justice **Ringnes:** I agree with Justice Bergh in all material respects and with his conclusion.
- (110) Justice **Matheson:** Likewise.
- (111) Justice **Kallerud:** Likewise.
- (112) Justice **Skoghøy:** Likewise.
- (113) The Supreme Court gave this

J U D G M E N T :

1. Jehovah's Witnesses – Ski Congregation is not liable.
2. Costs are not awarded in any instance.