



# SUPREME COURT OF NORWAY

## J U D G M E N T

given on 29 June 2023 by a division of the Supreme Court composed of

Justice Hilde Indreberg  
Justice Borgar Høgetveit Berg  
Justice Kine Steinsvik  
Justice Knut Erik Sæther  
Acting Justice Hedda Remen

**HR-2023-1246-A, (case no. 23-037489STR-HRET)**  
Appeal against Hålogaland Court of Appeal's judgment 2 February 2023

The Public Prosecution Authority

(Counsel Jan Fredrik Glent)

v.

A

(Counsel John Christian Elden)

(1) Justice **Steinsvik**:

### **Issues and background**

- (2) The case concerns punishment for flying drones over Svalbard. The issue is whether drone flying by Russian citizens falls within the scope of the Sanctions Act and associated regulations on restrictive measures regarding actions that undermine or threaten Ukraine's territorial integrity, sovereignty, independence and stability – hereafter referred to as the Sanctions Regulations.
- (3) According to section 19 subsection 1 of the Sanctions Regulations, all aircraft controlled by Russian natural or legal persons, including “non-Russian-registered aircraft”, are prohibited from taking off from or overflying the territory of Norway. The prohibition implements Article 3d (1) of Council Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.
- (4) On 10 November 2022, A was indicted for violation of section 4 see section 2 of the Sanctions Act, see section 22 see section 19 of the Sanctions Regulations, on the following grounds:
- “During the period of 3 August to 6 September 2022, while as a Russian citizen staying in Svalbard in his boat ‘X’, he was responsible for two drones that he owned, and that were used several times for drone flights over Svalbard. On certain occasions he was himself a pilot.”
- (5) A, who is both a Russian and a British national, has admitted that he flew two drones over Svalbard during the period, as described in the indictment. The drones had a camera for photo and video and weighed around 900 g.
- (6) A was acquitted by Nord-Troms and Senja District Court's judgment 7 December 2022. The District Court found that the drones could not be considered “aircraft” within the meaning of the Sanctions Regulations, and that they were not covered by Article 3d (1) of Council Regulation (EU) 833/2014. Furthermore, the District Court found that even if the drones could be considered aircraft, the prohibition in section 19 only applied to *registered* aircraft. This condition was also not met, as the relevant drones are not subject to registration.
- (7) On the basis of the District Court's interpretation of the Sanctions Regulations, other grounds for acquittal presented by A were not considered.
- (8) The Public Prosecution Authority appealed to the Court of Appeal against the District Court's application of the law. On 2 February 2023, Hålogaland Court of Appeal ruled as follows:
- “The appeal is dismissed.”
- (9) The Court of Appeal found that Article 3d (1) of Council Regulation (EU) 833/2014 does not cover the use of drones that are not subject to registration for recreational purposes. The Court of Appeal also found that to the extent the ban in section 19 of the Sanctions Regulations covered such drone flights, the Government would have exceeded its authority in section 2 of the Sanctions Act.

- (10) *The Public Prosecution Authority* has appealed to the Supreme Court against the application of the law.
- (11) Justice Webster was found to be disqualified by the Supreme Court's order 12 June 2023, see HR-2023-1082-A, and therefore does not participate in the hearing of the case.
- (12) The State represented by the Ministry of Foreign Affairs has, as responsible Ministry for regulations adopted with a legal basis in the Sanctions Act, submitted a written statement for clarification of public interests. The statement is permitted in analogy with section 15-8 subsection 1 (b) of the Dispute Act. Apart from that, the case stands as it did in the Court of Appeal.

### **The parties' contentions**

- (13) *The Public Prosecution Authority* contends:
- (14) The Court of Appeal's has made an error of law. Section 19 of the Sanction Regulations covers drones, and makes no exception for the type of drones concerned in the case at hand. The acts described in the indictment are therefore covered by the flight ban.
- (15) Section 19 of the Sanction Regulations must be interpreted in the light of Article 3d of Council Regulation (EU) 833/2014.
- (16) The Court of Appeal's interpretation of Council Regulation (EU) 833/2014 is incorrect. The drones used by the defendant must be considered "aircraft" within the meaning of the Regulation. The purpose of the flying is not relevant. Nor does Article 3d (1) of the Regulation require that the drone is registered or subject to registration in order to be covered by the third alternative in the ban, any "non-Russian-registered aircraft".
- (17) The various language versions of Council Regulation (EU) 833/2014 are equal, and the wording must be read in the light of the purpose and context of the Regulation in order to reach a uniform interpretation of the substantive EU rule.
- (18) The Court of Appeal has incorrectly concluded that any interpretive doubt implies that the Government will have exceeded its authority to issue regulations to the Sanctions Act. What is correct, is that the Regulations must be interpreted in accordance with the Council Regulation. The purpose of the flight ban is wide, and the case law of the European Court of Justice (ECJ) shows that security policy considerations are also relevant.
- (19) The prosecution authority asks the Supreme Court to rule as follows:
- "The Court of Appeal's judgment with a hearing and the District Court's judgment with a main hearing are set aside."
- (20) *A* contends:
- (21) The Court of Appeal's interpretation of the law is correct. The drone flying on which the indictment is based, is not covered by the ban in Article 3d of Council Regulation (EU)

833/2014. The Council Regulation is decisive for the interpretation of section 19 of the Sanctions Regulations.

- (22) The drones in question are not “aircraft” within the meaning of Council Regulation. The Regulation does not cover small drones as those used by the defendant. Furthermore, only registered aircraft are covered by the ban. Therefore, drones not subject to registration also fall outside the scope of the ban.
- (23) Moreover, A argues that the drone flying in any circumstance is not punishable, as the flying took place over Svalbard only. Section 1 of the Sanctions Regulations does not indicate that the Regulations apply on Svalbard. It is not sufficient that the Sanctions Act is applicable. The Sanctions Regulations, too, must apply on Svalbard in order for the act to be punishable.
- (24) A asks the Supreme Court to rule as follows:

“The appeal is dismissed.”

## **My opinion**

### ***Section 19 subsection 1 of the Sanctions Regulations***

#### *The issues*

- (25) A has admitted that he flew drones over Svalbard as described in the indictment. The drones were used for filming during a sailing trip around the archipelago.
- (26) The question in the Supreme Court is whether the drone flying is covered by section 19 subsection 1 of the Sanctions Regulations, which reads:
- “It is prohibited for any aircraft operated by Russian air carriers, including as a marketing carrier in code-sharing or blocked-space arrangements, or for any Russian registered aircraft, or for any non-Russian-registered aircraft which is owned or chartered, or otherwise controlled by any Russian natural or legal person, entity or body, to land in, take off from or overfly the territory of Norway. If necessary, the aircraft may be prevented from leaving the landing ground.”
- (27) As mentioned, the provision implements Article 3d of Council Regulation (EU) 833/2014, which was adopted by Council Regulation (EU) 2022/334 of 28 February 2022. The amendment, which implied a further tightening of the EU’s sanctions and restrictive measures against Russia, came as an immediate effect of Russia’s invasion of Ukraine 24 February 2022. The ban in section 19 of the Sanctions Regulations was initially included with a legal basis in the Aviation Act, adopted in English version on the same day as the adoption of Council Regulation (EU) 833/2014, see FOR-2022-02-28-299. With the amendments to the Sanctions Regulations, these Regulations were lifted, and the provision was translated and transferred to the Sanctions Regulations.
- (28) A’s contentions raise two interpretive questions: First, whether the drones must be considered “aircraft”. Second, and in the alternative, whether in that case they are covered by the third alternative in the ban covering “non-Russian-registered aircraft”.

- (29) The interpretation must be based on the wording of the Regulations. The term “aircraft”, considered in isolation, is sufficiently wide to cover drones. This term is not further defined, either in the other provisions of the Regulations or in other legal bases. Nor does the Aviation Act provide any significant guidance.
- (30) The term “non-Russian-registered aircraft” is also sufficiently wide to cover aircraft that are not registered. However, A maintains that the term only covers aircraft that are registered in other countries.
- (31) The scope of the ban in section 19 subsection 1 of the Sanctions Regulations must be determined through interpretation, where the Council Regulation – as this must be understood from the method of interpretation assumed by the ECJ – carries significant weight. I will first address the relationship between the Sanctions Regulations and Council Regulation.

*The relationship between the Sanctions Regulations and Council Regulation (EU) 833/2014*

- (32) Section 19 of the Sanctions Regulations is provided with a legal basis in section 2 of the Sanctions Act. The provision authorises the King to implement “sanctions or restrictive measures that have been adopted in intergovernmental organisations, or that otherwise have broad international support, and which aim to maintain peace and security or ensure respect for democracy and the rule of law, human rights, or international law in general”.
- (33) The overall objective of the Sanctions Act is to create the necessary internal legal basis for a swift and efficient implementation of international sanctions and restrictive measures in Norwegian law, see Proposition to the Storting 69 L (2020–2021) page 7.
- (34) When the amendments to the Sanctions Regulations were adopted on 18 March 2022, the Ministry stated that the purpose was to “implement in Norwegian law restrictive measures adopted by the EU in response to Russia’s military aggression against Ukraine, and to which Norway has given its political support”, see PRE-2022-03-18-410. It was also stated that the EU, following the Russian invasion, has adopted further restrictive measures in several rounds, and that Norway has “politically supported the measures as they have been adopted”. The Statement gives an overview over the measures implemented thus far, and point 2 sets out that the resolution includes measures “adopted and published by the EU up until and including 2 March 2022”. Through the Amendment Regulations of 18 March 2022, a number of amendments were therefore adopted in the Sanctions Regulations, corresponding to the EU’s simultaneous expanded measures and sanctions against Russia.
- (35) The special note to section 19 sets out that the provision implements in Norwegian law the flight ban in the new Article 3d of Council Regulation (EU) 833/2014, with necessary adjustments. It also sets out that the measure “in rough terms” entails a prohibition to land in, take off from or overfly the territory of Norway “for aircraft operated by Russian air carriers, registered or owned by Russian operators, or chartered or otherwise controlled by Russian persons, see subsection 1”.
- (36) Based on the statements from the Ministry, it must be assumed that section 19 subsection 1 was meant to implement Article 3d (1) of Council Regulation (EU) 833/2014. The description of what the flight ban “in rough terms” entails, and the fact that the ban in some places is

described as a prohibition of operating “aircraft” in Norwegian airspace, cannot be interpreted to mean that the Ministry intended to implement deviant regulations, in either direction.

- (37) Therefore, the provision is assumed to have the same substantive meaning as the Council Regulation. As a result, the scope of the prohibition in section 19 of the Sanctions Regulations must be determined fully in accordance with Article 3d (1) of the Council Regulation.

***Article 3d of Council Regulation (EU) 833/2014***

*Starting points for the interpretation*

- (38) Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine, was adopted as a step in the follow-up of decisions from the Council of the European Union within the area of the EU’s common foreign and security policy.
- (39) Sanctions and restrictive measures are foreign and security policy instruments, and the political situation may call for swift and extensive measures and expansions when needed. The development in the EU’s sanction rules against Russia since 2014 is a relevant example of this. Foreign and security policy in the EU is not a part of the EEA Agreement, and the Norwegian endorsement of adopted measures and sanctions in the EU and their implementation in Norwegian law is primarily a political matter.
- (40) However, the case at hand concerns the question whether A may be punished for violating the ban in section 19 of the Sanctions Regulations. The question whether the scope of the ban – and thus whether the necessary basis for criminal liability exists in internal law – must be examined by the courts in line with, among others, Article 96 of the Constitution. However, within the scope of the basic principles applicable to the courts’ hearing of criminal cases, I find that weight must be given to foreign policy considerations forming the basis for decisions on and implementation of international sanctions.
- (41) When establishing the meaning of the EU rule in this context, regard must be had to the ordinary method of interpretation used by the ECJ, which builds on the principle of independent and uniform interpretation. One must start with the wording of the relevant provision, but a special feature is that the many official language versions in the EU are equally applicable. In the event of any discrepancy between the different language versions, a uniform result must be sought through other interpretive factors, primarily the context and objective of the provision.
- (42) In cases raising questions of punishment or sanctions for violation of EU rules, the requirement of clarity in EU law also comes into play. Here, I mention the ECJ’s judgment of 28 March 2017 in Case C-72/15 *PJSC Rosneft*, concerning a request from an English court for a preliminary ruling in a case brought by a Russian oil company in the United Kingdom, on the validity of certain restrictive measures in Council Regulation (EU) 833/2014. The company’s allegations of a lack of clarity are discussed in the judgment’s paragraph 161 et seq. In paragraph 162, the ECJ states, referencing the charter and the Court’s case law that “the general principle of legal certainty ... implies, inter alia, that legislation must clearly define offences and the penalties which they attract”. It is also set out that this condition is met “where the individual concerned is in a position, on the basis of the wording of the

relevant provision and, if necessary, with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable”. In paragraph 164, the ECJ points out the clarity requirement in Article 7 of the European Convention of Human Rights (ECHR) and case law from the European Court of Human Rights (ECtHR), which is also emphasised in the individual assessment in the judgment’s paragraph 165 et seq.

- (43) I will use these principles of interpretation as I now turn to Article 3d (1) of Council Regulation (EU) 833/2014 and the interpretive issues raised in the case.

*Are the drones to be considered “aircraft” within the meaning of the Council Regulation?*

- (44) Council Regulation (EU) 833/2014 does not itself define the term “aircraft”, or “*luftfartøjer*” as used in the Danish version. In the ordinary meaning given to the term, it is sufficiently wide to cover drones, and it has no clear delimitation implying that drones are generally excluded.
- (45) The alternatives in Article 3d (1) read in context – “any aircraft operated by Russian air carriers”, “any Russian registered aircraft” and “any non-Russian-registered aircraft” – imply with sufficient clarity that the core of the ban is to prevent all civil and commercial Russian flights in European airspace. This is also supported by the exception in Article 3d (2) for emergency landings. However, the core of the sanction does not in itself clarify the extent of the ban or whether it covers Russian citizens’ use of drones in European airspace.
- (46) In the Preamble to amending Regulation (EU) 2022/334, implementing Article 3d, a reference is made to the Council Decision 28 February 2022, Decision (CFSP) 2022/335, on further restrictive measures against Russia. According to the Decision, which led to the creation of Article 3d of Council Regulation (EU) 833/2014, the ban is to be implemented by the Member States “in accordance with their national rules and laws and consistent with international law, in particular relevant international civil aviation agreements”, see Article 1 (2).
- (47) In the light of the references made in the Preamble, it is natural to assess more closely both EU law and international regulations in the area of civil aviation, and whether unmanned aircraft, including drones, are covered by these rules.
- (48) I will first mention the Preamble to Council Regulation (EU) 2022/2474 of 16 December 2022 amending Regulation (EU) No 833/2014. In point 14 on the expansion of the export ban covering goods suited for use in aviation, the following is set out:

“It is appropriate to expand the export ban covering goods and technology suited for use in aviation and the space industry to include aircraft engines and their parts. This prohibition as well as the prohibition to land in, take off from, or overfly the territory of the Union applies to both manned and unmanned aircrafts.”

- (49) Although this statement in a subsequent amending Regulation does not determine the interpretation of the wording in Article 3d, it must, in my view, carry some importance. The statement directly addresses the scope of the flight ban for unmanned aircraft and clarifies that these are covered.

- (50) Among other relevant EU regulations, I will first discuss Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency (EASA), referred to as the Basic Regulation. Article 3 (28) defines “aircraft” as “any machine that can derive support in the atmosphere from the reactions of the air other than reactions of the air against the earth’s surface”. In (30), “unmanned aircraft” is defined as “any aircraft operating or designed to operate autonomously or to be piloted remotely without a pilot on board”.
- (51) The definition of “aircraft” in the Basic Regulation thus includes drones. And in point 26 of the Preamble, it is stated that since “unmanned aircraft” also operate within the airspace alongside “manned aircraft”, such aircraft must be covered by the Regulation “regardless of their operating mass”.
- (52) As I interpret the Basic Regulation, the starting point is that all drones are covered by the term “aircraft” and thus fall within the scope of the Basic Regulation. Point 12 of the Preamble sets out that “measures taken in accordance with this Regulation to regulate civil aviation ... should correspond and be proportionate to the nature and risks associated with the different types of aircraft, operations and activities they address”. In other words, the Basic Regulation states that all unmanned aircraft are covered, and that the further regulation of different types of aircraft must be adjusted to the risk they represent.
- (53) Further rules on “unmanned aircraft”, including drones, are provided in the Commission Implementing Regulation (EU) 2019/947 of 24 May 2019 on the rules and procedures for the operation of unmanned aircraft, the so-called Drones Regulation, as well as in Commission Delegated Regulation (EU) 2019/945 of 12 March 2019 on unmanned aircraft systems and on third-country operators of unmanned aircraft systems.
- (54) The Drones Regulation splits the regulation into three categories according to the level of risk the operation is considered to represent: the “open” category, the “specific” category, and the “certified” category, see point 6 of the Preamble and Article 3. The very definition of “unmanned aircraft” is based on the definition in the Basic Regulation.
- (55) There is agreement that the drones in the case at hand fall within the “open” category, see Article 4 of the Drones Regulation. The “open” category regulates the drone operations with the lowest risk. Drones in this category must have a “maximum take-off mass” of less than 25 kilos and fulfil several operative terms, see Article 4 (1) (b). The “open” category is in turn divided into subcategories in accordance with requirements laid down in Part A of the Regulation’s Annex, see Article 4 (2). These subcategories are determined among other things from the weight of the aircraft. Subcategory A1 covers unmanned aircraft under 250 g. The drones in our case fall under subcategory A2. The operator in this category is subject to a duty of registration, but not for the aircraft itself, see points 15 and 16 of the Preamble and Article 14.
- (56) I cannot see that *the purpose* of drone flying, for example whether the drone is used for leisure and recreation purposes, is relevant under the definitions of the term “aircraft” in applicable EU regulations. It is the risk involved with the use that currently determines the level of the regulation.
- (57) The international-law basis for the regulation of civil aviation is the Convention on International Civil Aviation of 7 December 1944 (the Chicago Convention). The Chicago



Convention does not define the term “aircraft”, but its Article 17 provides rules on aircraft’s *nationality*. According to this provision, aircraft have the nationality of the State in which they are registered.

- (58) Article 8 contains rules on “aircraft capable of being flown without a pilot”. International Civil Aviation Organization, ICAO, issues Standards and Recommended Practices (SARPs), including recommendations on “[u]nmaned aircraft”. I mention ICAO Circular 328-AN/190, presented by the prosecutor, which initially in point 1.7 establishes that “unmanned aircraft (UA) are, indeed, aircraft: therefore, existing SARPs apply to a very great extent”.
- (59) Based on this, the Chicago Convention also does not seem to make a general distinction between “aircraft” and “unmanned aircraft”, including drones.
- (60) The air traffic within the EU is controlled by a number of Regulations, which jointly are part of the EU’s Single European Sky programme. Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky (the framework Regulation) defines, in Article 2 (8), “airspace users” as all aircraft operated as general air traffic”. In (26) “general air traffic” is defined as “all movements of civil aircraft ... when these movements take place in accordance with ICAOs procedures”. The four Regulations included in the Single European Sky programme contain no definition of “aircraft”.
- (61) Standardised rules for the European air traffic in the EU are also found in Standardised European Rules of the Air (SERA). These rules are based on the control under the Chicago Convention. Central here is the Commission Implementing Regulation (EU) No 923/2012 of 26 September 2012 laying down the common rules of the air and operational provisions regarding services and procedures in air navigation. Article 2 (18) defines “aircraft” in line with the wide definition in the Basic Regulation. The very application of the air traffic rules for unmanned aircraft depends on the individual regulation. I interpret Article 7 (2) and (3) of the Drones Regulation in the opposite way, such that drones in the “open” category are not regulated by the air traffic rules.
- (62) The scope of Regulation (EU) 923/2012 is set out in Article 1. With the Commission Implementing Regulation (EU) 2016/1185 of 20 July 2016, Article 1 was amended to clarify that the Regulation “shall not apply to model aircraft and toy aircraft”. Toy aircraft was at the same time defined by an addition to Article 2 (129) (a) as “an unmanned aircraft designed or intended for use, whether or not exclusively, in play by children under 14 years of age”. I cannot see that this distinction towards “toy aircraft” in the air traffic rules may carry any significance for the interpretation of “aircraft” in Council Regulation (EU) 833/2014. The distinction towards aircraft in general air traffic also does not influence the interpretation of “aircraft” in isolation, but must be assessed in the further interpretation of the scope of the ban.
- (63) Overall, it is my view that the regulation under international and EU law currently does not allow for an interpretation of “aircraft” that excludes drones of the type concerned in the case at hand. On the contrary, the starting point in the current regulations seems to be that “aircraft” generally also covers unmanned aircraft, including drones.
- (64) The purposes of the flight ban in Article 3d of Regulation (EU) 833/2014, to which I will return, also does not indicate a restrictive interpretation of “aircraft”.

- (65) Against this background, I conclude that the drones that A flew over Svalbard must be considered “aircraft” within the meaning of Article 3d (1) of Council Regulation (EU) 833/2014.

*Are the drones “non-Russian-registered aircraft”?*

- (66) As mentioned, the flight ban in Article 3d (1) is worded such that it covers three specific categories of aircraft. The ban means that it is prohibited “to land in, take off from or overfly the territory of the Union”.
- (67) I will base my further discussion on the English language version of the Council Regulation. The other language versions presented by the prosecution and the defence counsel, which show certain textual differences, will be commented on later.
- (68) The ban primarily targets “any aircraft operated by Russian air carriers, including as a marketing carrier in code-sharing or blocked-space arrangements”. This alternative covers all aircraft that are *operated or run by Russian air carriers*. According to the wording, it is insignificant whether the aircraft is registered, has nationality through registration or similar, see “any aircraft”. The alternative is slightly linked to the third alternative, as the scope of the ban is determined by *who* operates the aircraft.
- (69) The second category is “any Russian registered aircraft”, which, according to a natural understanding, targets Russian-registered aircraft. This category signifies that it is irrelevant who operates the aircraft, as long as it is Russian-registered.
- (70) The alternative forming the basis for the indictment covers
- “any non-Russian-registered aircraft which is owned or chartered, or otherwise controlled by any Russian natural or legal person, entity or body”.
- (71) Similar to the first alternative, the scope of the ban in the third alternative is in one direction determined by who operates the aircraft. On this point, the wording is widely formulated and covers any Russian natural or legal person.
- (72) The salient point is what is covered by “non-Russian-registered aircraft”.
- (73) In one direction, “non-Russian-registered” is different from “Russian registered” in the second alternative, yet such that only the latter is a registration category. Aircraft cannot be registered as “non-Russian”.
- (74) The question is whether “non-Russian-registered” must be interpreted to cover only *aircraft registered in countries other than Russia*, as the defence counsel contends, or whether it only establishes the negative; that it is sufficient that the *aircraft are not Russian registered*, as long as it is owned, leased or controlled by Russian persons.
- (75) The English wording suggests the latter. An interpretive result covering aircraft that are not registered in Russia, and thus also non-registered aircraft, is in any case clearly within the scope of the wording in the English language version.

- (76) Several of the presented language versions correspond to the English one. The Swedish version uses “icke-ryskregistrerade” and the Dutch version uses “niet-Russisch-geregistreerde”. The French version uses “non immatriculé en Russie”, translated to “luftfartøy som ikke er registrert i Russland” in a certified translation presented to the Supreme Court.
- (77) On the other hand, the Danish version uses “ikkerussisk registrerede”, which perhaps to a larger extent suggests a requirement of registration in countries other than Russia. However, the Danish wording is unclear, particularly in the light of the use of “russisk registrerede” in the second alternative. The Danish language version nonetheless allows for a reading of the provision such that it targets non-Russian, *but* registered aircraft.
- (78) In the German text, the wording in the second and third alternative is “in Russland registrierten Luftfahrzeugen sowie nicht in Russia registrierten Luftfahrzeugen ...”, in the translation presented to the Supreme Court: “i Russland registrerte luftfartøy, samt ikke i Russland registrerte luftfartøy<sup>1</sup>”. Another version is the Bulgarian version that is translated to “luftfartøy som er registrert utenfor Russland<sup>2</sup>” and similarly the Estonian version, using “luftfartøy registert utenfor Russland<sup>3</sup>”.
- (79) In the Finnish version, a correction is made, published in the Official Journal of the European Union on 2 March 2023. The previous Finnish version is translated to “luftfartøy som er registrert annesteds enn i Russland<sup>4</sup>”, but the amended version currently reads “luftfartøy som ikke er registrert i Russland<sup>5</sup>”. The reason for the amendment is unknown.
- (80) When comparing the various language versions, their wordings do not clarify how “non-Russian-registered” should be interpreted. Some versions – read in isolation – indicate rather clearly that the term only covers aircraft registered in countries other than Russia. However, I cannot see from the ECJ’s interpretive practice that the “clearest” or “more precise” language version has any form of prevalence in conflict with the starting point that the language versions are equal. Also, I am not aware of any ECJ case law indicating that a language version giving a provision a “narrower” scope should prevail over a version that formulates the same provision more “widely”. Such an interpretation would also deviate from the starting point that the language versions must be applied uniformly, see for example the ECJ’s judgment of 24 March 2021 in case C-950/19 paragraph 37 et seq.
- (81) In a situation as that at hand, the scope of the ban must be determined by the help of other interpretive factors, in particular the *context* and *objective* of the provision.
- (82) I have already addressed the purely linguistic context, which also does not provide any clear answer. The widest interpretation of the third alternative would entail that the first option becomes largely redundant. Perhaps, from a legal-technical point of view, this may suggest a narrower interpretation of the third alternative. In any case, the two alternatives have very different functions as the first one directs the ban explicitly at the Russian air carriers, which are clearly the main target of the sanction.

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<sup>1</sup> aircraft registered in Russia, as well as aircraft not registered in Russia

<sup>2</sup> aircraft that are registered outside Russia

<sup>3</sup> aircraft registered outside Russia

<sup>4</sup> aircraft that are registered in places other than Russia

<sup>5</sup> aircraft registered outside Russia

- (83) As it appears from the Preamble to the amending Regulation (EU) 2022/334, Article 3d (1) originates from Council Decision (CFSP) 2022/335. In Article 1 (2) of the Decision, a new Article 4e is added to Council Decision (CFSP) 2014/512, setting out that the Member States “shall, ... deny to any aircraft ... permission to countries in, take off from, or overfly the territory of the Union”. This wording may to some extent support that the ban only applies to the use of aircraft that require permission to land etc., but the Council Regulation itself does not support such an interpretation. Therefore, it is difficult to attribute decisive importance to this factor.
- (84) Some importance must also be attributed to the statements in point 14 of the Preamble to Council Regulation (EU) 2022/2474 of 16 December 2022 on amending Regulation (EU) 833/2014, which I have previously reproduced. An interpretation of the alternative “non-Russian-registered aircraft” as entailing a requirement of registration in countries other than Russia, matches poorly with the statement that the flight ban also applies to unmanned aircraft. The registration of drones, which in practice is the most important category, is for example aimed at registration of the *operators*.
- (85) In my view, a holistic reading of the provision gives the impression that the aim has been to ban all use of Russian controlled aircraft in European airspace. The third alternative appears as a collective provision, whose primary objective is to target all Russian use of the airspace that does not fall within the two first alternatives in the ban.
- (86) If the purpose of the formulation “non-Russian-registered” was to limit the ban to larger aircraft, aircraft within commercial civil aviation or similar, the wide definition of the target would also be less suited. Also, it is somewhat unexplained why the requirement should be actual registration and not a duty of registration. Overall, I do not find any contextual indication that the provision, on this point, must be interpreted to entail a requirement of registration in countries other than Russia. Rather, the structure of the provision and the context in which the term is used suggest that the third alternative generally covers aircraft that are not Russian registered.
- (87) Without it having any independent significance for the interpretation, I note that the European Union Aviation Safety Agency (EASA) in its website guide to the Member States on frequently asked questions (FAQ), clarifies that the sanctions prohibit Russian citizens to fly unmanned aircraft in the EU’s airspace, and that the ban does not distinguish between manned and unmanned aircraft. The EASA has used this as basis for similar information on its website.
- (88) Finally, I turn to the objective of the sanction and on whether this may entail a limitation of the flight ban. In the Preamble to Council Regulation (EU) 2022/334 amending Council Regulation (EU) 833/2014, a reference is made to Council Decision (CFSP) 2022/335, which amended Council Decision 2014/512/CFSP. The Council Decisions constitute the political basis for the legal acts.
- (89) The Preamble to Council Decision (CFSP) 2022/335 describes the development in Russia’s aggression, the European Council’s strong condemnation of the invasion and that the gravity of the situation now renders it “appropriate to introduce further restrictive measures related to finance and aviation”. Neither the Council Decision nor the subsequent Regulation provides any further clarification of the concrete purpose of the expansions. Nonetheless, it is clear that they are part of the overall and progressively more severe sanctions against Russia. The

overall effect of the flight ban was that the EU closed its own airspace as a direct response to Russia's full-scale invasion of Ukraine a few days before.

- (90) The flight ban must therefore be seen in the light of the sanction rules in general. The objective is to affect Russian economy as efficiently as possible, while pressuring Russian authorities to end the war that is contrary to international law, see point 2 of the Preamble to Council Regulation (EU) 833/2014. The way the ban is formulated, it affects both companies and Russian private individuals directly.
- (91) A contends that the objective does not reach as far as to cover Russian private individuals' use of the airspace for recreational activities such as drone flying. The prosecution authority has responded that this is also a matter of security policy. Although there is no actual suspicion that A's drone flying was anything other than a recreational activity, the use of drones clearly involves some security factors that are relevant for determining the scope of the sanctions. This particularly applies in the light of the changed security policy situation.
- (92) The ECJs judgment 28 March 2017 in Case C-72/15 *PJSC Rosneft* discusses the significance of security policy considerations when applying the sanction rules in Council Regulation (EU) 833/2014. The case concerned other sanctions than those in our case, but the ECJ's statements are general. In connection with the interpretation of a Partnership Agreement between Russia and the EU, it is set out in paragraph 115 that the aim of the restrictive measures prescribed by Council Regulation (EU) 833/2014 was to promote a peaceful settlement of the crisis in Ukraine and that this reflects the objective of maintaining peace international security. Then, it is stated in paragraph 116:
- “In those circumstances, taking into consideration the broad discretion enjoyed by the Council in this area, that institution could take the view that the adoption of the restrictive measures that issue in the main proceedings was necessary for the protection of essential European Union security interests and for the maintenance of peace and international security, within the meaning of Article 99 of the EU-Russia Partnership Agreement.”
- (93) The same is repeated in paragraph 150, where the ECJ assesses whether the restrictive measures affecting the Russian oil company were proportionate and maintained the company's basic interests, which the Court confirmed. Here, it is set out that international security may justify even significantly negative consequences for certain operators.
- (94) In the light of the statements from the ECJ in *PJSC Rosneft*, I believe it would be appropriate to emphasise security policy in the further determination of the scope of the ban. Security policy considerations generally indicate that the measure should be interpreted as a complete ban on all Russian controlled use of aircraft in the European airspace.
- (95) Against this background, I cannot see how the objective of the sanction rules may indicate an interpretation of the term “non-Russian-registered” that limits the ban to exclude unmanned aircraft or Russian citizens' use of the airspace for recreational purposes.

### *Summary*

- (96) Against this background, I conclude that the third alternative of the flight ban aimed at “any non-Russian-registered aircraft” covers unmanned aircraft, including drones of the type involved in the case at hand.

- (97) This cannot be interpreted to involve a requirement that the aircraft is registered in a country other than Russia to be covered by the sanction. Hence, both aircraft registered in other countries and unregistered aircraft are covered by Article 3d of Council Regulation (EU) 833/2014.

***The application under section 19 of the Sanctions Regulations***

- (98) The interpretation of Article 3d of Council Regulation (EU) 833/2014 must form the basis for the interpretation of section 19 of the Sanctions Regulations.
- (99) This means that the term “aircraft” in section 19 subsection 1 must be understood to cover the drones in the case at hand. Furthermore, the term “non-Russian-registered aircraft” must be interpreted as not containing a requirement that the aircraft is registered in a country other than Russia. Consequently, the ban also covers unregistered aircraft.
- (100) The interpretive result lies within the scope of the wording in section 19 subsection 1 of the Sanctions Regulations. The criminal-law requirements of a clear legal basis in, see Article 96 of the Constitution and Article 7 of the ECHR, are therefore met.
- (101) On these grounds, the Court of Appeal has interpreted section 19 of the Sanctions Regulations incorrectly, and the judgment must be set aside. The hearing in the Court of Appeal was limited, so I find it correct, as requested by the prosecution authority, to set aside also the District Court’s judgment and main hearing. In the continued hearing of the case, the District Court must assess the other grounds for acquittal asserted by A.

***Conclusion***

- (102) I vote for this

**J U D G M E N T :**

The Court of Appeal’s judgment and appeal hearing and the District Court’s judgment and main hearing are set aside.

- (103) Justice **Høgetveit Berg:**

**Dissent**

- (104) In contrast to Justice Steinsvik, I have concluded that the appeal cannot succeed and that it must be dismissed.
- (105) The drones flown by A over Svalbard weigh 900 g and may be bought in a store. The drones cannot be registered as aircraft. I will not consider whether they, nonetheless, are to be regarded as “aircraft” under the Regulations. In contrast to Justice Steinsvik, I believe under all circumstances that the drones are *not* “non-Russian-registered” aircraft under section 19 subsection 1 of the Sanctions Regulations.

- (106) When it comes to the methodical principles for the interpretation of the Sanctions Regulations, see Council Regulation (EU) 833/2014, I agree with Justice Steinsvik. I base myself on the same principles of interpretation as she has presented. The wording is the clear starting point for the interpretation of the Norwegian Regulations as well as of the Council Regulation.
- (107) Section 19 subsection 1 of the Sanctions Regulations prohibits landing in, taking off from or overflying the territory of Norway. The provision covers (i) “aircraft operated by Russian air carriers”, (ii) “Russian registered aircraft” and (iii) “non-Russian-registered aircraft” that are owned, chartered or otherwise controlled by Russian natural or legal persons.
- (108) This case concerns group (iii). The prefix “non-“ is connected to “Russian-registered” and not only to “registered”. Semantically, this alone indicates that non-registered aircraft are not covered. However, the wording may be characterised as ambiguous. We must therefore seek the interpretive result in the Council Regulation on which the Sanctions Regulations are based, as Justice Steinsvik has accounted for. I will base myself on the English language version.
- (109) Like section 19 subsection 1 of the Sanctions Regulations, Article 3d (1) of Council Regulation (EU) 833/2014 covers three groups of aircraft: (i) “any aircraft operated by Russian air carriers”, (ii) “any Russian registered aircraft” and (iii) “any non-Russian-registered aircraft”.
- (110) Group (i) – aircraft operated by Russian air carriers – naturally includes aircraft registered in Russia or in another country. Group (ii) covers Russian registered aircraft, typically owned by private individuals.
- (111) The delimitation in group (iii) may be read in three ways: (a) aircraft registered in countries other than Russia, (b) unregistered aircraft, or (c) aircraft registered in countries other than Russia and unregistered aircraft. Options (a) and (b) are mutually exclusive, while option (c) covers both options (a) and (b).
- (112) If one relies on interpretive option (b), the word “-Russian” will be linguistically redundant. From a legal point of view, this is not decisive. However, since the measures are based on the words and formulations, one must expect that the words and formulations have been carefully and consciously chosen.
- (113) If the interpretive option (c) was what Article 3d (1) of the Council Regulation was meant to signify, the wording ought to have been different. A better choice of words would have been “all aircraft” or “any aircraft”. Alternatively, “manned or unmanned aircraft” would have been suitable, which seems to be used in the EU rules where drones are explicitly mentioned. This interpretive option – i.e. aircraft registered in a country other than Russia and unregistered aircraft – makes the entire term “non-Russian-registered” redundant. In addition, the option has the effect that the entire aircraft group (i) becomes unnecessary and without independent relevance – since it, in any case, is a requirement that the aircraft is owned or controlled by a Russian operator. This is unlikely.
- (114) The wording of the Regulations and Council Regulation (EU) 833/2014 revolves around the *registration*. If it had been the intention that the aircraft’s registration was relevant, one might

conclude, or at least expect, that a different wording would have been chosen. Anything else would be making unrealistically small demands on the precision of the legislation.

- (115) Hence, based on a holistic and coherent linguistic reading of the English wording, interpretive option (a) – aircraft registered in countries other than Russia – is clearly the more natural choice.
- (116) Formulations similar to the English one are used in several other language versions. As maintained by Justice Steinsvik, some versions state quite explicitly that only aircraft registered in countries other than Russia – option (a) – are covered. Other language versions are not as clear. I agree with Justice Steinsvik that one should not immediately attribute more importance to the “clearest” or “most precise” language version.
- (117) On the other hand, I believe that regard should be had to whether one or more language versions rule out an interpretive option. Generally, when choosing between two language versions, one would be more likely to choose the version that may unite the interpretive options – and that creates no conflict between them. In our case, only interpretive option (a) – aircraft registered in countries other than Russia – is possible in *all* language versions. And in some of the versions, this is the only possible interpretation. I believe this must be given considerable weight. This argument is strengthened by the fact that the Finnish official language version has been amended, while the other language versions, stating explicitly that only aircraft registered in countries other than Russia are covered, have *not*.
- (118) The wording in Article 3d (1) of the Council Regulation therefore revolves around *registration*. As mentioned, it is also a requirement that the aircraft is Russian owned or controlled. Regardless of the meaning given to the term “aircraft”, it is then natural – when the objective of the sanctions is to affect Russia – that Article 3d (1) affects the use of aircraft that have a *nationality*. Nationality is obtained through registration, see section 3-12 of the Aviation Act. This means that unregistered aircraft fall outside the scope – including drones as in the case at hand.
- (119) Article 3d of the Council Regulation concerns closure of the airspace. Compliance with the ban is ensured with the support of “the Network Manager”, see Article 3e. The Network Manager controls the general air traffic in accordance with air traffic rules. In my view, therefore, the link between Article 3d (1) and Article 3e interpretive option (a) is further strengthened.
- (120) In paragraphs 83–86, Justice Steinsvik has emphasised the Preamble to a *later* amendment of *other aspects* of the Council Regulation. I accept the fact that these amendments may be relevant for the content of “aircraft” – either as a form of retroactive clarification or, on the contrary, as a basis for a contradictory conclusion. In any event, these amendments cannot be relevant to the question of whether or not the aircraft must be *registered*. Admittedly, there is no aircraft register for drones like those in the case at hand. However, larger unmanned aircraft can and must be registered, as long as they otherwise meet the requirements for registration.
- (121) Also, I cannot fully agree with Justice Steinsvik’s statements in paragraphs 89 et seq. regarding the objective of Article 3d (1) of the Council Regulation. It is obvious that the overarching purpose of the sanctions is to affect Russia’s economy – by affecting Russian companies and Russian citizens. However, to determine the more specific scope of Article 3d



(1), one must also identify the objective of the requirements made in exactly this provision. Without doing so, nearly anything could be targeted, as long as the broad overall objective dictates it. In other words, the objective must manifest itself in the regulation.

- (122) The question in the case at hand is how far a ban whose primary purpose is to affect Russian aviation interferes with the personal freedom of Russians who reside legally in Norway. The Council Regulation does not preclude or replace national legislation on security measures against espionage and other undesirable behaviour by Russian persons. I refer in particular to section 121 of the Penal Code on unlawful intelligence-gathering activity and section 126 on other unlawful intelligence-gathering. Although preventing access may justify restrictions against the Russians' use of drones, there is no trace of this in the adoption of the Council Regulation.
- (123) When Russian citizens' use of drones such as those in our case, as far as I can see, is not mentioned in the prehistory of Article 3d (1) of the Council Regulation – either by the Council, the EU Parliament or the EU Commission – I cannot see that the overall objective of the sanctions may add anything to our specific interpretive issue.
- (124) In addition, I point out that the prosecution authority has not presented or highlighted a single example from other European countries where Article 3d (1) of the Council Regulation has been enforced against Russian citizens having used such drones.
- (125) Against this background, I find that section 19 subsection 1 of the Sanctions Regulations does not cover the use of drones concerned in the case at hand, and that the appeal cannot succeed.
- (126) Acting Justice **Remen:** I agree with Justice Høgetveit Berg in all material respects and with his conclusion.
- (127) Justice **Sæther:** I agree with Justice Steinsvik in all material respects and with her conclusion.
- (128) Justice **Indreberg:** Likewise.
- (129) Following the voting, the Supreme Court gave this

#### J U D G M E N T :

The Court of Appeal's judgment and appeal hearing and the District Court's judgment and main hearing are set aside.