NORWEGIAN SUPREME COURT

On 25 April 2013, the Supreme Court delivered judgment in

HR-2013-00881-A, (case no. 2012/1900), Civil Appeal against Judgment.

The State represented by
the Ministry of Justice and Public Security (The Attorney General
repr. by Ms. Fanny Platou Amble)

v.

NN (Mr. John Christian Elden)

VOTING:

(1) Judge **Bårdsen:** Subject matter of the action is whether the State has responsibility for inadequate protection of NN against violation of her rights under the European Convention on Human Rights (ECHR) in the form of threatening and annoying behaviour over an extended period of time by a man with whom she had had a relationship for a brief period of time.

(2) On 27 October 1998, A made death threats against NN and subjected her to serious violence. By the Horten District Court's judgment of 13 February 1999 A was sentenced to a term of imprisonment of one year and two months for, amongst other things, violation of section 227 first penal alternative, section 229 first penal alternative, cf. section 232, of the Penal Code as well as several violations of a restraining order, cf. section 342 subsection 2. In spite of a quick serving of this sentence, the serving of a new sentence imposed by the Horten District Court of 31 March 2000 of 90 days' imprisonment for violation of a restraining order and violation of section 390 a of the Penal Code, extensive police operational measures and a practically uninterrupted regime of restraining orders up until May 2005, A kept contacting NN after the incident in October 1998. Because of a serious fear, NN in April 2001 moved with her four children to a different part of the country. She has since then been living at an unlisted address – which she still does – and has changed her name. The mental strain has resulted in considerable health problems. According to an expert statement from Professor Kjell Noreik of 10 June 2010, she has a permanent degree of disability of 45 per cent. From February 2013, she has been granted a 60 per cent disability pension starting from 1 October 1998.

(3) In the convictions against A from 1999 and 2000 NN was awarded damages totalling an amount of NOK 87,556, of which NOK 40,000 was damages for non-economic loss. The amounts have been covered by the District Governor. By a decision by the Compensation

Board for Victims of Violent Crime on 17 September 2009 and 18 October 2010 NN was awarded further damages for non-economic loss in the amount of NOK 30,000 and damages for permanent injury in the amount of NOK 438,460.

(4) On 23 April 2010, NN issued a writ of summons at the Oslo District Court against the State represented by the Ministry of Justice and Police filing a claim for damages for economic loss and non-economic loss resulting from the State having failed to afford her sufficient protection against A's violations of her rights under articles 2, 3, 5 and 8 of the ECHR, as well as a claim for damages for non-economic loss for her four children, cf. also article 3 of the Children's Convention. The State submitted a statement of claim for the Court to find in its favour. It was decided to split the hearing so that the issue relating to basis of liability was to be decided first, cf. section 16-1, subsection 2 of the Disputes Act. The issue of this first part of the case is thus simply whether the State has fulfilled its obligation under the ECHR to protect NN against prosecution from A.

(5) On 15 February 2011, the District Court delivered judgment with the following conclusion:

"1. The Court finds in favour of the State represented by the Ministry of Justice.
2. Costs are not awarded."

(6) The District Court held that A had violated NN's rights under articles 3 and 8 of the ECHR. The Court nevertheless, under some doubt, concluded that the State could not be held liable – all protection measures that could be reasonably expected had been initiated.

(7) NN appealed against the application of the law to the Borgarting Court of Appeal. She now asserted a violation of articles 2, 3, 8 and article 2 of Protocol no. 4. The State asked for the District Court's judgment to be affirmed.

(8) On 18 September 2012, the Court of Appeal gave judgment with the following conclusion:

"1. The State has vis-à-vis NN failed to fulfil its obligations under article 3 of the European Convention of Human Rights.
2. By way of costs before the Court of Appeal the State represented by the Ministry of Justice shall pay NOK 104,633 – one hundred and four thousand six hundred and thirty three – Norwegian kroner to NN within 2 – two – weeks from service of the judgment."

(9) The judgment was passed with dissenting votes in that one of the judges voted in favour of the Defendant. The minority found – like the District Court – that the State had initiated all reasonable protective measures.

(10) The State has appealed the Court of Appeal's judgment to the Supreme Court. The appeal concerns the application of the law, "but also certain aspects of the Court of Appeal's assessment of evidence".

(11) The Appellant – *the State represented by the Ministry of Justice and Public Security* – has briefly asserted the following:

(12) The treatment to which A subjected NN is in violation of her right to respect for private and family life under article 8 the ECHR. It does not, however, come under the prohibition of torture, inhuman or degrading treatment in article 3. Violations of this provision presuppose a

stronger element of physical violence; cf. in particular *Opuz v. Turkey* (judgment 9 June 2009). The predominant element in NN's case is the mental strain – fear and permanent mental injury – resulting from annoying and threatening personal prosecution over several years, what is known as "stalking".

(13) The subsumption under articles 3 or 8 is, regardless, not decisive for liability: the issue of the matter is whether the State has afforded NN adequate protection against A, cf. the State's obligation to secure for everybody under its jurisdiction the right and freedoms mentioned in the Convention, cf. article 1. This is not a result obligation in the sense that the State is required to prevent each and every violation. The issue is whether the State has to a reasonable extent initiated adequate protective measures. The requirements must be realistic and proportional, cf. *Osman v. United Kingdom* (Great Chamber judgment of 28 October 1998) section 116. The State has a discretionary margin as regards the choice of means. National resource and priority considerations are relevant. There will be room for isolated incidents of failure. The offender's human rights must also be safeguarded. The decisive point is therefore whether, from an overall point of view and in this sense, an efficient legal protection has been afforded, cf. the review of earlier case law and the summing up of the prevailing state of the law given in *Wilson v. United Kingdom* (decision to dismiss of 23 October 2012) sections 39–46: Only where the measures, based on the concrete situation, were "manifestly inadequate" is there a basis of liability, cf. most recently *Valiuliene v. Lithuania* (judgment 26 March 2013) sections 76–77. This resembles a fault-liability assessment. In reality it is only negligence of such a nature that it may result in fault liability that qualifies as a breach of positive obligations under the ECHR.

(14) The State agrees that there are certain weaknesses in the investigation and in bringing to trial possible threats and violations of the restraining order. However, the Court of Appeal majority has attributed excessive weight to these details. The crucial point is the total picture: A was punished for the incident of threat and violence in October 1998 and later also for the persecution of NN, extensive operational measures were initiated to protect NN and a number of enforcement measures were applied against A. Most of the time he was prohibited from contacting NN. These measures – seen in context – were likely to protect and deter. NN has been awarded damages for the persecution.

(15) The State represented by the Ministry of Justice and Public Security has submitted the following statement of claim:

"The District Court's judgment to be affirmed."

(16) The Respondent – *NN* – has briefly asserted:

(17) The Court of Appeal's judgment is correct. A has subjected NN to physical and mental abuse of such duration and strength that, collectively, they come under article 3 of the ECHR, cf. the criteria stated in *Opuz v. Turkey* (judgment 9 June 2009) section 158 and *Valiuliene v. Lithuania* (26 March 2013) sections 65–66. The persecution is, regardless, comprised by article 8.

(18) In view of the existing risk, information about the offender, the mental strain inflicted on NN, as well as her and the children's special vulnerability, the authorities should – given that it became clear at an early point in time that the offender was not deterred by restraining

orders or fines – have initiated stronger measures to protect NN. This includes follow-up by witnesses who could have given information about new threats and violations of the restraining order, a better co-operation between the police districts, the securing of traffic data, more frequent arrests and imprisonments of A, immediate institution of criminal proceedings for each individual violation of the restraining order, indictment requesting a sentence of imprisonment, evaluation of preventive supervision/preventive detention/compulsory mental health care and the use of deterrent measures for NN such as "reverse" and/or mobile violence alarm. Overall, protection has not been adequate. This means that the State is liable, cf. article 1 of the ECHR.

(19) NN has submitted the following statement of claim:

"Principally:	**The appeal against the Court of Appeal's judgment count 1 to be quashed.**
In the alternative:	**The State to be found guilty of having neglected its obligations to NN under article 8 of the ECHR.**
In both cases:	**NN to be awarded costs in the amount of NOK 9,450.- to cover her contribution to free legal aid before the District Court and the Court of Appeal."**

(20) In terms of evidence the case is to a large extent in the same position as before the lower courts. Written statements have been submitted to the Supreme Court from NN, Assistant Chief of Police B, Assistant Lensman C and the then Division Leader at the Police Data and Material Service D. They also gave evidence before the Court of Appeal.

(21) At NN's request, the appeal proceedings in the Supreme Court were conducted behind closed doors, cf. section 125 subsection 1 b of the Courts Act. For the same reasons that called for closed doors, the Claimant's name is not set out in the judgment here.

(22) **I have concluded** that there is basis of liability.

(23) It is necessary to start with a more detailed account of the facts of the case and NN's situation.

(24) NN met A in connection with her work some time in 1997. She entered into a relationship with him and they were according to the Court of Appeal's judgment lovers for a brief period of time. NN had the care of four minor children from two previous relationships.

(25) In connection with a disagreement between A and NN on 27 October 1998 – A was under the influence of alcohol – he hit her several times over the head with a heavy double-linked chain, he kicked her repeatedly and told her he was going to kill her. He threatened NN with a bread knife to her throat. According to the District Court, the use of violence resembled torture and it resulted in several broken ribs, swellings and bruises. NN had to spend a few days in hospital and suffered significant mental reactions in the form of fear of death, depression and insomnia.

(26) It transpires from the Horten District Court's judgment of 13 February 1999 that A had a high consumption of alcohol and suffered from a serious dissocial personality disorder. He had no impulse control and reacted with violence if he was rejected or did not get his own way.

(27) A, who had eight previous convictions, was immediately after the incident in October 1998 arrested and remanded in custody. After almost three weeks, he was released against an obligation to report daily to the police, ordered to refrain from drinking alcohol for a period of six months and to consult a psychologist. Pursuant to section 222 a subsection 1 of the Criminal Procedure Act, A was also prohibited from looking up or contacting NN for a period of six months. The restraining order has been renewed a number of times and has, as mentioned – when seen in conjunction with a judgment entailing a restraining order under section 33 of the Penal Code of 31 March 2000 – been practically uninterrupted up to 14 May 2005. In the decisions reference is made to the judgment from 1999, violations of earlier restraining orders and annoying and inconsiderate behaviour towards NN.

(28) A served the sentence from the Horten District Court of 13 February 1999 consisting of a term of imprisonment of one year and two months from 19 April 1999 to 31 March 2000, and he spent three weeks in custody from 26 January 2001 before he was transferred to serve the sentence from the Horten District Court on 31 March 2000 consisting of a term of imprisonment of 90 days. NN moved to X at an unlisted address immediately before A was released from prison on 16 April 2001.

(29) A did not respect the restraining orders. In spite of these and the serving of the prison sentence laid down in the two convictions, he on the contrary carried out what the District Court has referred to as "an uninterrupted persecution" of NN. From police logs, own reports and NN's formal complaints, it transpires that A violated the prohibition on a considerable number of occasions between November 1998 and April 2001. After NN and the children moved, it has been a question of more isolated violations and the last contact was in 2004. The Court of Appeal has relied on the assumption that A stopped the persecution of NN because he started a relationship with another woman.

(30) The persecution of NN has been in the nature of cards, letters, phone calls, texting and attempts to look her up, for example at home and by pursuing her by car. The main message has been that A wanted to continue the relationship with NN and that he was prepared to go a very long way to achieve this and to prevent her from starting a relationship with anyone else. In the contact NN's children were also an issue. NN experienced A as threatening and uncontrollable. The fact that she found it necessary to leave and move with four children to another part of the country which she had no connection with whatsoever and live there at an unlisted address is a strong reflection of the situation of no choice which she found herself in.

(31) In its judgment the Court of Appeal has presented a thorough account of the course of events and the strain on NN. I quote the following:

"As the Court of Appeal sees it, this is a question of a threatening and frightening persecution over an extended period of time which resembles mental harassment and terrorizing of NN.

The persecution must be seen in the light of the aggravated use of violence on 27 October 1998. From the time the offender was released from custody after having assaulted and maliciously wounded NN with a heavy chain and kicks and threatened to kill her with a knife, he did not in any way respect NN's right to be left in peace. Reference is made to the Court of Appeal's account above regarding the many persecutions by car, continuous phone calls and textings and other forms of contact on the part of the offender. This was a persecution that lasted over an extended period of time – from November 1998 until 2004/2005 – where also people close to NN have become involved. In the Court of Appeal's view, she was justified – based on the assault in 1998 – in fearing new serious violence on the part of the offender, even

though he has in fact not assaulted her physically since then. She had sole care of four minor children and was thus in an extremely vulnerable situation.

Based on the evidence adduced, the Court of Appeal is in no doubt that the persistent fear for her own and her children's safety as expressed by NN – also in her statement before the Court of Appeal – has been well founded – among other reasons because of the offender's earlier violent behaviour and unstable mental health. The offender was unstoppable, and she eventually felt forced to move to a smaller place in a different part of the country. The Court of Appeal finds it beyond doubt that the sustained persecution has had mental consequences for NN. She has herself explained that she was constantly "on the alert" and that she "never had a moment's relief" from the fear in her body. She is still struggling with fear and anxiety. Reference is here made to the supplementary report of 21 January 2011 from the psychiatrist Kjell Noreik, where it is assumed that the actual physical assault in 1998 has been less significant than the sustained persecution she has been exposed to and the anxiety and insecurity this has created.

The Court of Appeal also takes into consideration that NN's quality of life as a result of the offender's persecution was significantly impaired, for one thing by a restriction of freedom. She obtained an unlisted telephone number to no avail. Even when she took the very drastic step of moving herself and the four children to an unlisted address in another part of the country – away from family, friends, school and work – the offender after a while succeeded in locating her. The Court of Appeal has noted NN's explanation during the appeal proceedings that the relocation was a direct result of a death threat made by the offender immediately before he was to be released from prison. The threat was communicated to NN through a woman who looked her up in her home to warn her. To NN this meant that she had no choice but to flee from her home."

(32) I rely on the above and also endorse the Court of Appeal's conclusion that the sustained persecution of NN "must be considered a serious and aggravated violation of her integrity".

(33) This leads me to the legal aspect of the matter. The question is whether A's persecution of NN under substantive law violates articles 8 or 3 of the ECHR and whether the State can in that event be held liable for failing to protect her. I will first address the assessment of A's persecution.

(34) The right to respect for a person's *private life* under article 8 of the ECHR includes the physical and mental integrity and the right to be left in peace from unwanted attention from others. It is beyond doubt – nor has it been disputed by the State – that A's actions have violated NN's right to respect for her private life, cf. article 8. Also her right to respect for *her family life* and to *respect for her home* is very much affected.

(35) However, NN has asserted that A's treatment of her must be deemed *degrading* or *inhuman*, in the sense these terms are used in article 3 of the ECHR. The State has submitted that A's actions are not comprised by article 3 and has in particular cited that case law from the European Court of Human Rights is based on a premise of a stronger element of physical violence than is the case in this matter.

(36) This subsumption issue is not of decisive importance for my view of the state's liability here – and I doubt that it can have any influence worth mentioning on the concrete level of damages: Decisive must in both contexts be the reality of the violation of NN. I nevertheless wish to state the following:
(37) The State may be right that earlier case law from the European Court of Human Rights relating to abuse in close relationships seems largely to come under article 8, unless it was a question of murder or serious physical abuse. It is also correct that the more serious the violence, the more natural is the application of article 3. But I do not agree that the line between article 3 and article 8 can be drawn on the basis of how much physical violence has

in actual fact been used. The case law of the European Court of Human Rights' shows that the threshold for applying article 3 is *relative* – it depends on an overall evaluation of *all the circumstances of the case,* "such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim", cf. *Opuz v. Turkey* (judgment 9 June 2009) section 158, *Dordevic v. Croatia* (judgment 24 July 2012) section 94 and *E. M v. Romania* (judgment 30 October 2012) section 57.

(38) The most recent judgment in this area, *Valiuliene v. Lithuania* (judgment 26 March 2013), concerned a woman who had on five occasions within a months' time in 2001 been subject to moderate violence on the part of her cohabitant. The physical injuries were limited. However, the European Court of Human Rights found that one "cannot turn a blind eye to the psychological aspect of the alleged ill-treatment", and that the woman "over a certain period of time she had been exposed to threats to her physical integrity and had actually been harassed or attacked on five occasions". Article 3 was applied.

(39) There are in my view elements in NN's case which point in the direction of A's treatment of her being of such an aggravated nature as to fall within the scope of article 3: With a serious incident of threat and violence in 1998 as the point of departure she was for a number of years subjected to an uninterrupted and wilful personal persecution. This gave her reason to fear for her own and her children's safety, it deprived her of control of her own life, it inflicted permanent mental problems on her and reduced her quality of life to a significant degree. Even if A has not contacted her since 2004, these effects are still a reality for her.

(40) However, I will leave the subsumption open, see by way of comparison *A v. Croatia* (judgment 14 October 2010) section 57. The crucial point is whether the State can be held liable for inadequate protection of NN from A's persecution which is in violation of the Convention. I shall now give an account of my view of this issue.

(41) Article 1 of the ECHR imposes on the High Contracting Parties the obligation to *secure* to everyone within their jurisdiction the rights of the Convention. This includes an obligation on the part of the state, depending on prevailing circumstances, to take active steps to prevent that private individuals violate each other's rights. – The Convention has in this sense also a *horizontal* effect. I refer to *H. L. R v. France* (Grand Chamber Judgment 29 April 1997) section 40 and *Osman v. United Kingdom* (Grand Chamber Judgment 28 October 1998) section 115.

(42) As regards prohibition of torture, inhuman or degrading treatment under article 3, section 159 of the judgment in *Opuz v. Turkey* (judgment 9 June 2009) states the following:

"As regards the question whether the State could be held responsible, under Article 3, for the ill-treatment inflicted on persons by non-state actors, the Court recalls that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals … Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity …"

(43) The essential features here are repeated in e.g. *Valiuliene v. Lithuania* (judgment 26 March 2013) section 75, with the following addendum:

"Furthermore, Article 3 requires States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law- enforcement machinery for the prevention, suppression and punishment of breaches of such provisions, and this requirement also extends to ill-treatment administered by private individuals."

(44) Practice shows that the European Court of Human Rights uses the same approach in principle to the breaches of the right to private and family life by private individuals under article 8. I refer to the following summary in *Wilson v. United Kingdom* (decision to dismiss 23 October 2012) section 37:

"- While the essential object of Article 8 of the Convention is to protect the individual against arbitrary action by public authorities, there may in addition be positive obligations inherent in effective 'respect' for private and family life and these obligations may involve the adoption of measures in the sphere of the relations between individuals. Children and other vulnerable individuals, in particular, are entitled to effective protection.

- The concept of private life includes a person's physical and psychological integrity. Under Article 8 States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.

- Victims of domestic violence are of a particular vulnerability and the need for active State involvement in their protection has been emphasised in a number of international instruments (those instruments are set out in Opuz, cited above, §§ 72-86)."

(45) The European Court of Human Rights has in a series of decisions clarified and developed the content and scope of the duty of protection. There may be nuances in what is said, for example based on the nature of the case and over time. However, certain components seem to be recurring and I have – with a view to the decision in NN's case – in particular fastened on the following four:

(46) *In the first place:* Police work is demanding and complex, the possibility of foreseeing developments is limited and operational choices need to be made within the framework of determined prioritizations and resources. The Convention does not demand the impossible or the disproportionate. And the State is not expected to prevent each and every risk of violations committed by private individuals. But it is necessary to react against *real and immediate* risks which the authorities *are* or *ought to have been aware of*, with such measures as would be *reasonable* to expect based on the relevant situation. I refer to *Osman v. United Kingdom* (Grand Chamber Judgment 28 October 1998) section 116, *Kontrová v. Slovakia* (judgment 31 May 2007) section 50, *Milanovic v. Serbia* (judgment 14 December 2010) section 84 and *Dordevic v. Croatia* (judgment 24 July 2012) section 139.

(47) *Secondly*: The European Court of Human Rights has in a serious of decisions emphasized that it is the national authorities that are the closest to deciding the best way of reacting, cf. most recently *Valiuliene v. Lithuania* (judgment 26 March 2013) sections 76 and 85. The states have therefore according to the same practice demonstrated a certain *margin of discretion* as regards the choice of means in the sense that it is not a question of reviewing the authorities' choice based on ideal criteria – the question is whether the measures initiated were all in all *adequate* and *proportional.*

(48) *Thirdly:* Under the ECHR there is an expectation that measures will be implemented in a way that entails that they contribute to "practical and effective protection", cf. e.g. *Valiuliene v. Lithuania* (judgment 26 March 2013) section 75. The time aspect may be important here, cf. *Kalucza v. Hungary* (judgment 24 April 2012) section 64 and *Kowal v. Poland* (decision to dismiss 18 September 2012) section 51. The fact that it is *decided* to implement protective measures is not sufficient, these measures must also *be implemented* and *enforced,* cf. *A v. Croatia* (judgment 14 October 2010) sections 78–79.

(49) *Fourthly:* The requirements for activity on the part of the authorities will depend on the *field* in question. As regards violence to women, the European Court has in particular emphasized "the need for active State involvement in their protection". I refer to *Bevacqua and S v. Bulgaria* (judgment 12 June 2008) section 64–65, *Hajduová v. Slovakia* (judgment 30 November 2010) section 50 and *E. M v. Romania* (judgment 30 October 2012) section 58. In this area the authorities thus has a special reason to both initiate measures and to ensure that these measures afford practical and effective protection. This must be seen in conjunction with, amongst other things, the following statement as to principle in *Opuz v. Turkey* (Grand Chamber Judgment 9 June 2009) section 164:

"Furthermore, in interpreting the provisions of the Convention and the scope of the State's obligations in specific cases … the Court will also look for any consensus and common values emerging from the practices of European States and specialised international instruments, such as the CEDAW, as well as giving heed to the evolution of norms and principles in international law through other developments such as the Belém do Pará Convention, which specifically sets out States' duties relating to the eradication of gender-based violence."

(50) The European Council's Convention on preventing and combating violence against women and domestic violence from 11 May 2011 – the Istanbul Convention – came into being after the Opuz judgment. According to the preamble, the Convention was developed in the light of case law from the European Court of Human Rights in this field.

(51) With this as a backdrop I shall now move on to the concrete evaluation of NN's case.

(52) It is clear – and undisputed – that the police were familiar with the situation of A and NN. They received more or less continuously requests and complaints from her, to which they had strong reasons to react.

(53) A great deal was also done: The incident of violence and threats in October 1998 – and some earlier breaches of the restraining order – were investigated and brought to trial within a reasonable period of time. The serving of the prison sentence of one year and two months was carried quickly into effect. In connection with his release, A was on 31 March 2000 convicted of violations of section 390 a of the Penal Code and of breaches of the restraining order, and sentenced to 90 days' imprisonment and prohibition against contact under section 33 of the Penal Code. It is set out in the judgment that one of the breaches for which he was convicted had also resulted in an extended term of the first sentence. By the Tønsberg City Court's judgment of 11 June 2001, A was fined NOK 7,500 for violation of section 390 a of the Penal Code, for having followed NN by car. The area where NN was living before she moved was regularly patrolled by the police. Emergency responses were made, NN had a violence alarm installed in her home. She spent time at a shelter and she has since her move in 2001 had an unlisted address. Enforcement measures were implemented against A in the form of seizure of

his mobile phone, arrest, imprisonment and the use of non-custodial alternatives. He has, as mentioned, had a practically uninterrupted prohibition against contacting NN from October 1998 until May 2005.

(54) The case must be evaluated in the light of the very serious incidents to which A subjected NN in October 1998 in the form of aggravated violence and threats. It quickly became clear that A was not prepared to comply with the restraining order and there were reports that he was making new threats. Characteristic of the case is that A's persecution of NN continued with great intensity over a long period of time – several years – essentially only interrupted by the periods when he was in prison. When I have, in spite of the measures that were initiated, concluded that NN has *not* been afforded the protection required according to the practice of the European Court of Human Rights, this is due to two factors, in the light of what I have pointed out: that the follow-up of A's continued violations of the restraining order was highly inadequate and that two potentially extremely serious threats to NN were not investigated in any detail.

(55) A restraining order is an adequate means of protection against personal persecution. If such an order is to have the intended deterrent effect, it needs to be *enforced* – for example so that possible breaches are investigated and punished. I here refer to point 3 in my summary of the European Court's practice. As regards restraining orders also Norwegian sources of law attribute importance to the fact that violations must have consequences. In NOU (official Norwegian reports) 2003: 31 "The right to a life without violence" it is stated in section 9.4.3:

"Violations of restraining orders are punishable under section 342 of the Penal Code with fines or imprisonment of up to 6 months or both. If a person has a previous conviction for violation of a restraining order he may be sentenced to a term of imprisonment of up to 2 years. In order to safeguard the woman's need for protection, it is important that the police and the prosecuting authority react to any breach of the imposed restraining order. If a perpetrator of violence experiences that he can violate a restraining order, this has the direct opposite effect of the intention and the man will perceive this as a legitimizing of his actions."

(56) In a Circular from the Director General of Public Prosecutions no. 3/2008 about family violence (RA 2008-3), section 3 states the following:

"If an accused violates a restraining order, the reaction must be prompt and firm and it must be evaluated whether the violation gives grounds for an arrest and a hearing with a view to a remand in custody. A request for a sentencing for the violation of the restraining order should be considered, cf. section 342 c of the Penal Code, without waiting for the trial in the family violence case."

(57) I also wish to mention article 53 paragraph 3 of the Istanbul Convention which states:

"Parties shall take all the necessary legislative or other measures to ensure that breaches of restraining or protection orders … shall be subject to effective, proportionate and dissuasive criminal or other sanctions."

(58) A violated the restraining order on a large number of occasions – during certain periods of time on a daily basis – in ways that entailed a heavy strain on NN. In spite of NN's requests and complaints, only a few of these violations were investigated and brought to trial as such, viz. by the Horten District Court's judgment of 13 February 1999 and the Horten District Court's judgment of 31 March 2000. An incident on 16 September 1999 was the latest violation included in these cases. I wish to mention that on 13 April 1999, A accepted a fine

for violations of section 342 and section 390 a of the Penal Code. However, this was rescinded because section 342 in force at the time did not contain any fine alternative. The case was subsequently left in abeyance.

(59) After a formal complaint from NN on 22 January 2001, A was arrested and remanded in custody on suspicion of violations of section 342 subsection 2 and section 390 a of the Penal Code during the period 23 December 2000 to 22 January 2001. The order for remand in custody of 26 January 2001 refers to the risk of repeat offences. On 5 December 2002 – thus after almost two years – the criminal case was dropped because of the state of the evidence. It is set forth in the Sandefjord District Court's ruling of 9 October 2003 that the police left the complaint in abeyance in order to see how the relationship between NN and A developed. They did not want to push the matter out of consideration for "the good rehabilitation situation that A was in". It is stated in the ruling that the decision to drop the case was made in order "to help A to move on". The impression was that "A would in all probability have received a new prison sentence if the case had come to trial", and that this "would have ruined his further rehabilitation".

(60) The predominant impression in A's case is that the restraining order has in reality not been enforced in spite of the fact that the police and prosecuting authority at a fairly early stage realized that A was not prepared to respect this.

(61) Threats can, generally speaking, be difficult to evaluate. The threats in this case must be seen in the light of – and in conjunction with – the death threat and the aggravated violence which A committed against NN in the late autumn of 1998 and the picture of his relationship with her which manifested itself already at that time.

(62) It transpires from the police report of 6 January 1999 that NN received what she perceived as genuine death threats from A, via an acquaintance. This was approximately one month before the trial in the criminal case against A for the incident of threats and violence in October 1998. It appears from the police report of 12 April 1999 that NN again received what she perceived as genuine death threats from A, also this time communicated via a third party. Beyond interviews of A, these two incidents were not investigated in any detail. In my view, they ought to have been in order to clarify the need for increased protective measures around NN and for the arrest and remanding in custody of A, and to examine whether there was a basis for an indictment for violation of section 227 of the Penal Code.

(63) I want to sum up by saying: The police and the prosecuting authority did a great deal to protect NN. Based on the knowledge about A and his pattern of action and intensity and about the strain and risk for NN and her children over a very long period of time, the police and the prosecuting authority should have followed up on the information about continued violations of the restraining order in a much more effective manner. In particular, the possibility of arrest and remand in custody should have been carefully considered, and the violations should on an ongoing basis have been taken to trial as independent criminal offences. The unsatisfactory investigation of the death threats in 1999 enhances the impression of inadequate protection against continued prosecution and new – potentially very serious – infringements of integrity.

(64) I agree with the State that it is of interest that NN has been awarded criminal injuries compensation. However, this compensation cannot in NN's case lead to a judgment in favour

of the Defendant as regards the question of basis of liability. I will not go into the meting out of compensation in the case here.

(65) The Respondent has had free legal aid before all courts. In view of the relationship between the litigant parties, no request has been submitted for compensation of the State's costs. However, before the District Court and the Court of Appeal NN has had to pay a total of NOK 9,450 as her own contribution, which the State shall compensate, cf. section 20-2 subsection 1, of the Disputes Act.

(66) I vote in favour of the following:

JUDGMENT:

1. The State has not fulfilled its obligation under the ECHR to protect NN against persecution from A.
2. The State represented by the Ministry of Justice and Public Security shall pay to NN by way of costs before the District Court and the Court of Appeal 9,450 – nine thousand four hundred and fifty – Norwegian kroner within 2 – two – weeks from service of this judgment.

(67) Judge **Kallerud:** I concur in all essentials and as regards the conclusion with the first-voting judge.

(68) Judge **Normann:** Likewise.

(69) Judge **Utgård:** The same.

(70) Judge **Gjølstad:** Likewise.

(71) After the voting, the Supreme Court gave the following

JUDGMENT:

1. The State *has not fulfilled its obligation under the ECHR to protect NN against persecution from A.*
2. The State represented by the Ministry of Justice and Public Security shall pay to NN by way of costs before the District Court and the Court of Appeal 9,450 – nine thousand four hundred and fifty – Norwegian kroner within 2 – two – weeks from service of this judgment.