SUPREME COURT OF NORWAY

J U D G M E N T

given on 31 March 2023 by a division of the Supreme Court composed of

Justice Bergljot Webster
Justice Ingvald Falch
Justice Espen Bergh
Justice Kine Steinsvik
Acting Justice Magni Elsheim

HR-2023-604-A, (case no. 22-146588STR-HRET)
Anke over Borgarting Court of Appeal's judgment 26 August 2022

A	(Counsel John Christian Elden)
v.	
The Public Prosecution Authority	(Counsel Peter Other Johansen)

(1) Justice **Steinsvik:**

Issue and background

(2) The case concerns a penalty notice (*forelegg*) for not complying with the police's order to leave the reception area at a Ministry during a demonstration against Norwegian climate policy. The question is whether the criminal sanction interferes with the right to participate in peaceful assemblies and demonstrations.

(3) On 25 August 2021, A received a penalty notice for violating section 30 (1) see section 5 of the Police Act by failing to comply with the police's order. The basis for the charge was that she, on the same day at 1.50 p.m. refused to leave the premises of the Ministry of Health and Care at Teatergata 9 in Oslo, after the police had requested her to do so.

(4) A was arrested by the police, taken to and held in police custody for about 6 hours and 40 minutes before she was released. She was issued a penalty notice of NOK 6 000. She refused to accept the penalty, and the case was brought to the District Court for adjudication, see section 268 of the Criminal Procedure Act.

(5) Two days earlier, A had also received a penalty notice for failing to comply with the police's order to leave the roadway during a demonstration in a crossroads at Majorstua in Oslo. This penalty notice was also not accepted.

(6) The demonstrations were conducted under the direction of the global climate and environment movement Extinction Rebellion, which in August 2021 held a number of demonstrations in Oslo. The activists are known for using both traditional forms of action and non-violent offences – civil disobedience – as means to gain attention to climate and environment issues.

(7) By Oslo District Court's judgment of 24 September 2021, A was acquitted of the count of the protest inside the Ministry. She was sentenced to pay a fine of NOK 10 000, alternatively 20 days of imprisonment, for the obstruction of traffic at Majorstua. The conviction of the latter offence is final.

(8) The District Court found that the police's reactions to the demonstration inside the Ministry overall constituted a disproportionate interference with A's right to freedom of assembly under Article 11 of the European Convention on Human Rights.

(9) The Public Prosecution Authority appealed to Borgarting Court of Appeal, challenging the application of the law. The Court of Appeal handed down a judgment on 26 August 2022, ruling as follows with regard to A:

> "2. A, born 00.00.1990, is convicted of violating section 30 (1) see section 5 of the Police Act, and the offences of which she was convicted by Oslo District Court's final judgment of 24 September 2021, see section 79 subsection 1 (a) of the Penal Code, and sentenced to pay a fine of NOK 11 800, in the alternative to fifteen days of imprisonment. For the alternative prison sentence, a deduction of four days will be made for time spent in custody on remand, see section 83 subsection 6 of the Penal Code.
>
> 3. No costs are imposed."

(10) The Court of Appeal found that the penalty was not a violation Article 11 of the ECHR, and that A was to be convicted as indicted also of the demonstration inside the Ministry. An aggregate fine was measured for both offences.

(11) *A* has appealed to the Supreme Court. The appeal concerns the application of the law and the procedure.

(12) She contends that she must be acquitted because the police's aggregate sanctions against the protest inside the Ministry were disproportionate, and thus incompatible with Article 11 see Article 10 of the ECHR. It is significant for the proportionality assessment that A was deprived of her liberty in conflict with Article 5 of the ECHR.

(13) The defence counsel asks the Supreme Court to rule as follows:

> "Principally: A is acquitted of the indictment of 25 August 2021.
>
> For the offence adjudicated by Oslo District Court's judgment of 24 September 2021, the sentence is set to a fine of NOK 7 000, in the alternative 11 days of imprisonment with a deduction of 4 days for time spent in custody on remand if the sentence is to be served in prison.
>
> In the alternative: For the offence in the indictment of 25 August 2021 sentencing is waived, see section 61 of the Penal Code.
>
> For the offence adjudicated by Oslo District Court's judgment of 24 September 2021, the sentence is set to a fine of NOK 7 000, in the alternative 11 days of imprisonment with a deduction of 4 days for time spent in custody on remand if the sentence is to be served in prison.
>
> In the next alternative: The aggregate fine is reduced."

(14) *The Public Prosecution Authority* contends that the conditions for interfering with the freedom of assembly under Article 11 of the ECHR were met. In the proportionality assessment, regard must also be had to the ownership right to the building. A's arrest was justified under section 173 subsection 2 of the Criminal Procedure Act and did not amount to a violation of Article 5 of the ECHR.

(15) The prosecutor asks the Supreme Court to rule as follows:

> "The appeal is dismissed."

My opinion

The factual circumstances

(16) The Court of Appeal heard the Public Prosecution Authority's appeal against the application of the law, thus relying on the factual course of events that the District Court had found proven. About the demonstration in itself, the Court of Appeal has reproduced the following from the District Court's judgment:

> "At around 10.45-11.00 a.m., a message was sent from the police operations centre that some protesters had entered the premises of the Ministry of Health and Care Services and that they also were marching on the outside. B and her police colleague were one of the units sent to the scene. B stated that there were protesters outside the Ministry's premises when the police arrived. These persons had banners, filmed and chanted. According to B, there were about ten protesters inside the premises, who had sat down in 'somewhat tricky places'. B said, among other things, that some of the protesters had placed their legs between steel cables connected to the sun shading on the windows, that 4-5 people were sitting by the entrance gate to the premises and that two had also glued their hands to the entrance gate. Defendant A was part of the group sitting by the entrance gate. A had not glued her hands, but was sitting on the floor by the entrance gates, see the video and the photo identifying A."

(17) The police witnesses stated in the District Court that the police had been notified of the protest march planned on 25 August 2021, and had representatives following the demonstration. However, the police did not know that some of the protesters would also enter the Ministry. In the Court of Appeal, there was consensus that the police had not been formally notified of the demonstration inside the Ministry in accordance with section 11 of the Police Act. According to this provision, anyone wishing to use a public place for a demonstration "shall notify the police accordingly well in advance". The notification shall ordinarily be in writing and contain details on the venue, among other things.

(18) The police did not intervene on their own initiative, but awaited notification of the Ministry's wish to have the protesters removed. After a while, a written request came from the Ministry's security services department (SAV), rounding off as follows:

> "SAV requests the Oslo Police District to move/remove personnel blocking the entries/exits of the ministry buildings. This constitutes an obstacle to the day-to-day operation of the Ministry, and it blocks emergency exits in the event of fire or other incidents that require evacuation of the building."

(19) When assessing the demonstration's effects on the operation of the Ministry, the District Court found as follows based on the evidence presented:

> "The Court notes that several protesters, including A, were sitting by the entrance gate to the premises, which according to B was the main entrance, used by both visitors and employees. The Court finds that the removal of A – who was among the protesters sitting by the entrance, thus obstructing such an escape route in the event of evacuation – pursued a legitimate aim. The extent to which the protesters inside the premises also 'an obstacle to the day-to-day operation' of the Ministry (see the request) appears to the Court as more uncertain. Based on the evidence presented, nothing suggests that the protesters hindered the ministry's operations, behaved aggressively or noisily, contributed to destruction or similar."

(20) Based on the Ministry's request, the protesters were first requested to disband, which they did not. The District Court has described the police's further handling of the situation as follows:

> "When, after a few minutes, the protesters chose not to comply with the request, the police went back and ordered each individual to leave as they were disturbing the peace and order in the building. According to B, the police then told the protesters that they had fifteen minutes to leave and that they would be taken into police custody if they did not comply. According to, they were all asked if they had understood the order, to which they nodded and said yes. None of the ten people in the room moved, and the police made arrests after receiving a warrant. Ten people were taken into custody at the

> police station. According to B, the protesters were easy to deal with all along, and it all went peacefully."

The freedom of assembly and demonstration

Principles and rationale

(21) The freedom of assembly and demonstration is laid down in Article 101 subsection 2 of the Constitution:

> "All people may meet in peaceful assemblies and demonstrations."

(22) The right to meet in assemblies is closely linked to the freedom of association, laid down in the Article's subsection 1, and the freedom of expression in Article 100. When Article 101 was adopted in connection with the constitutional revision in 2014, the Storting's Standing Committee on Scrutiny and Constitutional Affairs emphasised that the freedom of assembly is crucial to the development and safeguarding of the democracy. In Recommendation 186 S (2013–2014) page 27, the following is set out:

> "Constitutionalisation of the freedom of assembly and association constitutes an obstacle that will ensure the protection of means that contribute to the safeguarding of our democracy and rule of law."

(23) In the same passage, it is set out that the constitutionalisation was not meant to entail any change to the current status of the law. The freedom of assembly was also previously protected under several international human rights conventions, including in Article 11 of the ECHR and Article 21 of the International Convention on Civil and Political Rights (ICCP). Article 101 of the Constitution must therefore be interpreted in the light of the international conventions, see also the Supreme Court judgment HR-2022-981-A *Extinction Rebellion* paragraph 18.

(24) I also mention the Human Rights Commission's report on human rights in the Constitution, Document 16 (2011–2012). Here, the freedom of assembly and association is discussed in chapter 29. On page 167, the Committee states the following on the freedom of demonstration, as a particularly important part of the freedom of assembly:

> "The freedom of demonstration is a particular expression of the freedom of assembly and must be understood as an assembly in support of or in protest against something or someone. In a democratic society, it is particularly important that different points of view come to light on the actions, assessments or decisions of others. At the same time, a rule of law state must be founded on the idea that everyone may display their protests in community with others, without having their freedom restricted."

(25) The preparatory works to the constitutional provision further clarify that the freedom of assembly is not absolute, and that interference or restrictions may take place within the scope of the international conventions, see Document 16 (2011–2012) pages 166–167.

(26) Hence, the right to participate in peaceful assemblies and demonstrations enjoys a strong protection in law. The protection in the Constitution is presupposed to be of the same scope as the international conventions by which Norway is bound. Central among these is Article 11 of the ECHR, and the further limitations on measures must therefore be determined based on

case law from the European Court of Human Rights (the ECtHR). I also mention the UN Human Rights Committee's General Comment No. 37 on the right of peaceful assembly of 17 September 2020, which clarifies the legal content of Article 21 of the ICCPR.

Article 11 of the ECHR – the scope

(27) Article 11 of the ECHR reads:

> "Art 11. Freedom of assembly and association
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. …"

(28) According to the wording, the provision only protects *peaceful assemblies*. It is undisputed that the demonstration in question was peaceful.

(29) The ECtHR's case law further clarifies that also assemblies or demonstrations where the participants commit non-violent offences are protected at the outset. Interference with protests partially consisting of *civil disobedience* must therefore meet the conditions in Article 11 (2). I mention the ECtHR's Grand Chamber judgment of 15 October 2015 *Kudrevičius and Others v. Lithuania* paragraph 97, which concerned obstruction causing serious disruption and the judgment of 1 September 2022 *Makarashvili v. Georgia* paragraph 84*,* which concerned protesters blocking the entrance to the parliament in Tbilisi. However, in both judgments, the ECtHR stated that obstructing the ordinary course of life and severe disruption of lawful activities carried out by others, are "not at the core of that freedom as protected by Article 11". This must be read to mean that the authorities' measures against such demonstrations are more easily deemed proportionate.

(30) Nor the failure by organisers or participants to notify the authorities where this is required under national law makes the demonstration fall outside the scope of Article 11 of the ECHR. However, also this is part of the proportionality assessment, see *Kudrevičius and Others v. Lithuania* paragraph 147 et seq.

Conditions for interference – overview

(31) In *Extinction Rebellion*, the Supreme Court clarified the legal starting points for interference with the freedom of assembly. The case concerned fining of two protesters for disturbance of the peace and for violation of the Police Act in connection with a traffic blockade on Ring 1, which is the main arterial road in the inner city of Oslo. The Supreme Court found in that individual case that a fine or an alternative prison sentence did not amount to a violation of Article 11 of the ECHR. Also, this was not considered to be a borderline case, see paragraph 55. Due to the sit-down, the morning traffic was blocked in both directions for one and a half

hour. In paragraph 46, it is set also out that the protest "created a dangerous situation and hazard to life and health".

(32) Although the factual circumstances differ from those in the case at hand, the basic legal starting points for possible measures are the same. In order to be lawful, an interference with the freedom of assembly must meet the conditions in Article 11 (2): The restrictions must be prescribed by law, pursue one of the legitimate aims mentioned in the provision and be necessary in a democratic society.

(33) In *Extinction Rebellion* paragraph 23, it is stated with a reference to *Kudrevičius and Others v. Lithuania* that because the right to freedom of assembly is fundamental in a democratic society, the exceptions must be *narrowly interpreted*.

(34) The police's measure towards A consisted in ordering her to leave the Ministry's property. By the time the police intervened, the protest had lasted for nearly three hours. A was first requested to leave in line with the Ministry's wish, which she refused. She was then ordered to leave within 15 minutes. When she refused to follow the police's order, she was arrested and taken to the police station, where she was detained for six hours and forty minutes. She was issued a penalty notice for not complying with the police's order.

(35) The lawfulness of the interference depends on whether *sum of measures* taken by the authorities – before, during and after the demonstration – meet the conditions in Article 11 (2), see *Extinction Rebellion* paragraph 24. There are examples in ECtHR case law of the Court in such cases assessing the proportionality of the individual measure, before making an overall assessment, see for instance the judgment of 23 September 1998 *Steel and Others v. the United Kingdom* paragraph 103 et seq and judgment of 8 March 2022 *Ekrem Can v. Turkey* paragraphs 90 and 92.

(36) In the case at hand, the parties agree that the police's measures were *prescribed by law*, yet so that A maintains that the deprivation of her liberty was unlawful and incompatible with Article 5 of the ECHR. It is further agreed that the measure *pursued a legitimate aim*; that is, the consideration of preventing disorder and protecting the rights and liberties of others. The salient point is therefore the proportionality assessment: whether the measure as a whole was necessary in a democratic society.

The proportionality assessment

(37) In *Extinction Rebellion* paragraphs 25 to 33 Justice Høgetveit Berg presents the content of the proportionality assessment based on *Kudrevičius and Others v. Lithuania.* Paragraph 26 describes the basic interests that must be balanced as follows:

> "In one balance of the scale are the purposes mentioned in Article 11 (2) of the ECHR. In the other is the free expression of options by word, gesture or even silence by persons assembled on the streets or in other public place, see paragraph 144. It is central to the assessment whether the measure is reasonable and suitable for achieving the purpose in question. As a starting point, there is a requirement that other and less intrusive measures suitable for achieving the purpose are unavailable, see paragraph 143 and *Kjølbro* page 852."

(38) Justice Høgetveit Berg then highlights several factors to be assessed, such as (i) the nature and the severity of the sanction, (ii) the significance of prior approval requirements, (iii) the nature of the demonstration and the level of disruption, (iv) whether the disruption is intended or merely a side effect of the demonstration, (v) whether there is a connection between the message and the person at whom the demonstration is directed, and (vi) whether there are other effective and available ways of expressing the same. In paragraph 34, the following summary is provided:

> "… Society must tolerate a certain level of disruption of ordinary life, and the authorities must exercise a certain degree of tolerance. Under the circumstances, this also implies that the authorities must wait to intervene. However, the degree of tolerance cannot be determined in general, but must be assessed in each case – particularly with regard to the effects of the disruption. Where there is a risk to life and health, the authorities can intervene immediately. Also, it generally takes a lot for measures against a protest that creates serious obstruction of traffic, and which has not been announced and is contrary to national regulations, to constitute a violation of Article 11 of the ECHR."

(39) The assessment of whether the measure is necessary and proportionate must be carried out individually, and which factors assert themselves will vary along with the individual facts. Moreover, the overview of factors is not necessarily exhaustive.

(40) In the case at hand, the defence counsel has stressed that the use of *punishment as a sanction* makes the interference disproportionate. On the use of criminal sanctions for offences committed in connection with peaceful demonstrations, the following is set out in *Kudrevičius and Others v. Lithuania* paragraph 146:

> "The nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued … . Where the sanctions imposed on the demonstrators are criminal in nature, they require particular justification (see Rai and Evans, cited above). A peaceful protest should not, in principle, be rendered subject to the threat of a criminal sanction …, and notably to deprivation of liberty … . Thus, the Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence … ."

(41) In other words, the use of criminal sanctions for offences during demonstrations protected by Article 11 requires particular justification to be considered proportionate. The requirement of particular justification also applies to criminal sanctions for civil disobedience.

(42) The ECtHR's inadmissibility decision of 17 November 2009 *Rai and Evans v. the United Kingdom,* referenced in the quote, concerned the arrest, detention for some hours and fining of two protesters for having organised and participated in a demonstration within a designated area where unauthorised protests were prohibited under English criminal law. The ECtHR found that the sanctions were proportionate and stated:

> "Finally, the Court notes that the sanctions foreseen by section 136 of the 2005 Act are criminal and, as such, require particular justification. However, as noted above, the present sanctions concerned only unauthorised protests in certain limited and security sensitive areas. The applicants continued with the protest on the day even after the police gave them an opportunity to disband without the imposition of any sanction. Moreover, the sanctions actually imposed were not severe. While the first applicant (charged with organising the protest) risked imprisonment and/or a fine, he was ordered to pay a fine at

> the lowest end of the statutory scale and to contribute a relatively small sum to prosecution costs. The second applicant (charged with participating) risked a fine but was simply conditionally discharged (no fine would be imposed if she refrained from participating in unauthorised protests for 12 months) and to contribute a small sum to prosecution costs. Having regard to the above, the Court does not consider that the present sanctions, of themselves, rendered disproportionate the interference with the applicants' rights."

(43) The decision shows that the criminal sanction is assessed on an entirely individual basis, and that both the penalty the person in question risks and the actual sentence are significant. In this decision, the ECtHR emphasised that the criminal sanction only concerned unauthorised protests in certain limited and security sensitive areas.

(44) In *Kudrevičius and Others v. Lithuania,* the ECtHR concluded after an individual assessment that the relevant sanctions were proportionate, and gave the following reasoning in paragraph 173:

> "As can be seen from the above case-law, the intentional serious disruption, by demonstrators, to ordinary life and to the activities lawfully carried out by others, which disruption was more significant than that caused by the normal exercise of the right of peaceful assembly in a public place, might be considered a "reprehensible act" within the meaning of the Court's case-law (see paragraph 149 above). Such behaviour might therefore justify the imposition of penalties, even of a criminal nature."

(45) Here, it is expressed that protesters' use of *intentional serious disruption* to ordinary life and the lawful activities of others that exceeds disruption normally caused by the exercise of the right to peaceful assembly, might be considered a reprehensible act. Such reprehensible behaviour may therefore justify the use of criminal sanctions, see also *Extinction Rebellion* paragraph 34.

(46) The required seriousness of the disruption must assessed individually. However, the use of criminal sanctions against less serious disruption will impose strict demands on the authorities' reasoning for why the sanction is proportionate and necessary to pursue the legitimate aim, and thus justified.

(47) The prosecutor maintains that importance must be attached to the State's right of ownership and right to manage governmental buildings, although Protocol 1 Article 1 of the ECHR is not directly applicable. Here, I start by mentioning the ECtHR's judgment of 8 March 2022 *Ekrem Can and Others v. Turkey,* which, with reference previous case law, clarifies that the right to freedom of assembly in principle includes the right to choose the time, place and manner of conduct, but within the limits established in Article 11 (2). The case concerned 15 protesters who staged a protest in a courthouse. Among other things, they had locked themselves in a corridor, thereby impeding hearings that were taking place. For this, they received lengthy prison sentences, which the ECtHR found to constitute a violation of Article 11. About the place of the assembly, the following is set out in paragraph 81:

> "The right to freedom of assembly includes the right to choose the time, place and manner of conduct of the assembly in question, within the limits established in paragraph 2 of Article 11… . In particular, that provision does not require the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property, such as, for instance, government offices and ministries… ."

(48) In its individual assessment, the ECtHR found that the interference with the protest was in itself necessary, mentioning among other things that the protesters had disrupted an essential public service. In paragraph 91, the ECtHR further stated that the general principles in *Kudrevičius and Others v. Lithuania* apply correspondingly:

> "These considerations are equally valid in the context of the present case where the applicants staged their protest in a courthouse in combination with other acts that were, albeit non-violent, capable of seriously disturbing the orderly administration of justice."

(49) Particularly when it comes to peaceful demonstrations connected to official buildings, I add that the UN Human Rights Committee in its General Comment No. 37 to Article 21 of the ICCPR discusses the possibility to interfere with the freedom of assembly with regard to time, place and manner of assembly. The following is set out in paragraphs 55 and 56:

> "As for restrictions on the element of place, peaceful assemblies may in principle be conducted in all spaces to which the public has access or should have access, such as public squares and streets. While rules concerning public access to some spaces, such as buildings and parks, may also limit the right to assemble in such places, the application of such restrictions to peaceful assemblies must be justifiable in terms of article 21. …
>
> The designation of the perimeters of places such as courts, parliaments, sites of historical significance or other official buildings as areas where assemblies may not take place should generally be avoided, inter alia, because these are public spaces. Any restrictions on assemblies in and around such places must be specifically justified and narrowly circumscribed."

(50) This means that interference with demonstrations connected to official buildings must be justified under the criteria in Article 21, which corresponds to Article 11 (2) of the ECHR, and the conditions for interference must be strictly interpreted.

(51) Based on these legal starting points, I will now turn to my individual assessment of whether there has been a violation of A's right to freedom of assembly and demonstration.

The individual proportionality assessment

The police's order

(52) I will first consider the police's order. It is undisputed that this was warranted in section 5 see section 7 (1) of the Police Act, and justified by the consideration of preventing disruption and safeguarding the rights and liberties of others.

(53) Although the police knew that Extinction Rebellion would be conducting a protest march in Oslo on that particular day, they had not been notified of the demonstration inside the Ministry's reception area, as required in section 11 of the Police Act. Although this is significant, it does necessarily justify measures taken by the authorities, see *Extinction Rebellion* paragraph 28. As long as the demonstration enjoys protection under Article 11, the authorities must exercise a certain degree of tolerance.

(54) The demonstration was aimed directly at the Ministry, and the protesters demonstrated against Norwegian authorities' climate policy and destruction of nature. The message was thus aimed directly at the authorities, and the disruption involved affected to a limited extent persons

other than those targeted. This implies that the threshold is higher for a measure to be considered proportionate, and political statements aimed at the "administration of the State" are also at the core of the freedom of expression, see Article 100 subsection 3 of the Constitution.

(55) The reception area was open to the public. The District Court found no evidence that the protesters impeded the Ministry's operation, acted aggressively or noisily, contributed to destruction or similar. A was sitting on the floor in the open public area by the entrance gates to the inner zone of the building. She was calm, not glued to anything and did not block the entrance.

(56) The District Court did find it proven that A was sitting in a way that blocked an emergency exit. However, as I understand the findings of fact, there was no significant security risk associated with this. Overall, I find that the demonstration did not create any intentional serious disruption. Also, the demonstration was lawful until the police interfered with an order under the Police Act.

(57) At the same time, the Ministry's security services department exercised significant tolerance. A and the nine other protesters were allowed to demonstrate as planned for several hours. The police were notified of the protesters' entry into the Ministry around 11.40, and the orders to leave the property were issued around 1.30 p.m. with a deadline at 1.50 p.m. Thus, the protesters had sufficient time to display their message.

(58) The interference caused by the measure was not directed at the statements or the demonstration as such, but at the means used by A when sitting down in the reception. The order was only that A had to leave the Ministry's property. Thus, she was free to continue the demonstration on the outside.

(59) In the light of the limited interference caused by the measure, I cannot see that we are dealing with a disproportionate interference with the freedom of assembly. The police's conduct at the scene while the demonstration was being disbanded inside the Ministry, suggests that the interference was disproportionate. Once the order had been given, A had a duty to comply, which means that the police could lawfully have removed A from the reception, if necessary, by carrying her out.

The arrest and the subsequent deprivation of liberty

(60) A was arrested when she did not comply with the order to leave the Ministry's property. The defence counsel maintains that the arrest and subsequent detention were incompatible with Article 5 of the ECHR, and that this crucial to determine whether the measure was proportionate also under Article 11. I will first consider whether the measure was prescribed by national law.

(61) The arrest took place in accordance with section 173 subsection 2 of the Criminal Procedure Act. According to this provision, a suspect who is not known to have a permanent place of residence in the realm may be arrested "when there is reason to fear that he will, by fleeing abroad, evade prosecution or the execution of a sentence or other precautions". The basis for the charge was violation of section 30 (1) see section 5 of the Police Act for failing to comply with a police order. A was not at any time charged with other offences, neither in connection

with the arrest nor later. On this count, the case differs from that in *Extinction Rebellion*, which also involved a charge for disturbance of the peace, and where the arrest took place in accordance with section 173 subsection 1 of the Criminal Procedure Act.

(62) I mention initially that a violation of section 30 (1) of the Police Act gives a maximum sentence of "fines or imprisonment not exceeding three months". Due to the low maximum sentence, A could not be arrested under the main rule in section 171 of the Criminal Procedure Act. This provision requires just cause for suspicion of acts "punishable by imprisonment for a term exceeding six months".

(63) The deprivation of liberty lasted for 6 hours and 40 minutes. It was thus also not warranted in section 8 of the Police Act section 8, which on further conditions allows bringing persons to the police station or similar in connection with disturbance of the peace among other things. According to section 8 subsection 2, no-one may be detained under this provision "longer than 4 hours".

(64) What determines whether A's arrest was in accordance with national law, which is a basic condition under Article 5 of the ECHR, is therefore whether the conditions in section 173 subsection 2 of the Criminal Procedure Act are met.

(65) The decision on arrest is justified by the risk of evasion of prosecution. It sets out that A "is not known to have residence in the realm", and that there is reason to fear that she "by fleeing abroad will evade prosecution or execution of a sentence". Arrest under section 173 subsection 2 may take place without regard to the size of the penalty, see the reference to subsection 1.

(66) In connection with the arrest inside the Ministry, the police had learned that A was Swedish. She identified herself by a Swedish driver's licence. The salient point is therefore whether there was reason to fear that A would evade "prosecution or the execution of a sentence" by "fleeing abroad".

(67) I assume that, like under the ordinary condition for arrest if there is a risk of evasion in section 171 (1) of the Criminal Procedure Act, that preponderance of probability is not required, only that there must be certain objective and concrete evidence, see "reason to fear". The wording further requires evasion by "fleeing abroad". Whether the conditions are met must be assessed, among other things, in the light of the severity of the charge. With regard to the content of section 173 subsection 2, I mention Keiserud and others., *The Criminal Procedure Act, Commentary*, à jour as of 1 July 2022, the comment to section 173, which reads:

> "In contrast to section 171 subsection 1 (1), it is only the risk of flight abroad that may justify arrest and imprisonment according section 173 subsection 2. Thus, foreigners who do not have permanent residence in Norway may more easily be assumed to flee abroad than Norwegians, especially when they have family in another country. The provision primarily applies to foreigners who commit an offense during their stay in Norway, provided the use of an alternative to imprisonment is not sufficient, such as confiscation of driving license or passport, see Proposition to the Odelsting No. 53 (1983–84) section 3.1.2.1 (pages 25–26). Arrest is particularly relevant if the relevant person is from a country with which Norway has no extradition agreement. In all cases, it is a condition that the fear of evasion of punishment will occur in connection with flights abroad."

(68) The Proposition referenced in the quote sets out that the provision is meant to be narrow, and that its "primary purpose is to preserve the possibility for alternatives to imprisonment without the suspect's consent", see page 26. On the same page, it is stated that towards Nordic citizens, the confiscation of passport will be inappropriate, but that there are other options, such as "confiscation of driving licence". Finally, the Ministry mentions that persecution and execution of sentences in the other Nordic countries otherwise do not create large problems in practice.

(69) In the light of the wording and the guidelines in the preparatory works on the scope of the grounds for arrest, it is difficult to see that the arrest and the subsequent detention of A had sufficient legal basis in section 173 subsection 2. In any case, it applies without a further proportionality assessment under section 170 a of the Criminal Procedure Act and the possibilities to apply alternatives under section 181 subsection 1. No circumstances have been mentioned that may suggest any escape risk, apart from A being Swedish. The charge concerned a fineable offence.

(70) The requirement of a legal basis in Article 5 of the ECHR means that any deprivation of liberty must take place in accordance with a "procedure prescribed by law". In other words, it is a requirement that both the procedural and the substantive conditions for detention under national law must be met, see Kjølbro, *The European Convention on Human Rights, for practitioners*, 2020, page 419 with a reference to ECtHR case law. Deprivation of liberty contrary to national law is contrary to Article 5 of the ECHR, and I must therefore conclude that A's detention was a violation of Article 5.

(71) This in itself is significant when assessing whether the authorities' measures were overall necessary and proportionate under Article 11 of the ECHR (2). In my view, however, regardless of the lack of a legal basis, there may be reason to question the necessity of detaining A for 6 hours and 40 minutes, particularly in the light of the charge and the limited disruption caused by the demonstration. As mentioned, the fact that the demonstration was a political protest aimed directly at the authorities entails that the same the authorities must exercise tolerance. Their interference must not exceed what is necessary to pursue the legitimate aim.

The criminal sanction and the overall proportionality assessment

(72) For refusing to comply with the police's order, A was sentenced to a fine of NOK 8 000, alternatively to 14 days of imprisonment. As I have explained, the use of punishment requires particular justification. The imposition of a fine is a milder reaction than imprisonment, but a fine is also a criminal sanction. The penalty notice may be enforced by imprisonment if the person charged does not pay, and the reaction is registered in the penalty and fining register.

(73) An intentionally disobeyed the police's order, and thereby committed an offence. Considerations of general deterrence normally imply that offences must be punished. The legislature has also discussed, but not issued any, provisions on exemption from criminal liability in connection with civil disobedience protests, see Proposition to the Odelsting no. 90 (2003–2004) page 109.

(74) In the individual case, the penal provision in section 30 (1) of the Police Act must nonetheless be applied within the scope of the freedom of assembly and demonstration. Also, criminal

sanctions for acts committed in connection with the exercise of these rights must be necessary and proportionate.

(75) Case law from the Supreme Court and the ECtHR clarifies that also the use of criminal sanctions for disobeying a police order during a demonstration may in some circumstances be justified. This is particularly the case for intended and serious disruptions. Other specific circumstances may also render the use of sanctions proportionate, for example where protests are held in particularly exposed areas. However, there are no rulings from the ECtHR that directly concern situations comparable to that at hand, and ECtHR case law does not clarify the lower threshold for interference.

(76) In my assessment, it is not necessary to take a final stand as to whether A could have been issued a penalty notice for failing to comply with the police's order, alternatively after being taken to the police for only a short period under the Police Act. I find it decisive that, when viewing the criminal sanction here in context with the unwarranted arrest and the deprivation of liberty, the overall interference cannot be considered proportionate and necessary to pursue the legitimate aim that justified it.

Conclusion

(77) Against this background, I have concluded that the imposition of a fine, seen in the light of the preceding arrest and deprivation of liberty, constitutes a disproportionate interference with A's right to participate in peaceful assemblies and demonstrations, see Article 101 of the Constitution and Article 11 of the ECHR.

(78) This implies that she must be acquitted of failing to comply with the police's order during the demonstration inside the Ministry on 25 August 2021.

(79) However, a fine must be measured for the offence finally adjudicated in the District Court's judgment. The District Court found at the outset that under aggravating circumstances the fine should be set at NOK 11 000. I agree. A proportionate deduction must be made from the fine for four days spent in custody on remand, see section 83 subsection 1 see subsections 2 and 6 of the Penal Code, and *Extinction Rebellion* paragraph 68. The fine is therefore set at NOK 7 000. An alternative prison sentence is set at 11 days with a deduction of four days for time spent in custody on remand.

(80) I vote for this

J U D G M E N T :

1. A is acquitted of the offence in the penalty notice of 25 August 2021.

2. For the offence finally adjudicated in the District Court's judgment, the sentence is set at a fine of NOK 7 000, or 11 days of imprisonment. Deducted from the alternative prison sentence are four days for time spent in custody on remand.

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

(82) Justice **Bergh:** Likewise.

(83) Acting Justice **Elsheim:** Likewise.

(84) Justice **Webster:** Likewise.

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

J U D G M E N T :

1. A is acquitted of the offence in the penalty notice of 25 August 2021.

2. For the offence finally adjudicated in the District Court's judgment, the sentence is set at a fine of NOK 7 000, or 11 days of imprisonment. Deducted from the alternative prison sentence are four days for time spent in custody on remand.