SUPREME COURT OF NORWAY

J U D G M E N T

given on 25 November 2024 by the Supreme Court composed of

Justice Wilhelm Matheson
Justice Aage Thor Falkanger
Justice Ingvald Falch
Justice Espen Bergh
Justice Kine Steinsvik

HR-2024-2161-A, (case no. 24-074141STR-HRET)
Appeal against Agder Court of Appeal's judgment 7 March 2024

I.
A
B
C (Counsel Elif Demirbas)

v.

The Public Prosecution Authority (Counsel Alf Butenschøn Skre)

D, represented by guardian (Counsel John Christian Elden)

II.
The Public Prosecution Authority (Counsel Alf Butenschøn Skre)

v.

A
B
C (Counsel Elif Demirbas)

(1) Justice **Steinsvik:**

Issues and background

(2) The case concerns possible criminal liability for entering into a marriage-like relationship with a 14-year-old girl in Bulgaria. It raises the question of whether Norwegian courts have jurisdiction, and if so, whether the Court of Appeal has correctly interpreted and applied section 262 subsection 2 of the Criminal Procedure Act. Furthermore, the case raises issues regarding sentencing, confiscation and aggravated damages. For one of the defendants, the case also concerns the lower threshold for "depiction that sexualises children" in section 311 of the Penal Code.

(3) The three defendants, the married couple B and C and their son, A, have lived in Norway since 2019. The family originates from X in Bulgaria. The aggrieved person, D, comes from Y, a town approximately 37 kilometres from X. Both the defendants and the aggrieved person belong to a Turkish-speaking Muslim minority in the country.

(4) A and D met via Facebook in October 2021 and eventually started a romantic relationship. A travelled to Bulgaria from 4 to 25 December 2021, where he met with D a couple of times. I early January 2022, A travelled to Bulgaria again, this time along with his father. When returning on 28 February 2022, he brought D with him. She was then 14 years old, and A was 23.

(5) When arriving in Norway, B and D were stopped at the immigration control at Sandefjord airport, Torp. The police made some initial inquiries and, based on their findings, sent a notice of concern to the child welfare services. On 3 March 2022, the police and the child welfare services conducted an inspection at the defendants' home in Oslo. During the inspection, the child welfare services issued an emergency care order to place D in an institution. D stayed in the child welfare institution for slightly longer than a month before she was returned to Bulgaria. There, she was placed in the care of Bulgarian child welfare services before being reunited with her parents.

(6) On 26 May 2023, the Prosecution Authority of Vestfold, Telemark and Buskerud, indicted B, C and A for violation of section 262 subsection 2 see section 15 of the Penal Code for having entered into a marriage-like relationship with a person under the age of 16, or for contributing thereto – count I of the indictment. The basis was as follows:

> "On Saturday 29 January 2022 in X in Bulgaria, A entered into a marriage or a marriage-like relationship with D, born 00.00.2007, by holding a ceremony where they, among other things, exchanged rings.
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> A's parents, B and C, contributed to the execution of the ceremony by buying a dress for D, organising a venue and otherwise instigating the event."
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> On Monday 28 February 2022, D travelled to Norway via Torp airport in Sandefjord together with A and B to live with them on ---road 000 in Oslo indefinitely."

(7) A was also indicted for violation of section 311 subsection 1, see subsection 2, of the Penal Code for producing a depiction that sexualises children, or for possessing such depictions. The basis for count II of the indictment read:

> "During the period from 29 January 2022 to 21 March 2022 in X in Bulgaria and in Norway, he took sexualised photos of D, born 00.00.2007, only dressed in underwear in a bed or in a bedroom, and stored the photos on his mobile phone."

(8) By Vestfold District Court's judgment 7 November 2023, all three defendants were convicted of violating section 262 subsection 2 see section 15 of the Penal Code. All three were sentenced to 11 months of imprisonment. In addition, A was convicted of violating section 311 subsection 1, see subsection 2 of the Penal Code. The defendants were also jointly and severally ordered to pay NOK 75,000 in aggravated damages to D.

(9) The three defendants appealed against the judgment to the Court of Appeal. The appeals concerned the findings of fact and the application of the law in determining guilt, and the sentencing. C also appealed against the procedure, citing flawed reasoning. In addition, all three demanded a new hearing of the civil claim.

(10) Agder Court of Appeal agreed to hear the appeals against the findings of fact in the determination of guilt. During the hearing in the Court of Appeal, the Public Prosecution Authority – unlike in the District Court – requested the confiscation of A's mobile phone, which was used to take the photos covered by count II of the indictment.

(11) On 7 March 2024, the Court of Appeal ruled as follows:

> "1. A, born 00.00.1998, is convicted of violating section 262 subsection 2 and section 311 subsection 1 see subsection 2 of the Penal Code and sentenced to eleven months of imprisonment. Section 79 (a) of the Penal Code applies.
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> A deduction of three days is granted for time spent in custody on remand.
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> 2. A, born 00.00.1998, is sentenced to the confiscation of a mobile phone referred to as seized object A-1, see sections 69 and 75 of the Penal Code.
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> 3. B, born 00.00.1974, is convicted of violating section 262 subsection 2 see section 15 of the Penal Code and sentenced to eleven months of imprisonment.
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> 4. C, born 00.00.1979, is convicted of violating section 262 subsection 2 see section 15 of the Penal Code and sentenced to seven months of imprisonment.
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> 5. The District Court's judgment, item 4 of its conclusion, is upheld."

(12) The Public Prosecution Authority has appealed against the sentencing.

(13) A, B and C have appealed against the application of the law under count I, the procedure and the sentencing. A has also appealed against the application of the law under count II and the confiscation. I addition, all three have demanded a new hearing of the claim for aggravated damages.

(14) On 27 June, the Supreme Court's Appeals Selection Committee allowed the appeals against the sentence to proceed with regard to the application of the law, the sentencing and the confiscation. At the same time, consent was given for a new hearing of the claim for aggravated damages.

(15) The aggrieved person, D, has also demanded a new hearing of the claim for aggravated damages. The Supreme Court's Appeals Selection Committee consented to a new hearing of the claim on 25 September 2024.

My opinion

The issues and the further discussion

(16) The case raises several issues. Regarding section 262 subsection 2 of the Penal Code, the primary question is whether Norwegian courts have jurisdiction, see section 5 of the Penal Code. Secondly, the question is whether the Court of Appeal has misapplied the condition in section 262 subsection 2 second sentence on punishment for a person who "establishes a marriage-like relationship" with a person under the age of 16.

(17) The indictment for violation of section 311 of the Penal Code on depiction that sexualises children addresses the lower threshold for criminal liability. For this count, it is also a question of whether the Court of Appeal could hand down a judgment for confiscation of the mobile phone the defendant had used to take the photos of the aggrieved person, when confiscation had neither been requested in nor considered by the District Court.

(18) For the civil claim, it is a question of applicable law, sentencing and of whether the convicted individuals, if found liable, should be ordered to pay one common or separate amounts of aggravated damages.

(19) I find it expedient to begin by outlining my view of the general interpretation of section 262 subsection 2 second sentence of the Penal Code. Then I will consider the jurisdiction issue and the Court of Appeals application of the law under count I of the indictment, before I consider the issues under count II, the sentencing and the civil claim.

The requirement of a legal basis

(20) The defence counsel argues that it would contradict Article 96 of the Constitution and Article 7 of the European Convention of Human Rights (ECHR) to convict the defendants, and that neither section 5 nor section 262 of the Penal Code meets the requirement of a clear legal basis in this case.

(21) The clarity requirement from Article 96 of the Constitution and Article 7 of the ECHR implies that a penal provision must be sufficiently clear and accessible to the public. This means that the rule must be worded, in most cases, to leave no doubt whether an act is covered by it, and that punishment may be the consequence if the rule is violated, see HR-2024-1107-A *quarantine hotel* paragraph 80 with reference to HR-2020-2019-A *mobile phone* paragraph 14 a seq.

(22) The message in both these rulings is that the clarity requirement does not prevent punishment under provisions that allow some margin for interpretation, as long as the interpretive result is sufficiently rooted in the wording and lies within what may reasonably be expected. The principle that criminal liability must be derived from considering several provisions in

conjunction is not significance as long as the final interpretive result is sufficiently clear, see for instance *quarantine hotel* paragraph 86.

(23) Moreover, case law from the European Court of Human Rights (ECtHR) establishes that the requirement of a legal basis in Article 7 of the ECHR does not prevent a gradual clarification of the rules on criminal liability through legal interpretation from case to case, provided that the development is consistent with the essence of the offence and could reasonably be foreseen, see the ECtHR's Grand Chamber judgments of February 2008 *Kafkaris v. Cyprus* paragraph 141 and 26 September 2023 *Yüksel Yalçınkaya v. Turkey* paragraph 239.

(24) The jurisdiction provisions in the Penal Code constitute a part of the legal basis for criminal liability. If the result of an interpretation of section 5 of the Penal Code is that the conditions for Norwegian jurisdiction are not met, the offender must be acquitted, see Proposition to the Odelsting no. 90 (2003–2004) page 175. Although jurisdiction provisions by their nature do not define which acts are punishable or what the penalty should be, criminal jurisdiction is, according to Norwegian law, an invariable condition for criminal liability. Therefore, the clarity requirement is applicable also when interpreting such provisions, see also HR-2017-1947-A *Dubai II* paragraph 20.

Interpretation of section 262 subsection 2 of the Penal Code

(25) Section 262 of the Penal Code concerns penalties for violations of the Marriage Act etc. Subsection 2 reads:

> "Any person who enters into marriage with a person who is under 16 years of age shall be subject to a penalty of imprisonment for a term not exceeding three years. Any person who enters into a marriage-like relationship as mentioned in section 253 with a person under 16 years of age, shall be punished in the same manner. A person who was ignorant of the fact that the aggrieved person was under 16 years of age may nonetheless be punished if he/she may be held to blame in any way for such ignorance. The penalty may be waived if the spouses are approximately equal in age and development."

(26) The prohibition of child marriage in section 262 subsection 2 first sentence was included in section 220 subsection 1 of the Penal Code 1902 by Act of 4 July 2003 no. 76. The purpose was to enhance the fight against forced marriage. In the Proposition, the Ministry emphasised that entering into a marriage with a child under the age of 16 in itself represents "an assault to the child that should give rise to criminal liability", see Proposition to the Odelsting no. 51 (2002–2003) pages 29 and 36. It is also stated that there is a "strong presumption that the marriage has been entered into by force, when at least one of the spouses is younger than 16 years of age", and that possible voluntariness from the child should "have no significance". Complicity was also made punishable. With the same amendment, a separate penal provision was adopted on forced marriage.

(27) The prohibition of entering into a "marriage-like relationship" with a child under 16 years of age was added by Act of 4 December 2020 no. 135 and took effect on 1 January 2021. The same addition was later made to section 253 of the Penal Code on forced marriage. It is set out in Proposition to the Storting 66 L (2019–2020) page 42 that the background to the amendment was to enhance the legal protection of persons subjected to illegitimate, forced marriages. The Ministry pointed out that illegitimate marriages in practice have many of the

same effects as forced marriages formally entered into, and that the resemblance between the two "calls for a common criminal-law regulation."

(28) *The wording* in section 262 subsection 2 second sentence affects any person who "enters into a marriage-like relationship as mentioned in section 253" with someone under 16 years of age.

(29) The provision formally equates marriage with someone under the age of 16 with an illegitimate marriage with someone under the age of 16. The requirement "marriage-like relationship" must be interpreted in the same manner as the corresponding requirement in section 253 on forced marriage, see the reference in the provision and the special comment in the Proposition on page 45.

(30) The wording in section 253 subsection 1 (b) defines a "marriage-like relationship" as follows:

> "To determine whether a marriage-like relationship has been entered into, it must be emphasised whether the relationship is enduring, perceived as binding and establishes rights and obligations between the parties of a legal, religious, social or cultural nature."

(31) A specification is added in consideration of the clarity requirement in Article 96 of the Constitution and Article 7 of the ECHR, see the Proposition page 42.

(32) The special remark to section 253 on page 158 in the Proposition specifies that it is "insignificant how the relationship is established", and that it is not necessary that it takes place in a "ceremonial form". It is also not necessary that the relationship is entered into "at a certain point in time". A person can therefore "be forced into such a relationship over time". The same must apply when interpreting section 262 subsection 2; however, so that under this provision, due to the child's age, there is no requirement of the use of force.

(33) Furthermore, the special remark clarifies certain aspects in connection with the three factors to be emphasised:

(34) For the relationship to be *enduring,* it must be of a permanent character. Normally a marriage-like relationship will be unlimited in time, but time-limited marriage-like relationships can also be imagined.

(35) When assessing whether the relationship *is perceived as binding,* both the parties' perceptions and their social circle are significant.

(36) Whether the relationship *establishes rights and obligations between the parties,* must be assessed based on both formal and informal norms:

> "The rights and obligations may be of a legal nature that is not recognised in Norway. They may also be of a religious, cultural or social nature. There is partial overlap and no clear distinction between the mentioned categories. The rights and obligations may, for example, concern reproduction and sexual relations. The wording does not prescribe equality between the parties."

(37) In summary, the wording and the preparatory works prescribe a concrete overall assessment based on the mentioned factors. The assessment requires a determination of whether the relationship has sufficient similarities with a formal marriage, in that it is perceived as enduring and binding based on formal or informal norms of a religious, cultural or social

nature. Without sufficient elements of endurance and a binding nature, the relationship will fall outside the scope of section 253 of the Penal Code, and thus also outside section 262 subsection 2.

Norwegian courts' jurisdiction in child marriage cases

(38) The acts in count 1 of the indictment were committed in Bulgaria, and it must therefore be established whether they are covered by Norwegian criminal legislation.

(39) Norwegian courts' jurisdiction in cases regarding child marriage and forced marriage is regulated by section 5 subsection 1 (4) of the Penal Code, which makes an exception from the main rule on dual punishability. The provision states that Norwegian criminal law applies to acts committed by a person residing in Norway, when the acts

> "are deemed to constitute child marriage or forced marriage".

(40) The crucial point in the interpretation is whether the phrase "are deemed to constitute child marriage" should be interpreted to mean that the marriage must be *legally and validly entered into in the country of marriage,* or whether it also covers marriage-like relationships under section 262 subsection 2 second sentence of the Penal Code.

(41) The term "child marriage" is not used in other provisions of the Penal Code, nor is a specific definition provided. Based on a natural linguistic understanding of the term "child marriage", it encompasses all forms of marriage where at least one of the parties is a child, including both civilly registered and religiously established marriages. The fight against child marriage and forced marriage is a high priority on both national and international political agendas, and there is little doubt that the use of the terms are not limited to civil marriages.

(42) Section 5 of the Penal Code regulates the application of Norwegian criminal law to acts committed abroad. To determine what is "deemed to constitute" child marriage under Norwegian criminal law, and thus subject to Norwegian jurisdiction, section 5 must be considered in conjunction with section 262, which regulates the scope of criminal liability for marrying a child. Similarly, what is "deemed to constitute" a forced marriage, must be determined by viewing section 5 in conjunction with section 253.

(43) As I have outlined, section 262 of the Penal Code, after the amendment in 2021, covers both legal and illegal child marriages. The wording of the jurisdiction provision, particularly the phrase "deemed to constitute child marriage", suggests that the decisive factor for jurisdiction is the extent of the criminal liability under Norwegian criminal law at any given time, within the scope of the wording of the jurisdiction provision.

(44) I have not found any statements in *the preparatory works* of direct significance to the issue:

(45) According to the Penal Code 1902, Norwegian jurisdiction in child marriage cases followed from section 12 subsection 1 (3) (a). The provision generally designated Norwegian criminal law for acts committed abroad by Norwegian nationals or "persons residing in Norway" when the act was covered by several chapters in the Penal Code, including chapter 20 on crimes in family relationships. The wording in section 12 subsection 1 (3) (a) implied that expansions of criminal liability under the respective chapters of the Penal Code automatically fell under

Norwegian jurisdiction, unless exceptions were made. Consequently, the then section 220 subsection 1 applied to acts committed abroad from its adoption in 2003, but was limited to Norwegian nationals and persons residing in Norway, as noted in Proposition to the Odelsting no. 51 (2002–2003) page 36.

(46) Upon the adoption of the Penal Code 2005, the system of the jurisdiction provision was changed. The enumeration in the previous section 12 subsection 1 (3) (a) was not continued. In Proposition to the Odelsting no. 90 (2003–2004), the Ministry discussed jurisdiction in cases of forced marriage and child marriage and chose to uphold the legal status established with the adoption of the substantive penal provisions in 2003, see the Proposition page 402. Of some interest is the statement in the Proposition on page 188:

> "The Ministry has not yet taken a position on the legal design and placement of the rules on child marriage, forced marriage or genital mutilation, and for the time being, therefore, only the type of offense is indicated in the Ministry's draft section 5, without reference to sections. This must be added when the special part of the Code has been prepared."

(47) The statement suggests that the term "child marriage" in section 5 was chosen to describe the "type of offence", which in turn suggests that the internal-law scope of the criminal liability for this type of offence must also be deemed to dictate the jurisdiction.

(48) As mentioned section 262 subsection 2 second sentence of the Penal Code was added by an amendment in 2021. The amendment was advanced in Proposition to the Storting 66 L (2019–2020). Changes were made to section 5 in several other regards, but I cannot see that the jurisdiction issue related to the proposed expansion of sections 253 and 262 of the Penal Code is discussed in detail.

(49) I note, however, that in the same Proposition, additions were made to section 196 of the Penal Code on the duty to avert. In the listing of offenses in section 196, a general reference was added to offenses "as mentioned in section 253 (forced marriage)" and "section 262 subsection 2 (marriage with a person who is under 16 years of age)". The Proposition indicates that the Ministry, with the chosen formulations, intended to cover *the entire* content of the two penal provisions. On page 25, it is stated that "the expansion will also include illegitimate marriage with persons under 16 of age". This was also the basis for the Storting's Justice Committee, see Recommendation to the Storting 41 L (2020–2021) page 4, where it "emphasises that the expansion will also include illegitimate marriages with persons under 16 of age".

(50) Definite conclusions cannot be drawn from the preparatory works since the issue is not explicitly discussed. However, both the legislature's purpose of prohibiting extrajudicial marriages with children under the age of 16, the assumption that the two forms of marriage were to be equated, and the statements in connection with the rules on expanded duty to avert, suggest interpreting the jurisdiction provision in section 5 to cover both forms of child marriage. The penal provision on extrajudicial child marriages is particularly significant when the relationship is established abroad.

(51) As I have explained, the clarity requirement comes into play when interpreting section 5 of the Penal Code. I cannot see that interpreting the jurisdiction provision to include both lawful and illegitimate child marriages conflicts with the clarity requirement, as I have outlined its content:

(52) In my view, the wording in section 5 – "deemed to constitute" – is sufficiently broad to cover the description of the act in both the first and second sentence of section 262 subsection 2. Foreseeability considerations are maintained by section 5, which in itself does not contain action norms, referring to other substantive penal provisions through the use of "deemed to constitute". The scope of the criminal liability is clear when considering section 5 in conjunction with section 262 subsection 2.

(53) Although the term "marriage" in section 5 may connote only civil marriages, I find that my interpretive result falls within the essence of section 5 of the Penal Code, in conjunction with section 262 subsection 2. Reading these provisions together also maintains the consideration of foreseeability. The preparatory works to section 262 subsection 2 second sentence also explicitly clarify that the two forms of child marriage in Norwegian law are considered equal.

(54) Nor can I see that it contradicts the clarity requirement that criminal liability for child marriage entered into or established abroad *is in fact* expanded by the adding of section 262 subsection 2 second sentence. As long as the penal provision itself had entered into force at the time the acts in the indictment were committed, and the expansion of section 262 falls within the scope of the wording of the jurisdiction provision, the clarity requirement is met.

(55) Against this background, I conclude that section 5 subsection 1 (4) of the Penal Code must be interpreted to give Norwegian courts jurisdiction on the terms laid down in the provision, in cases regarding violation of section 262 subsection 2 second sentence of the Penal Code.

(56) Therefore, the Court of Appeal has correctly concluded that the acts in the indictment fall within the scope of the Penal Code.

The Court of Appeal's application of section 262 subsection 2 second sentence

(57) Under the appeal against the application of the law, the defence counsel submits that the facts found by the Court of Appeal are not sufficient to meet the requirement of a marriage-like relationship in section 262 subsection 2 second sentence, and that the convicted individuals must therefore be acquitted. As I understand the defence counsel, she also objects to parts of the Court of Appeal's findings of fact, which the Supreme Court cannot review, see section 306 subsection 2 of the Criminal Procedure Act.

(58) The facts that the Court of Appeal has found proven are thoroughly described in the judgment. Briefly, it is set out that A and D did not know each other when they met via Facebook in the autumn of 2021. This was followed by extensive contact on the messaging service WhatsApp from 14 December 2021 to 23 February 2022. They met physically in Bulgaria at least twice during the period from 4 to 25 December 2021, when A was staying there. Both times, each of them was accompanied. A returned once more to Bulgaria in early January 2022 together with his father. Prior to 22 January 2022, A and D had decided to become partners, which they had communicated to their respective parents.

(59) The relationship was discussed in a meeting between the couple's fathers in D's home, and on 22 January 2022 at the latest, the fathers made an agreement to approve the romantic relationship between A and D. On the same day, a gathering was held in the defendants' home in X, where B, A and D's parents participated.

(60) On 26 January 2022, D and A's mother, C, went together to rent and buy party gowns for D. After that, gatherings/parties were held on both 29 and 30 January, where A and D, the parents and respective family members participated. The party started in D's home in Y on 29 January and continued in B's home in X. D was dressed in an evening gown during both gatherings, wearing makeup and a tiara. After the gatherings on 29 and 30 January, C received several greetings on her phone, which were later deleted. The messages referred to D as C's "daughter in law".

(61) No later than on 4 February 2022, D's mother contributed to the issuance of an indefinite and undated authorisation for B to act as D's guardian in all areas of life in Bulgaria and several of other countries. At the same time, an undated travel document was issued, where D's mother consented to B and A leaving Bulgaria with D. D's date of birth was stated in these documents. D travelled together with B and A to Norway on 28 February 2024 to live in their home during their stay.

(62) Based on the overall presentation of evidence, the Court of Appeal found it proven that A and D, from the autumn of 2021 and until 3 March 2022, when D was placed in the child welfare services' care in Oslo, entered into a marriage-like relationship, and that A's parents contributed to this. The Court of Appeal's reasoning does not specify when the relationship was deemed to have been entered into, and consequently consummated. Read in conjunction, my understanding of the premises is that the marriage-like relationship between A and D was consummated before the journey home to Norway, and that the events in connection with the journey and after arriving in Norway are considered subsequent evidence substantiating the establishment of such a relationship.

(63) The following is set out in a summarising paragraph in the judgment:

> "Based on the overall evidence of the events leading up to 3 March 2022, as outlined in the above assessment, the Court of Appeal finds it proven that A entered into a marriage-like relationship with D and that B and C contributed to this. The relationship found proven has the characteristics of being enduring and binding, and of having established rights and obligations, as section 262 subsection 2 second sentence of the Penal Code requires."

(64) I addition to the more exterior circumstances I have already presented, central elements in the Court of Appeal's findings of fact indicate that D, after the gatherings on 29 and 30 January 2022, relocated from her family in Y and to A's family in X, to be cared for by the defendants. After an overall assessment, the Court of Appeal found that the gatherings connoted a ceremony, and that D's appearance signalled "far more" than a romantic relationship in its early days, referred to in the judgment as "söz". D did not have her own money or any sources of livelihood, and she was dependent on A and his family. Furthermore, the Court of Appeal emphasised the extensive written contact between the parties up until 29 January 2022, where they discussed marriage, having children and the use of contraceptives. The intimate photos taken of the couple from 29 January until the departure for Norway are also emphasised. This is true regardless of the Court of Appeal not finding it proven that sexual activity took place between A and D during the period they lived together.

(65) The Court of Appeal has accounted for its interpretation of section 262 subsection 2 second sentence of the Penal Code, and I cannot see that it has committed any errors of law or set the threshold for criminal liability too low. There are several elements in the findings of facts that support the binding and marriage-like nature of the relationship. The actual duration of the

relationship must, here, be considered in the light of its termination upon the child welfare services' intervention after D's arrival in Oslo.

(66) The contention that the provision is not sufficiently clear can also not succeed. While the term "marriage-like relationship" in itself may sound vague, the Penal Code lists the central factors to be included in the assessment. Thus, in my view, the wording maintains the requirements that can be derived from Article 96 of the Constitution and Article 7 of the ECHR.

(67) Against this background, I cannot see that the appeal against the application of the law can succeed. With the facts that the Court of Appeal has found proven, it is clear to me that the threshold for a punishable violation of section 262 subsection 2 second sentence of the Penal Code has been crossed.

Section 311 of the Penal Code – a depiction that sexualises children

(68) Section 311 subsection 1 (a) and (c) reads:

> "A penalty of a fine or imprisonment for a term not exceeding three years shall be applied to any person who
>
> a. produces a depiction of sexual abuse of children or a depiction that sexualises children,
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> …
>
> c. acquires, imports or possesses depictions as specified in (a), or intentionally acquires access to such material,
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> …"

(69) It is the alternative "a depiction that sexualises children" in (a) that is relevant in the case at hand. The question is whether six photos of D found on A's mobile phone are covered by the provision.

(70) The criminal act under (a) is the *production* of such a depiction. According to (c), the provision also covers any person who "possesses depictions as specified in (a)". It can be questioned whether a lower threshold must be set for what can naturally be considered criminal production under (a). The term "produces" suggests a requirement of a certain degree of professionalism, scope or similar. As the case stands, I do not find it necessary to consider whether taking one or a few photos with one's own mobile phone is covered by the production alternative in (a).

(71) The indictment involves both production and possession, and both the District Court and the Court of Appeal have found it proven that A stored the relevant photos on his phone. He was thus in possession of the photos, which are also "depictions" within the meaning of the law. Decisive for the criminal liability is thus whether the photos "sexualise[s] children".

(72) The phrase "a depiction that sexualises children" stands as an alternative to "depiction of sexual abuse" and must therefore cover other depictions than those of abuse situations. The wording requires that the child is depicted in a sexualised situation, or at least in a situation that is generally suited to give sexual connotations. On this point, the provision is a continuation of section 204 a of the Penal Code 1902, see Proposition to the Odelsting no. 22 (2008–2009) side 447.

(73) The phrasing was introduced with the adoption of the previous section 204 in the Penal Code 1902. In Recommendation to the Odelsting no. 66 (2004–2005), it is stated that the Storting's Justice Committee believed that "sexual depictions", which was proposed by the Ministry and used in previous provisions, was "not very clarifying in relation to the gravity of the type of act it intended to cover", see page 3. Regarding the content in the chosen wording, it is stated:

> "The *Committee* points out that seemingly innocent photos of children can be presented in a way that makes the material punishable. The display of the subject may give sexual connotations, for example by presenting the "innocent" material together with more explicit material. The Committee emphasises that the intention is not that fewer cases than under current law should be covered by the new provision.
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> ...
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> The *Committee* further emphasises that the proposed legal text should not only target depictions where sexual assault is documented, but also where children are portrayed as sexual objects. Sexualisation of children can be depictions where a child is forced to pose in sexually provocative positions."

(74) In the same place, it is stated that the central purpose of the rule is to contribute to protecting children against sexual assault.

(75) Significant for the lower threshold for criminal liability are also the statements in the preparatory works to section 211 of the Penal Code 1902, as they read until 2000. Proposition to the Odelsting no. 20 (1991–1992) page 53 sets out:

> "The line must be drawn between 'normal' nude photos of children and photos that are suited to give sexual connotations. If it involves photos where children and adults are depicted together and which allude to a sexual connection between them, the threshold for criminal liability is easily crossed. It will likely take more if the child or children are depicted alone. Decisive here will be whether the child's or children's nudity can be perceived as natural in the context in which the photo appears. Although the child is alone in the photo, an emphasis on the genitalia that leads the mind towards sexual exploitation will be considered 'indecent'. If the child is depicted in a way that leads the attention towards a sexual activity, and at the same time includes elements that further contribute to reinforcing the offensive, degrading or aggravated nature, the material is clearly considered 'indecent'."

(76) Based on statements in the preparatory works and the arguments for criminal liability, I assume that photos of children – to be covered by section 311 subsection 1 of the Penal Code – generally must be suited to give sexual connotations. Both content, presentation and the situation in which the photo is taken are central in the assessment. Where the material consists of several photos, they can be considered together. For photos of children and adults together that suggest a sexual connection between them, the threshold for criminal liability is easily crossed. In such cases, the reasoning behind the rule prescribes a strict assessment. If it involves photos of the child alone, a holistic assessment must be made of whether the photo is natural or generally suited to give sexual connotations.

(77) Against this background, I will now turn to the individual assessment. Since the case involves a limited number of photos, and it is unclear whether each photo is covered by the penal provision at all, I will assess each photo separately.

(78) The Court of Appeal has built on District Court's description of the content in the six photos which forms the basis for the conviction under count II:

> "- Photo taken on 29 January 2022 at 19:19. The photo shows the aggrieved person and A. The aggrieved person is wearing a blue, silky outfit without sleeves. A has a naked torso and black trousers. The photo seems to be taken in a room where the two are alone, with what looks like bed linen in the background.
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> - Photo taken on 14 February 2022 at 02:40. The photo shows the aggrieved person's face and upper body. She is wearing a black bra, and appears to be lying on a bed.
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> - The photo shows A and the aggrieved person. A is lying under what may look like a duvet, with a bare torso. The aggrieved person is holding her left arm around A. She is wearing underwear/a top. The time of the photo is unknown. The sheets on the photo are same as on the other photos covered by the indictment count, and the court therefore considers it proven that the photo is from the relevant period.
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> - Photo taken on 26 February 2022 at 02:58. The photo shows the aggrieved person's upper body. She is wearing a black bra and has messy hair.
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> - Photo taken 28 February 2022 at 01:23. The photo shows parts of the aggrieved person's upper body with a bra, and she is surrounded by bed linen.
>
> - Photo taken 28 February 2022 at 01:23. The photo shows the aggrieved person probably lying in a bed. She is dressed in underwear. A's hand is placed at a height above the aggrieved person's body."

(79) It appears from the Court of Appeal's judgment that during the hearing, there was agreement that all photos were taken in the bedroom of the defendant's home in X, and that the photo in the third indent was taken on 14 February 2022.

(80) I base myself on the lower instances' description and add that the photos have also been presented during the hearing in the Supreme Court. During the appeal hearing, the prosecutor has presented a seventh photo, showing D brushing her hair while standing on the floor in front of a bookcase, dressed in underwear. As I cannot see that this photo has been evaluated by the lower instances' findings of fact, I will disregard it.

(81) Two of the photos show A and D together. The photo in the *first* indent shows the parties sitting together on the edge of a bed. The photo has no direct connection with the others. The only element that may be suited to give sexual connotations, is that A has a naked torso, and that the photo is taken in a bedroom. In my view, however, it not suggest a sexual connection between the parties, nor is the content otherwise suited to give sexual connotations. It then falls below the threshold for a punishable depiction.

(82) However, I find that the photo in the *third* indent crosses the threshold. Here, A and D are lying close together in a bed under a duvet, and D is holding her arms around A. D is wearing a bra. Both torsos are otherwise naked, to the extent they are visible. The photo does not show a natural situation between an adult male and a 14-year-old girl, and it suggests that there is a sexual connection between them.

(83) The four other photos show D alone. The photo in the *second* indent shows D lying in bed wearing a bra and is taken in a temporal context with the photo where A and D are lying close together. The context and content of the photo make it cross the threshold for punishable depiction, but within the lower range.

(84) The photo in the *fourth* indent shows D sitting or standing with a soda bottle in her hand. Her upper body is visible from the navel up, and she is only wearing a bra. Neither the facial expression nor the overall appearance is generally suited to give sexual connotations. The photo is also not connected to any of the others. I therefore believe that the photo does not exceed the threshold for criminal liability in section 311 of the Penal Code.

(85) The last two photos – in the *fifth and sixth* indents – are taken together and show D lying in bed dressed only in underwear. The photo in the sixth indent gives clear sexual connotations based on both the position and D's facial expression. D's body is shown from the thighs up, she is only wearing panties and a bra, striking a sexualised pose. The photos, which must be assessed together, exceed the threshold for criminal liability.

(86) Based on this, I have a different view of the punishability of three of the photos included in the Court of Appeal's basis for convicting A in accordance with count II of the indictment. The offence therefore has a slightly smaller scope than what the Court of Appeal has found, and this must be reflected in the sentencing.

Confiscation

Can the Court of Appeal hear the confiscation request as the first instance?

(87) In the Court of Appeal, A was sentenced to the confiscation of his mobile phone that was used to take and later store the photos in count II of the indictment.

(88) The defence counsel submits that the Court of Appeal's judgment on this point must be set aside, because confiscation was neither requested in nor considered by the District Court. The contention is that a confiscation request cannot be considered by the appellate instance as the first instance.

(89) The confiscation request was made by the Public Prosecution Authority at the beginning of the hearing. The Court of Appeal heard the defendants' appeals against the findings of fact in determining guilt, and the starting point under section 331 of the Criminal Procedure Act is that "a completely new trial of the case shall be held in so far as it has been referred".

(90) Confiscation is a criminal-law reaction, see section 30 of the Penal Code. According to section 38 subsection 2 of the Criminal Procedure Act, the court is not bound by the indictment or the contentions made "with regard to a penalty and other applicable sanctions". Confiscation is another sanction, see section 2 (2) of the Criminal Procedure Act. The provision implies that the District Court is not bound by a confiscation request, and it may impose a greater confiscation liability than contended, provided both parties have had the opportunity to express their views on the matter, see section 38 subsection 3.

(91) Section 38 of the Criminal Procedure Act also applies to the appellate instance, see section 327 subsection 1. However, the question is whether the fact that confiscation requests are a

separate ground for appeal in the Act means that the request cannot be dealt with by the Court of Appeal as the first instance. The Act clearly establishes that confiscation requests must also be heard in the District Court. If the request has been heard by the District Court, the Court of Appeal can only consider it to the extent it is covered by the appeal, see HR-2024-1610-U.

(92) The current rules on the courts' jurisdiction in the hearing of a confiscation request were added to the Criminal Procedure Act by an amendment in 1999. The preparatory works to the amendment do not address the issue directly, apart from a general statement that the amendments would also "be significant during the appeal hearing", see Proposition to the Odelsting no. 8 (1998–1999) page 75. The Ministry's proposal, however, built on the following general starting point, see page 48:

> "Confiscation, on the other hand, is exclusively a criminal law reaction. In the Ministry's opinion, this means that the court's jurisdiction is the same for confiscation as for punishment, unless there are good reasons for a different solution. Once the case has been brought before the courts, the principle of accusation should not be extended so as to limit the court's jurisdiction. The court should then be able to view all criminal law reactions in conjunction."

(93) Legal literature presents various views on this issue.

(94) The consequence of not allowing the hearing of a confiscation request from the Public Prosecution Authority during the appeal is that the request must instead be brought in a separate case. This is permissible under section 51 subsection 2 of the Criminal Procedure Act. In a separate confiscation case, the court will not have the same opportunity to consider the criminal reactions in conjunction in the sentencing process. This suggests that the request should be brought directly before the Court of Appeal.

(95) A basic condition for bringing the request before the Court of Appeal is that the defendant is given the opportunity to express his or her views and sufficient time to prepare the defence. If necessary, a suitable suspension must be granted, see section 38, subsection 3.

(96) Given the Court of Appeal's full jurisdiction in reviewing the findings of fact in determining guilt, and the conditions in section 38, subsections 2 and 3 of the Criminal Procedure Act, I conclude that the Court of Appeal had jurisdiction to hear the Public Prosecution Authority's confiscation request, even though it had not been heard in the District Court.

The individual assessment – are the conditions for confiscation met?

(97) The confiscation in this case has its legal basis in section 69 subsection 1 (c) of the Penal Code. The phone has been used to commit a criminal act, and the basic condition is therefore met. A was also given the opportunity to express his opinion and had sufficient time to prepare his defence.

(98) According to the wording, the object "may" be confiscated when the conditions are met. Factors relevant in the discretionary assessment of whether confiscation should be effected are provided in section 69 subsection 3:

> "In determining whether confiscation shall be effected, and the scope of the confiscation, particular weight shall be given to whether confiscation is necessary for the purposes of effective enforcement of the penal provision, and whether it is proportionate. In assessing

> proportionality, weight shall among other things be given to other sanctions that are imposed, and the consequences for the person against whom the confiscation is effected."

(99) The Supreme Court ruling HR-2021-2249-A concerned a request for confiscation of a mobile phone from a minor in a case that, objectively, involved a violation of section 311 of the Penal Code. After an individual assessment, the Supreme Court found that confiscation was a proportionate sanction, but emphasised the spreading of the photo and the fact that the boy had demanded money from the aggrieved person to delete it, see paragraphs 27 and 28.

(100) In the case at hand, the offence involves possession of three sexualised photos of the aggrieved person, stored on the defendant's own mobile phone. The violation lies in the lower range of section 311 of the Penal Code. The photos were also not shared with others. The basis for confiscation is thus a less severe offence. Although the phone was central to the commission of the offence, confiscation in this case, after an overall assessment, would not be proportionate.

(101) A must therefore be acquitted of the confiscation request.

Sentencing

(102) A sentence must be stipulated for B and C for complicity to establishing a marriage-like relationship, see section 262 subsection 2 see section 15 of the Penal Code.

(103) A is convicted of establishing a marriage-like relationship. In addition, he has violated section 311 subsection 1, see subsection 2 of the Penal Code. Section 79 (a) of the Penal Code is therefore applicable. The offence under count I of the indictment is significant in the sentencing process. The offence under count II considered in isolation is subject to a fine and emphasised as an aggravating circumstance.

(104) The maximum penalty for violation of section 262 subsection 2 second sentence of the Penal Code is three years of imprisonment. Illegally contracted marriages are, according to the wording, to be sanctioned "in the same manner" as legally contracted marriages. The maximum penalty was reduced from four to three years in the Penal Code 2005, but solely because the Penal Code does not operate with maximum penalties of up to four years of imprisonment, see Proposition to the Odelsting no. 22 (2008–2009) side 144.

(105) General deterrence considerations weigh heavily, initially necessitating an immediate prison sentence of a certain duration.

(106) In the sentencing process, the District Court based itself on the legislature's reasoning for implementing punishment for illegitimate child marriage and stated:

> "The legislature's view of marriage-like relationships with a child, as the Court sees it, must be reflected in the sentencing for this type of offense. The entry into a child marriage constitutes an aggravated violation of the child's personal integrity, and any voluntary participation from the child's side is irrelevant. The child's age must be given additional weight in the assessment. Other factors to consider are possible aggravating circumstances such as coercion, threats or other improper behaviour. In the Court's opinion, general considerations suggest that the reaction should be immediate imprisonment for this type of offense. The specific sentencing must be based on the circumstances of each individual case."

(107) I agree with this. It should also be highlighted that child marriage facilitates sexual activity with a child under the age of 16, thereby creating a risk of early pregnancy with subsequent risks to the child's own health.

(108) In the specific stipulation of the penalty for A, I take into account that D was 14 years and three months old when the marriage-like relationship was entered into. A was 23 years old, and the age difference aggravates the offence. Considering D's age, it is irrelevant that the relationship was voluntary on her part. She was placed in a very vulnerable situation, completely dependent on A and his family, in that she was taken to a foreign country for an indefinite period of time, far away from her family.

(109) After an overall assessment, I believe that the penalty should be set somewhat higher than in the lower instances. For A, I find that the appropriate penalty would be about one year and three months of imprisonment.

(110) The offence in count II of the indictment is an aggravating factor. However, the rather lengthy processing time should be emphasised as a mitigating factor.

(111) The aggregate penalty for A is therefore set at one year and two months of imprisonment.

(112) B's complicity in the offense is central and was necessary for the marriage-like relationship to be established. Based on the evidence presented in the Court of Appeal, it is found that he, as the head of the family, had to consent to the relationship, which he did by concluding an agreement with D's father. He also took on full guardianship rights for D, so that she could be taken to Norway and thus placed in a very vulnerable situation. Although there are no other aggravating factors pertaining to B, I believe that the appropriate penalty for him should also be one year and two months of imprisonment. Some consideration is given to the long processing time.

(113) C also contributed to the establishment, although in a less central role. She arrived in Bulgaria later than A and B and did not participate in the meeting between B and D's father, which took place on 22 January 2022. The proven involvement relates primarily to facilitating the establishment of the marriage-like relationship, including the purchase and rental of dresses for the gatherings. There is no evidence that C took part in the actual decision to allow the illegitimate child marriage. At the same time, the Court of Appeal has found it proven that C's role was "slightly more than passively observing the events that have been demonstrated".

(114) I agree with the Court of Appeal that the penalty for C should be set lower than for the other two. After an overall assessment, I have concluded that the penalty of seven months of imprisonment, as set by the Court of Appeal, should be upheld. The long processing time is taken into account.

Claim for aggravated damages

Starting points – jurisdiction and choice of law

(115) In the Court of Appeal, D was awarded NOK 75,000 in aggravated damages from the three wrongdoers as jointly and severally liable. A new hearing of the claim for aggravated damages has been requested by both the wrongdoers and the injured party, and the Appeals

Selection Committee has consented to a new hearing of the claim during the criminal case in the Supreme Court.

(116) The criminal claim has been decided under the jurisdiction provision in section 5 (4) of the Penal Code. For the civil claim, Norwegian jurisdiction follows the main rule in Article 2 of the Lugano Convention that persons resident in a convention state shall be sued in the courts of that state. The wrongdoers are domiciled in Norway, and the claim has been made here.

(117) As the civil claim has a connection with Bulgaria, it is also necessary to determine the applicable law – which country's substantive law should be applied to decide the claim. It is established in case law that claims for aggravated damages due to criminal acts are considered civil tort claims, see Rt-2011-531 (*war criminal*) and HR-2021-955-A. In both these rulings, it was determined after individual assessments that Norwegian law was applicable. However, the cases had specific features that make the rulings unsuitable for providing guidance on the choice of law in any case concerning aggravated damages for criminal acts.

(118) However, the ruling HR-2021-955-A has clear similarities with the situation in the case at hand, and I cannot see any basis for assessing the choice of law issue differently from what was done in that ruling.

(119) The case concerned a claim for aggravated damages following sexual assault against an American woman committed by a Norwegian national on a cruise ship in international waters. Norwegian jurisdiction in the criminal case followed from the provision on personal jurisdiction in section 5 subsection 1 (a), see no. 9, of the Penal Code.

(120) Justice Ringnes outlines the general starting points for the choice of law under Norwegian international private law in paragraphs 21 and 22. In paragraph 24, he states that "tort claims are normally governed by the law of the place where the wrong occurred – *lex loci damni*". The place of the wrong coincided with the place of action. That is also the situation in our case; however, so that the violation continued as D was taken to Norway.

(121) Justice Ringnes then discusses whether the rule of the place of the wrong applies as a "more fixed rule" to govern claims for aggravated damages in a criminal case, with the effect that the applicable law should not be determined under the so-called Irma Mignon formula. In paragraphs 42 and 43, he gives the following summary:

> "So far, my view can be *summarised* as follows: The law of the country where the wrong occurred, applied by the Supreme Court as the basic choice-of-law rule in connection with tort, is not a "fixed" rule for claims for aggravated damages arising from serious violations of someone's integrity filed during a criminal case.
>
> The applicable law must consequently be determined pursuant to the basic rule in Norwegian international private law – *the Irma Mignon formula*."

(122) I believe this must also be the solution in our case: We are dealing with a claim for aggravated damages arising from a criminal act involving a serious violation of integrity. The criminal claim is subject to Norwegian jurisdiction under a provision that makes an exception from the requirement of dual punishability. I cannot see that the choice-of-law rules in EU law, primarily Article 4 of the European Parliament and Council Regulation (EC) No. 864/2007 – the Rome II Regulation – leads to a different solution. This provision allows, albeit within

narrow limits, for an exception from the law of the place of the wrong if the harmful act is obviously more closely connected to a country other than the place of the wrong.

(123) Also, in determining where the case has the closest connection, the assault judgment has transfer value. Although the claim for aggravated damages is a civil claim, it is closely connected to the criminal case. The offence – a violation of section 262 subsection 2 of the Penal Code – is a direct basis for liability under Norwegian law, see section 3-5 subsection 1 (b), see section 3-3 of the Compensatory Damages Act, and the claim is pursued procedurally together with the criminal claim, see section 3 of the Criminal Procedure Act.

(124) The wrongdoers' Norwegian residence ties the case to Norway and is central to Norwegian jurisdiction and thus the application of Norwegian criminal law. Additionally, the overall violation was partly inflicted by bringing the injured party to Norway, and during the stay here. In the same manner as in cases regarding compensation after sexual assault, Norway also has an interest in ensuring that victims of child marriage and forced marriage receive aggravated damages. This consideration is best maintained if Norwegian law is applied when the case is heard in Norwegian courts.

(125) Against this background, I conclude that Norwegian courts have jurisdiction, and that D's claim for aggravated damages should be governed by Norwegian law

The issue of liability – should the defendants pay one common or separate amounts of damages?

(126) The conviction of violation of section 262 subsection 2 of the Penal Code creates a legal basis for holding A, B and C liable under 3-5 subsection 1, see section 3-3 of the Compensatory Damages Act.

(127) D's counsel has argued that separate claims should be established for three wrongdoers, as each of them is responsible for acts that constitute separate violations, which have had a cumulative effect.

(128) According to section 3-5 subsection 2 of the Compensatory Damages Act, separate claims for aggravated damages can be established for each individual responsible in cases where "several jointly have caused harm, inflicted injury or exhibited misconduct". This condition is met here, necessitating a discretionary assessment to determine whether individual or joint compensation liability should be imposed. As a guideline for the assessment, subsection 2 second sentence states:

> "In the assessment under the first sentence, particular emphasis should be placed on the increased burden for the aggrieved person of several individuals acting together."

(129) The preparatory works to the provision set out that separate requirements "should be used in particular where the basis for aggravated damages is a severe violation of integrity committed by several individuals jointly", see Proposition to the Storting 137 L (2026–2017) page 147. In such cases, it is generally not correct that the offenders should benefit from having acted together with others.

(130) In our case, D has been subjected to one violation – the establishment of a marriage-like relationship with A. The wrongdoers have each contributed to the violation in their own way, but the case differs, for example, from cases involving sexual assault by multiple offenders. I cannot see that the parents' complicity in facilitating the relationship implies such an increased burden for the aggrieved person that compensation liability should be determined individually. However, in determining the amount of compensation, consideration must be given to the fact that several individuals have jointly contributed to the violation.

(131) It remains to determine the amount of aggravated damages. Regarding the factors in the assessment, I refer, like the Court of Appeal, to HR-2020-1345-A paragraph 28. The damages must be determined on an individual and discretionary basis, with emphasis on "the objective severity of the act, the wrongdoer's culpability, the aggrieved person's subjective experience of the violation and the nature and extent of the inflicted harm".

(132) Cases involving aggravated damages following conviction under section 262 subsection 2 of the Penal Code differ to such an extent that there is no basis for a standard level of damages.

(133) The Court of Appeal calculated the damages to NOK 75,000 and emphasised the following in the individual stipulation:

> "The aggrieved person was just over 14 years old when the marriage-like relationship was entered into. She moved to the defendants' family and the much older A. She was taken to a foreign country with A and his father to live indefinitely with the defendants' family. Guardianship rights were given solely to B, and D had only known B for a short time. D did not have her own phone, bank card or money while she was in Norway, and she spoke neither English nor Norwegian. The marriage-like relationship with the 9-year-older A facilitated both sexual activity with a child under 16 years of age and early pregnancy. D was consequently placed in a very vulnerable situation. B and A's conduct led to D being placed in the care of the child welfare services and having to endure a burdensome stay in an institution in Norway, as mentioned above. We have not been provided with information on D's current situation in Bulgaria. It has thus not been documented that D currently suffers from psychological harm. However, in the Court of Appeal's view, the hardship to which D was subjected, which affected her during the initial facilitated interview, generally poses a risk of long-term psychological effects."

(134) I agree that these are central factors in the specific assessment. As already noted, I believe that the sentence should be slightly increased from that given by the Court of Appeal. Similarly, I believe the aggravated damages should be slightly increased, particularly considering the severity of the act and the overall consequences for the aggrieved person. Also, considering the fact that several individuals contributed to the violation, the aggravated damages should be set at NOK 120,000.

(135) The three wrongdoers are jointly and severally liable for the awarded amount, see section 5-3 (1) of the Compensatory Damages Act.

Conclusion

(136) Against this background, I have concluded that the appeals against the Court of Appeal's application of the law under the criminal claim cannot succeed, but that the sentence for A and B must be increased. For C, the appeal against the sentencing is dismissed.

(137) A is acquitted of the confiscation request.

(138) D is awarded aggravated damages of NOK 120,000. A, B and C are jointly and severally liable for the amount.

(139) I vote for this

J U D G M E N T :

1. In the Court of Appeal's judgment, item 1 of its conclusion, the change is made that the sentence for A is set at one year and two months of imprisonment.

2. A is acquitted of the confiscation request.

3. In the Court of Appeal's judgment, item 3 of its conclusion, the change is made that the sentence for B is set at one year and two months of imprisonment.

4. The appeals against the criminal claim are otherwise dismissed.

5. A, B and C are, jointly and severally, liable to pay NOK 120,000 in aggravated damages to D within two weeks of the service of this judgment.

(140) Justice **Falkanger:**

Partial dissent

(141) I have a different view than Justice Steinsvik on whether the Penal Code section 5 (4) gives a basis for convicting under section 262 subsection 2 second sentence of the Penal Code.

(142) As concerns the legal starting points, I refer to Justice Steinsvik's account. As she emphasises, a penal provision can only be applied if it is sufficiently clear and accessible to the public. This clarity requirement must also apply to section 5 of the Penal Code, which stipulates when the criminal legislation is applicable to acts committed in countries other than Norway.

(143) In our case, the question is whether the term "child marriage" in section 5 (4) comprises the types of "marriage-like relationships" as are covered by section 262 subsection 2 second sentence of the Penal Code.

(144) Linguistically, we are dealing with a marriage when it is validly established in the country in which it is entered into, see Rt-2006-140 paragraphs 21 and 22. Whether a relationship is a marriage depends on the legislation in the respective country. Although other – more or less similar – arrangements may involve significant elements of intended or perceived commitment, they are not marriages.

(145) I find it difficult to see that this formal aspect disappears in the compound word "child marriage". Linguistically, this also refers to a formal marriage, but such that at least one of the parties must be a child. If section 5 (4) had only applied to "child marriage", a "marriage-like relationship" would clearly fall outside.

(146) What creates some doubt is that section 5 (4) applies to acts that are "deemed to constitute" child marriage. Nonetheless, I cannot see that the provision must be interpreted to cover a "marriage-like relationship". If section 262 subsection 2 second sentence had expressed that such relationships should be deemed to constitute marriage, the application of section 5 (4) would have been unproblematic. But that is not what the provision says. It only states that the person entering into such a marriage-like relationship is to be punished "in the same manner", which is different.

(147) I therefore cannot see that it is sufficiently clear that the wording in section 5 (4) covers an illegitimate arrangement such as that in our case.

(148) As Justice Steinsvik stresses, the clarity requirement does not rule out that punishability can be derived by viewing several legal provisions in conjunction. Like her, I have noted that simultaneously with the introduction of section 262 subsection 2 second sentence, amendments were made to section 196 of the Penal Code on the duty to avert a criminal offence, where it now refers to "section 262 subsection 2 (marriage with someone under 16 years of age)". Although the preparatory works show that the amendment was also intended to apply to illegitimate marriage, I cannot see how this removes the ambiguity related to the term "child marriage". The principle of foreseeability dictates that there must be a limit to how much the wording can be supplemented with interpretative elements from entirely different parts of the Penal Code. In my opinion, a broad interpretation of section 5 (4) cannot be justified by the wording in section 196.

(149) Therefore, I also cannot see that section 5 (4), when considered in conjunction with other penal provisions, meets the requirement of a legal basis.

(150) The way I interpret section 5 (4), the question arises whether section 5 (1) means that the actions were nonetheless punishable.

(151) Section 5 (1) applies to acts that are "also punishable under the law of the country where they are committed" – so-called dual punishability. The question is therefore whether the actions were punishable under Bulgarian law. Both the objective and subjective conditions for punishment must be met.

(152) The Court of Appeal has not addressed these conditions, since it found that section 5 (4) is applicable. I therefore have no basis to take a position on whether the requirement of dual punishability is met. This applies to both the objective and subjective conditions for punishment. With the position I have taken on section 5 (4), the reasoning is thus flawed, see section 343 subsection 2 (8), see section 342 subsection 2 (4) of the Criminal Procedure Act. Generally, the Supreme Court cannot hear grounds for appeal that the Appeals Selection Committee has refused to refer under section 323 of the Criminal Procedure Act. In our case, the Appeals Selection Committee refused to refer the appeal against flawed reasoning in the question of whether the conditions under section 262 subsection 2 second sentence of the Penal Code were met. This does not prevent the Supreme Court from setting aside a ruling for flawed reasoning related to section 5 (4) of the Penal Code, see HR-2021-1207-A paragraph 44.

(153) In my view, the Court of Appeal's judgment must be set aside with regard to the convictions for violations of section 262 of the Penal Code. I can therefore not vote for convictions for violation of this provision.

(154) When it comes to the questions related to violation of section 311 of the Penal Code, the sentencing, the confiscation and the claims for aggravated damages, I agree with Justice Steinsvik in all material respects and with her conclusion.

(155) Justice **Falch:** I agree with Justice Falkanger in all material respects and with his conclusion.

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

(157) Justice **Matheson:** Likewise.

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

J U D G M E N T :

1. In the Court of Appeal's judgment, item 1 of its conclusion, the change is made that the penalty for A is set at one year and two months of imprisonment.

2. A is acquitted of the confiscation request.

3. In the Court of Appeal's judgment, item 3 of its conclusion, the change is made that the penalty for B is set at one year and two months of imprisonment.

4. The appeals against the request for punishment are dismissed.

5. A, B and C are, jointly and severally, liable to pay NOK 120,000 in aggravated damages to D within two weeks of the service of this judgment.