SUPREME COURT OF NORWAY

J U D G M E N T

given on 31 March 2025 by a division of the Supreme Court composed of

Justice Wilhelm Matheson
Justice Henrik Bull
Justice Wenche Elizabeth Arntzen
Justice Ingvald Falch
Justice Are Stenvik

HR-2025-604-A, (case no. 24-167325STR-HRET)
Appeal against Borgarting Court of Appeal's judgment 17 September 2024

The Public Prosecution Authority	(Counsel Erik Førde)
v.	
A	(Counsel Marius Oscar Dietrichson)

(1) Justice **Arntzen:**

Issues and background

(2) The case concerns the conditions for punishing a foreign national for failing to leave the realm following an expulsion order issued as a consequence of a prison sentence. The key issue is what actions can be required of the foreign national to comply with the obligation to leave.

(3) A, born in 1994, is a Moroccan national. He arrived in Norway in December 2012 and applied for asylum. The Norwegian Directorate of Immigration (UDI) rejected his application in January 2013 and ordered him to leave the country within three weeks. His appeal against this decision was unsuccessful. In April 2014, UDI issued a new expulsion order with a five-year re-entry ban, due to his failure to leave Norway after the initial expulsion order.

(4) On 16 December 2015, UDI issued another expulsion order against A, this time with a permanent re-entry ban and an obligation to leave the country immediately, see section 90, former subsection 5 (f), of the Immigration Act. The decision was based on his criminal record, which included two fines in 2014 and an 18 days of imprisonment in 2015 for multiple drug offenses. UDI also cited his unlawful stay in Norway for a period of one year and eight months. The parties acknowledge the validity of the expulsion order.

(5) In 2017, 2019 and 2021/2022, A was sentenced to prison terms ranging from 75 days to seven months for drug offenses and for violating section 108 of the Immigration Act by failing to leave the country following expulsion. In the latter case, the sentence was determined by the Supreme Court on 12 October 2022, see HR-2022-1963-A.

(6) On 3 October 2023, the Chief of Police in Oslo indicted A for violating section 108 subsection 3 (f), see section 55 subsection 2, of the Immigration Act (count I) and for twice violating section 231 subsection 1 of the Penal Code (count II). The violation of the Immigration Act is described as follows:

> "During the period from 1 April 2022 until 15 August 2023, he failed to leave the realm despite being permanently expelled by UDI's order of 16 December 2015, as a result of the imposed prison sentence."

(7) On 16 November 2023, Oslo District Court ruled as follows on the criminal charges:

> "1. A, born 00.00.1994, is acquitted of counts I and II (b) of the indictment.
>
> 2. A, born 00.00.1994, is convicted of violating section 231 subsection 1 of the Penal Code and sentenced to eighteen months of imprisonment. Execution of the sentence is suspended by a two-year probation period under 34 of the Penal Code."

(8) The Public Prosecution Authority appealed against the findings of fact and the application of law concerning the question of guilt under count I of the indictment. By judgment of 17 September 2024, Borgarting Court of Appeal upheld the acquittal. One of the lay judges voted in favour of conviction.

(9) The majority of the Court of Appeal found that it had not been substantiated that the defendant had a genuine opportunity to leave the country. His ability to obtain travel documents was hindered by the diplomatic tensions between Moroccan and Norwegian authorities during the indictment period. As a result, no assistance could be expected from the Moroccan embassy.

(10) The Public Prosecution Authority has appealed against the application of law concerning the question of guilt.

(11) In a letter dated 10 February 2025 to the Supreme Court, with a copy to the defence counsel, the prosecutor stated that a conviction would be sought and proposed a sentence of one year of imprisonment. Against this background, A was summoned to the hearing in the Supreme Court. He was present during the final stage of the proceedings, which were simultaneously interpreted into his native language. He did not request to make a statement.

(12) Apart from this, the case in the Supreme Court remains unchanged from the previous instances.

The parties' contentions

The Public Prosecution Authority contends:

(13) The penal provision applies unless the defendant substantiates that leaving the country is hindered by circumstances beyond his control. The defendant must demonstrate that he has taken all reasonable measures to leave Norway voluntarily. Circumstances between states that complicate *forced return* do not affect the defendant's right to consular assistance from his own embassy.

(14) The Supreme Court has a sufficient basis in the Court of Appeal's findings of fact to deliver a conviction. The facts of the case are not in dispute. In the sentencing, a deduction may be granted for the period of delay following the defendant's summons to serve the Supreme Court's sentence on 12 October 2022.

(15) The Public Prosecution Authority asks the Supreme Court to rule as follows:

> "A born 00.00.1994 is convicted of violating section 108 subsection 3 (f) of the Immigration Act and section 231 subsection 1, in conjunction with section 79 a and b of the Penal Code, and sentenced to one year of imprisonment."

(16) *The defence counsel* contends:

(17) It is a condition for criminal liability that the defendant had a genuine opportunity to leave the realm. The Court of Appeal has not found this proven. Only reasonable measures can be required of the defendant. As long as he could not expect any assistance from the Moroccan embassy, it would have been futile to approach it. Consequently, the Public Prosecution Authority has not demonstrated that the defendant had a genuine opportunity to leave the realm.

(18) It is unclear whether a new judgment can be handed down as the Court of Appeal's description of the facts cannot automatically be used for a conviction. In the event of sentencing, a deduction should be made for the period the defendant awaited trial and imprisonment, at least for the time following the summons to serve the sentence.

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

> "Primarily:
> The appeal is dismissed.
>
> In the alternative:
> Borgarting Court of Appeal's judgment is set aside.
>
> In the further alternative, the defence counsel asks that
> the defendant be treated with the utmost leniency."

My opinion

Section 108 subsection 3 (f) of the Immigration Act

(20) It follows from the structure of the Immigration Act that foreign nationals without a right of residence in Norway are obliged to leave the country voluntarily. If this obligation is not fulfilled, the Police Immigration Unit (PU) may carry out a forced return under section 90 subsections 6 and 7 of the Immigration Act.

(21) The penal provision in section 108 subsection 3 (f) of the Immigration Act is aimed at expelled foreign nationals and reads:

> "A penalty of a fine or imprisonment for a term not exceeding two years shall apply to any person who:
> …
> f. has been expelled as a result of being sentenced to imprisonment, preventive detention or a special sanction under provisions other than subsection 2, and who, intentionally or negligently, breaches the requirement for a residence permit in section 55 subsection 2 of the Immigration Act by failing to leave the realm."

(22) In other words, the objective condition for criminal liability is unlawful stay by failing to leave the realm following expulsion resulting from a prison sentence.

(23) The provision was given its current wording through a legislative amendment in April 2021, which increased the maximum penalty from six months to two years of imprisonment.

(24) The background to the amendment is discussed in Proposition to the Storting 60 L (2020–2021) section 2.1, which states, among other things:

> "The process of returning foreign nationals without a residence permit is resource-intensive and, in some cases, futile. The enforcement of an expulsion order requires that the necessary conditions for return are fulfilled. In many cases, the foreign national does not contribute to the enforcement process, for example by withholding or failing to clarify his or her identity or by withholding identity documents. Some foreign nationals also go into hiding to evade deportation. In such cases, it may take a long time to establish confirmed identity and carry out

> the deportation. Moreover, some countries of return will not accept individuals who do not leave voluntarily."

(25) As stated in HR-2022-1963-A paragraph 19, the rationale for increasing the maximum penalty for unlawful stay following expulsion resulting from a prison sentence was to enhance the deterrent effect with the aim of increasing compliance with expulsion orders.

(26) It is clear that an unlawfulness reservation must be interpreted into the penal provision. Regarding such reservations in general, the following is stated in Andenæs et al., *Alminnelig strafferett* [ordinary criminal law], 6th edition 2016, page 157:

> "To state that an act is not unlawful due to the unlawfulness reservation, does not explain the reason for the exemption from criminal liability, but rather expresses the outcome of an interpretative process leading to the conclusion that the act falls outside the scope of the penal provision, despite falling within its wording. In this interpretation, an assessment of the societal acceptability of the act often plays a central role."

(27) The unlawfulness reservation implies that section 108 subsection 3 (f) of the Immigration Act must be interpreted restrictively such that criminal liability requires that the foreign national must have had *a genuine opportunity to leave the country*. The reservation must not be applied in a manner that undermines the foreign national's incentive to leave voluntarily.

(28) The obstacles that may justify exemption from criminal liability are discussed in Proposition to the Storting 60 L (2020–2021), pages 19–20. These may include physical barriers affecting foreign nationals in custody or security obstacles arising from conditions in the home country. Regarding practical obstacles, which is the relevant option in our case, the following is stated:

> "As mentioned above, criminal liability requires that the foreign national has a genuine opportunity to leave the country. Even outside of repeat cases (and under current law), the foreign national may argue that return is practically impossible. In this regard, the Ministry notes that almost all foreign nationals will be able to leave Norway, possibly with assistance from Norwegian authorities, if they cooperate. Residence permits under section 8-7 of the Immigration Regulations, based on 'practical obstacles to return beyond the foreign national's control' are very rarely granted. In the Ministry's view, there is seldom any doubt that return constitutes a genuine opportunity, unless it can be shown that the foreign national has taken all reasonable steps to comply with the obligation to leave, without success. The Ministry nonetheless emphasises that the ability to facilitate departure will form part of the factual assessment in a criminal case, and will therefore be subject to stricter evidentiary standards than those applied in a purely immigration law context."

(29) The restrictive interpretation of the law indicated in the preparatory works shows that this concerns a narrow exception. The reference to section 8-7 of the Immigration Regulations supports that the obstacle must be beyond the foreign national's control. The Ministry operates with a factual presumption that all foreign nationals are able to leave the country voluntarily. This presumption may be set aside if the foreign national demonstrates that *all reasonable steps* to comply with the obligation to leave have been attempted. What is considered "reasonable steps" must be assessed on an individual basis. The stricter evidentiary standard referred to in the final sentence, concerns the foreign national's capacity to fulfil his or her duty to act, not the probable outcome of such action.

The Court of Appeal's individual assessment

(30) In its findings of fact, the majority of the Court of Appeal proceeded on the basis that, during the indictment period, A possessed no identification documents other than a birth certificate and therefore lacked the necessary travel documents. Nor is he registered in Morocco's national fingerprint database. According to the majority, if a passport – or possibly a certified copy, family book or a national ID card – cannot be obtained, "Moroccan authorities will verify the identity of their nationals based on the following documents:

- Self-declaration (signed by the parents, declaring that the individual is their child with the correct identity and date of birth)
- Residence certificate for mother/father with photo
- National ID card for father/mother
- Birth certificate for father/mother"

(31) The majority states in the following paragraph that it "must be assumed that the defendant has not in fact made any efforts to contact his parents, and the majority cannot, at the outset, see that the defendant has taken all reasonable steps to obtain the necessary documents to leave Norway". It is also noted that A refused to cooperate in obtaining the necessary documentation from Moroccan authorities when summoned to the Moroccan embassy in 2013 and 2017. The majority goes on to conclude that "no evidence has been presented to suggest that the defendant's attitude towards such cooperation has changed in the meantime".

(32) In my view, this is sufficient to establish that A cannot benefit from the unlawfulness reservation. As I have just explained, acquittal on the basis of such practical obstacles will only be relevant where the foreign national can demonstrate that all reasonable steps have been taken to comply with the obligation to leave. The reservations that may at first glance appear to be implied by the Court of Appeal's formulations "must be assumed" and "at the outset" must be understood in conjunction with the subsequent paragraphs, in which the majority explains why there is nonetheless no basis for conviction.

(33) In the first of these paragraphs, the majority states that "in April 2022, a challenging diplomatic situation arose between Norway and Morocco, which made it impossible for the PU to engage with Moroccan authorities or obtain assistance in verifying a foreign national's identity. In my view, this is not decisive. Forced return is a subsidiary measure that does not affect the foreign national's obligation – subject to criminal sanction – to leave the country voluntarily.

(34) Furthermore, the majority is not accurate in asserting in the following paragraph that it is "highly uncertain whether the defendant would have received assistance from the Moroccan embassy if he had approached it". As previously noted, the issue is not the *outcome* of the foreign national's efforts to comply with the obligation to leave, but whether the individual can substantiate that all reasonable steps were *attempted*. Thus, it is also not decisive that it was "highly uncertain" whether the defendant's parents would have sent him the necessary documents upon request, or whether he would have subsequently received the required assistance from the embassy.

(35) Against this background, I conclude that the acquittal by the majority in the Court of Appeal is based on an error of law. The decisive factor for conviction is that A failed to take all reasonable steps to leave the country voluntarily.

(36) In my view, the Court of Appeal's findings of fact provide sufficient grounds to convict under section 345 of the Criminal Procedure Act. I refer to the Court of Appeal's statements that A has neither contacted the embassy nor attempted to contact his parents, and thus failed to take all reasonable steps to obtain the necessary documents to leave Norway. Both the objective and subjective conditions for criminal liability are met.

Sentencing

(37) The indictment covers the period between 1 April 2022 and 15 August 2023. The obligation to leave the country does not apply where the foreign national is physically prevented from doing so. This has been ensured by setting the indictment period between the release from custody on remand on 16 March 2022 and the commencement of sentence on 16 August, as determined in HR-2022-1963-A.

(38) The parties appear to agree that, when calculating the duration of the unlawful stay, the period following A's summons to serve the sentence on 26 July 2023 must be excluded. This is supported by section 40 of the Execution of Sentences Act, in conjunction with section 461 subsection 1 of the Criminal Procedure Act, which provides that failure to comply with an order to report for serving the sentence is punishable. Although the issue was not further addressed in the parties' submissions, I rely on the agreement without further examination, as it benefits the defendant and, in any case, hardly has any impact on the sentencing.

(39) Apart from this, the starting point must be that the foreign national is able leave the realm unless he or she is subject to special restrictions to the contrary. Entry for the purpose of serving the sentence at a later stage may be arranged in cooperation with Norwegian authorities.

(40) Against this background, I conclude that a penalty must be imposed for an unlawful stay lasting approximately 15 months.

(41) In HR-2022-1963-A, the Supreme Court proceeded on the basis that A's unlawful stay – lasting approximately five and a half months after the penalty increase in April 2021 – warranted a sentence of 90 days of imprisonment. An aggravating factor was that the defendant had previously been convicted twice for unlawful stay, see Penal Code section 79 (b) in conjunction with section 77 (k). The sentence for the relevant period was set at five months of imprisonment.

(42) The case at hand concerns an unlawful stay that lasted nearly three times longer. I agree with the prosecutor that the duration of the unlawful stay indicates a sentence of seven months of imprisonment. A significant repeat-offender surcharge must be applied due to the two previous convictions falling under section 79 (b) of the Penal Code, see HR-2022-1963-A paragraph 23. In that case, the Supreme Court increased the sentence in accordance with section 77 (k) of the Penal Code, even though the conditions for doubling the maximum penalty under section 79 (b) were not met.

(43) Therefore, I find that the sentence should be set at one year of imprisonment. This includes the District Court's final suspended sentence of 18 days of imprisonment for violating section 231 subsection 1 of the Penal Code.

(44) I vote for this

J U D G M E N T :

A, born 00.00.1994, is convicted of violating section 108 subsection 3 (f) of the Immigration and section 231 subsection 1 of the Penal Code, in conjunction with section 79 (a) and (b) of the Penal Code and sentenced to one year of imprisonment.

(45) Justice **Stenvik:** I agree with Justice Arntzen in all material respects and with her conclusion.

(46) Justice **Falch:** Likewise.

(47) Justice **Bull:** Likewise.

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

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

J U D G M E N T :

A, born 00.00.1994, is convicted of violating section 108 subsection 3 (f) of the Immigration and section 231 subsection 1 of the Penal Code, in conjunction with section 79 (a) and (b) of the Penal Code and sentenced to one year of imprisonment.