THE SUPREME COURT OF NORWAY

On 17 March 2017 the Supreme Court gave judgment in

HR-2017-569-A, (case no. 2016/1379), civil case, appeal against judgment

A	(Counsel Dag Holmen)
Norwegian Organisation for Asylum Seekers (NOAS) (intervener)	(Counsel Terje Einarsen)
v.	
The state repr. by the Immigration Appeals Board	(The Attorney General repr. by counsel Jørgen Vangsnes – test case)

V O T I N G :

(1) Justice **Noer:** The case concerns the validity of a decision to reject an asylum application pursuant to the Immigration Act section 28 subsection 4. The provision applies to asylum seekers who need protection because of their acts in Norway, and implies that such applicants may not be recognised as refugees if the main purpose of their acts has been to obtain a residence permit. For the Supreme Court, the question is whether this exemption is consistent with the Refugee Convention of 28 July 1951 Article 1 A.

(2) A was born on 00.00.1990 and comes from East Wallaga in Ethiopia. He belongs to the Oromo people, the largest ethnic group in Ethiopia.

(3) A came to Norway on 10 March 2010 and sought asylum on the same day. He declared that he was persecuted and wanted by Ethiopian authorities for his membership in the political party Oromo Liberation Front. By the decision of the Norwegian Directorate of Immigration (UDI) of 19 July 2010, his application was rejected. A appealed to the Immigration Appeals Board (UNE), which by a decision of 3 October 2011 came to the

same conclusion. The decisions were based on UDI and UNE's view that it was highly unlikely that the Oromo Liberation Front was active in Ethiopia.

(4) A remained in Norway. In 2012, Norwegian authorities signed a return agreement with Ethiopia that made it possible to return rejected asylum seekers.

(5) During the period from 2011 to 2014, A made several attempts to have the rejection reversed. He eventually became active in the Oromo Liberation Front in Norway, which he presented as a new and independent basis for asylum.

(6) On 11 June 2014, UNE decided to grant a one-year temporary residence permit to A with a right to work, see the Immigration Act section 74. The decision is based on A risking persecution in Ethiopia because of his political activities in Norway, and that he is therefore protected against refoulement pursuant to the Immigration Act section 73 subsection 1. However, he was not granted asylum pursuant to the Immigration Act section 28 subsection 1. UNE held that the main purpose of A's political activities in Norway was to obtain a residence permit, and that he could therefore not be granted refugee status, see section 28 subsection four second sentence. The following arguments are given:

> **"It is UNE's opinion that the appellant's activities are an attempt to obtain a residence permit. It is important to protect the asylum institute against attempted misuse as is the case here. The appellant's suddenly escalating activities during the period 2013-2014 do not appear to be a genuine political engagement, even if giving him the benefit of the doubt. After an overall assessment of the gravity of such misuse of the asylum institute, UNE finds that the terms for exemption from recognition are fulfilled. He will thus not be granted refugee status pursuant to the Immigration Act section 28 subsection 1 a."**

(7) After having received a notice of action from A's counsel, UNE decided on 18 October 2014 not to reverse the decision.

(8) A issued a writ against the state in the Oslo District Court. On 24 June 2015, the district court gave judgment with the following conclusion:

> **"1. The Immigration Appeals Board's decision of 11 June 2014 with the subsequent statement of 18 October 2014 is invalid.**
>
> **2. The state repr. by the Immigration Appeals Board is to pay NOK 224,967 including VAT to A as compensation for legal costs within two weeks from the service of the judgment."**

(9) The district court concluded that A was entitled to be recognised as a refugee pursuant to the Immigration Act section 28 subsection 1 a. In the district court's opinion, A's political activities in Norway were a natural continuation of his political engagement in his country of origin, and not acts committed with the purpose of obtaining a residence permit in Norway.

(10) The state appealed to Borgarting Court of Appeal, which gave judgment on 6 May 2016 with the following conclusion:

> **"1. The state repr. by the Immigration Appeals Board is found for.**
>
> **2. A is to pay costs in the district court and the court of appeal to the state repr. by the Immigration Appeals Board in the amount NOK 220 720 –**

twohundredandtwentythousandsevenhundredandtwenty within two weeks from service of the judgment."

(11) The court of appeal endorsed UNE's assessment regarding the purpose of A's political activities in Norway, and concluded that the decision not to grant asylum pursuant to the exemption provision in the Immigration Act section 28 subsection 4 second sentence, is valid.

(12) A has appealed the court of appeal's judgment on the basis of incorrect application of the law and the assessment of evidence. The Supreme Court's Appeals Selection Committee agreed to hear the part of the appeal concerning "the interpretation of the law with regard to the legal basis for refusing to grant refugee status pursuant to the Immigration Act section 28 subsection four, see section 74, including the consistency with Norway's obligations under international law".

(13) The basis for the appeal that the Supreme Court has agreed to hear – that there is no legal basis for refusing to grant A refugee status in Norway – were first presented in the appeal to the Supreme Court, and has not been considered by the district court or the court of appeal.

(14) The Norwegian Organisation for Asylum Seekers (NOAS) has declared intervention for the appellant, see the Dispute Act section 15-7 subsection 1 b.

(15) The UN High Commissioner for Refugees (UNHCR) has submitted a written statement to throw light on public interests, see the Dispute Act section 15-8 subsection 1 a.

(16) The appellant – *A* – and the intervener – *Norwegian Organisation for Asylum Seekers (NOAS)* – have briefly contended the following:

(17) A is denied refugee status pursuant to the Immigration Act section 28 subsection 4 second sentence. The provision is inconsistent with the Refugee Convention.

(18) The Refugee Convention is incorporated in Norwegian law through the Immigration Act section 28 subsection 1 a, see sections 29-30, and applies, in the event of conflict, before domestic law, see the Immigration Act section 3. Norwegian authorities have no margin of appreciation when interpreting the Refugee Convention. The contents of the Convention's refugee concept must be applied in an individual interpretation under international law based on the principles in the Vienna Convention of 23 May 1969 on the law of treaties.

(19) The definition of a refugee in the Refugee Convention article 1 A (2) comprises according to its wording any person with a fear of being persecuted for his own acts outside the country of his nationality, irrespective of the purpose of these acts. Article 1 C-F gives a detailed account for when the Convention is nevertheless not applicable to persons comprised by Article 1 A, and does not make an exemption for events as in the case at hand. The clear wording of the Convention implies that A must be recognised as a refugee and be granted the rights as are set out in Articles 3-33. This is also consistent with the object of the Convention, which is to secure fundamental rights for refugees.

(20) Other sources of law suggest the same, with a possible exception for the practice of certain other states and the EU Council Directive 2004/83/EC. However, in light of the

wording and object of the Refugee Convention, and with reference to the variation in member state case law, these interpretation factors cannot be given much weight.

(21) The UN's body for enforcement of the Refugee Convention – UNHCR – has a long-term and consistent view that risk of persecution arising from the individual's own acts outside his country of origin fall within the Convention's refugee concept. This also applies when the acts are carried out with the purpose of obtaining a residence permit. There are good reasons for UNHCR's view. The enforcement body's application must be given substantial weight when interpreting the Convention.

(22) In the event that the Refugee Convention should be deemed to make exemptions in certain cases, it is contended in the alternative that the Immigration Act section 28 subsection 4 second is more far-reaching than the Convention.

(23) In the second alternative, it is contended that it is unclear from the court of appeal's judgment whether A is comprised by a misuse provision within the scope of the Refugee Convention, since the court of appeal has not considered A's genuine political stand. The court of appeal's judgment must therefore in any case be set aside.

(24) A has submitted this prayer for relief:

> **"Principally:**
>
> **1. The Immigration Appeals Board' decision of 11 June 2014, with the subsequent statement of 18 October 2014, is invalid.**
>
> **2. The state repr. by the Immigration Appeals Board is to compensate A for costs in the district court, the court of appeal and in the Supreme Court."**
>
> **In the alternative:**
>
> **1. The judgment of the court of appeal is to be set aside.**

(25) NOAS has submitted an identical prayer for relief, but has not claimed costs in the Supreme Court.

(26) The respondent – *the state repr. by the Immigration Appeals Board* – has briefly contended:

(27) The exemption in the Immigration Act section 28 subsection 4 second sentence is not in consistence with the Refugee Convention.

(28) When applying the primacy rule in the Immigration Act section 3, it is important that section 28 subsection 4 does not create any doubt as to the interpretation and that it is based on the clear will of the lawmaker.

(29) The Refugee Convention gives the member states a certain latitude in terms of the implementation of it. The traditional view is that cases where the need for protection is a result of the applicant's own acts after he left his country of origin, lies in the border area of the Convention's refugee concept and that each of the member states is entitled under international law to regulate such situations, see the Supreme Court judgment in Rt. 1991 page 586. There is no reason to depart from this principle. A is in any case ensured protection against refoulment pursuant to the Immigration Act section 73, so that the

central right in the Refugee Convention – the protection against refoulment in Article 33 – is maintained.

(30) The Refugee Convention article 1 A contains no specific regulation of the misuse cases, where the purpose of the acts having caused the risk of persecution is to obtain a residence permit. In the state's view, this was not relevant when the Convention was ratified. Thus, a misuse provision is also not included. The object of the Convention strongly suggests that refugee status should not be granted in the event of misuse.

(31) Also case law suggests that an exemption must apply in misuse cases. The Supreme Court has already established that the risk of persecution due to acts committed outside the country of origin does not give an unconditional right to protection as a refugee under the Convention, see the Supreme Court judgment in Rt. 1991 page 586. This is supported by EU's Council Directive 2004/83/EC [the status directive] stating in Article 5 no. 3 that "Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status". Several other western states also have rules similar to that in the Immigration Act section 28 subsection 4.

(32) In addition, the misuse exemption is supported by strong policy considerations. If refugee status is granted in the misuse cases, this will undermine the legitimacy of the asylum institute, both nationally and internationally. It may also be considered unfair to asylum seekers with a genuine political stand if other applicants are granted asylum based on a political conviction that is not real.

(33) The state repr. by the Immigration Appeals Board has submitted this prayer for relief:

> **"1. The appeal is to be dismissed.**
>
> **2. Costs in the Supreme Court are not to be awarded."**

(34) *My view on the case*

(35) The question is whether A has a right to be recognised as a refugee in Norway. This depends on whether UNE's decision is based on a correct reading of the Immigration Act section 28 subsection 4, or if the provision must be interpreted restrictively as a consequence of not being consistent with the Refugee Convention Article 1 A. The specifics of the case are finally decided by the court of appeal and are not to be reviewed by the Supreme Court.

(36) As mentioned, A has been granted a temporary residence permit pursuant to the Immigration Act section 74. The permit has been granted since he risks persecution in Ethiopia for his political activities in Norway, which makes him protected against refoulement pursuant to the Immigration Act section 73 subsection 1. Such a temporary residence permit does not grant the same rights and advantages as when a person is recognised as a refugee pursuant to the Immigration Act section 28. For instance, the permit does not form a basis for family immigration or a permanent residence permit, nor does it give a right to receive travel documents or social benefits on a par with persons with refugee status. These are some of the reasons for bringing the action.

(37) The main rule governing who is to be regarded as a refugee under Norwegian law, is provided in the Immigration Act section 28 subsection 1:

> **"A foreign national who is in the realm or at the Norwegian border shall, upon application, be recognised as a refugee if the foreign national**
>
> **(a) has a well-founded fear of being persecuted for reasons of ethnicity, origin, skin colour, religion, nationality, membership of a particular social group or for reasons of political opinion, and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of his or her country of origin, see Article 1 A of the Convention relating to the Status of Refugees of 28 July 1951 and the Protocol of 31 January 1967, or**
>
> **(b) without falling within the scope of (a) nevertheless faces a real risk of being subjected to a death penalty, torture or other inhuman or degrading treatment or punishment upon return to his or her country of origin."**

(38) The first subsection refers to and quotes the legal definition of a refugee in the Refugee Convention Article 1 A, and establishes that an applicant comprised by the definition *"shall … be recognised as a refugee"* in Norway. The provision is a continuation of the provision in section 3, stating that the Immigration Act "shall be applied in accordance with international provisions by which Norway is bound when these are intended to strengthen the position of the individual". Hence, sector-monism has been implemented on the field of immigration law. And although the Refugee Convention itself does not give a right to refugee status to individuals, see the Supreme Court judgment in Rt. 2015 page 1388 para 122, the Immigration Act section 28 subsection 1 a will, as a starting point, grant refugee status under national law if the person in question meets the requirements in the Refugee Convention.

(39) A's asylum application has been rejected on the basis of the Immigration Act section 28 subsection 4:

> **"The applicant shall normally also be recognised as a refugee under subsection 1 when the need for protection has arisen since the applicant left the country of origin, and is a result of the applicant's own acts. When assessing whether an exemption shall be made from the general rule, particular importance shall be attached to whether the need for protection is due to acts that are punishable under Norwegian law, or whether it seems more likely that the main purpose of the acts was to obtain a residence permit."**

(40) Subsection 4 second sentence second option constitutes the so-called *misuse provision*. It forms a basis for refusing to grant refugee status if the risk of persecution is due to the applicant's acts after he left his country of origin, and it is more likely than not that the main purpose of the acts was to obtain a residence permit. The preparatory works of sections 3 and 28 show that the lawmaker's intention has not been to narrow the refugee concept from what is set out in the Refugee Convention Article 1 A. The question is whether this, nevertheless, is the consequence of the provision. The parties agree that UNE's decision is in that case invalid, see the Immigration Act section 3.

(41) Before I address this issue further, I mention that section 28 subsection 4 governs the so-called "subjective sur place" situations. Traditionally, a distinction has been made between objective and subjective sur place situations. *Objective sur place* is where changes take place in the country of origin while the applicant is present in another country, and the changes make it impossible for the applicant to return without risking persecution, see Proposition to the Odelsting no. 75 (2006–2007) chapter 5.5.1. This could for instance be political upheaval that involves a risk for people of the same ethnicity or party membership as the applicant risks imprisonment and/or other forms of

abuse upon return. Objective sur place is comprised by the definition of a refugee in the Refugee Convention's Article 1 A and the Immigration Act section 28 subsection 1.

(42) S*ubjective sur place* is cases where the risk of persecution is caused by acts committed by the applicant after he left his country of origin. This may be political work or religious activities carried out in the country of application that come to the attention of the authorities in the country of origin. A distinction is made between the so-called "bridge cases", where the acts are a continuation of the applicant's activities at home, and cases where the applicant has not previously been active to the same extent.

(43) Pursuant to the Immigration Act section 28 subsection 4, the main rule is that subjective sur place gives a right to recognition as a refugee in Norway, with the exceptions set out in the second sentence. The question is, as mentioned, whether the exceptions are inconsistent with the Refugee Convention Article 1 A (2), reading as follows:

> **"For the purposes of the present Convention, the term "refugee" shall apply to any person who: …**
>
> **2. As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."**

(44) The Convention must be interpreted in accordance with the principles in the Vienna Convention of 23 May 1969. The starting point is the natural understanding of the wording, read in the context in which it is placed and in light of the object of the Convention, see the Supreme Court judgment in Rt. 2012 page 494 para 33. It is set out in Articles article 31 and 32 of the Convention that other sources of law will have limited relevance to the interpretation. This entails that there is little room for a dynamic interpretation.

(45) The Refugee Convention Article 1 A (2) contains no direct regulation of cases where the grounds for persecution are acts committed in a different country mainly to obtain asylum. But in my view, it is natural to read the provision so as to not include this. I refer to the refugee concept being reserved under the Convention for people who risk persecution *due to* political activities or similar. The Supreme Court has previously established that the purpose of the Convention is to "protect people who need it from persecution due to characteristics of those persons that are so fundamental that they cannot and cannot be expected to abandon them", see the Supreme Court judgment in Rt. 2012 page 494 para 36. This is less accurate for cases where the main motivation for the activity is a wish for residence.

(46) The Convention originally only applied to persons risking persecution due to events *that had taken place before 1 January 1951*, that is before the Convention was ratified on 28 July 1951. Before 1951, however, it was not an option to engage in activities outside one's country of origin to obtain refugee status, since the Convention did not exist at the time. It must therefore be trusted that the original wording of the Convention did not comprise the so-called misuse cases.

(47) By the 1967 Protocol Relating to the Status of Refugees, the time limit was cancelled and the Convention thus became applicable also to events occurred after 1951. But this change only concerned the Convention's limitation in time and geographic scope, and did not alter the very definition of a refugee.

(48) The appellant has pointed out that Article 1 A (2) concerns any person who "is outside the country of his nationality", and that there is no requirement that the risk of persecution has occurred before he fled from that country. I share this view, but I cannot see how it resolves the issue in our case. As I have mentioned, the Convention grants protection in connection with objective sur place, which forms the basis for the wording on this point, see Zimmermann (red.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary, 2011, page 329.

(49) With regard to this, the appellant has contended with the support of the intervener that *the Refugee Convention Article 1 F* is an *exhaustive regulation* of the conditions for depriving a person of his refugee status. The provision establishes that the Convention does not grant protection in cases where there is a genuine reason for assuming that the applicant is guilty of war crimes or similar serious acts. As I read the provision, however, it applies to persons who otherwise would have been recognised as refugees under Article 1 A. Hence, one must first determine whether or not the person in question is comprised by the definition in Article 1 A. This is the issue to resolve in the case at hand.

(50) I will now turn to reviewing how this issue has been assessed previously in Norwegian law, and how other member states and bodies have addressed it. Although it is the Vienna Convention's principles that form the basis for the interpretation, a previous understanding of the Convention will of course be an important source of law of unless new relevant sources have emerged.

(51) Neither the Immigration Act of 1956 nor the Immigration Act of 1988 contained provisions regarding persons who had caused the risk of persecution by their own acts after having left their country of origin. Such applicants were normally not recognised as refugees, but were granted residence on humanitarian grounds with almost the same benefits and rights as those who were granted refugee status.

(52) The question of the lawfulness of the practice was dealt with in the Supreme Court judgment in Rt. 1991 page 586 (Abdi). The Supreme Court took as its starting point that the Refugee Convention Article 1 A (2) "is of material importance when interpreting the Norwegian provision", in the Immigration Act 1956 section 2 regarding recognition as a refugee, see page 590. Both the majority of four justices and the minority of one concluded that the immigration authorities' practice was not contrary to international law, see the judgment on page 594, stating:

> **"In cases where the risk of persecution is triggered by changes in the country of origin – the objective sur place cases – I assume that asylum must be granted pursuant to the Immigration Act [1956] and the current Act section 17 subsection 1 first sentence. On the other hand, in the subjective sur place cases, where the risk of persecution is triggered by own activities after departure from the country of origin, the authorities will normally not be obliged to do so. Cases containing both subjective and objective elements may raise difficult distinction issues.**
>
> **I do not exclude the possibility that asylum in particular cases will also have to be granted to subjective sur place refugees who have triggered the risk of persecution by their own acts, when those acts are sufficient to establish that it is within the competence of the authorities under any circumstance to grant asylum in the bridge cases."**

(53) The Supreme Court thus concluded that the authorities are normally not obliged to grant refugee status in connection with subjective sur place – irrespective of whether it concerns so-called misuse. The question is whether events have taken place later which mean that this no longer can be sustained.

(54) As to the development of case law after the judgment, I refer to Proposition to the Odelsting no. 75 (2006–2007) chapter 5.5.2. When the current Immigration Act was adopted, it was established that subjective sur place applicants must normally be recognised a refugees by law, with the exceptions set out in section 28 subsection 4 second sentence.

(55) According to the preparatory works, the relationship to the Refugee Convention was not discussed, see Proposition to the Odelsting no. 75 (2006–2007) chapter 5.5.6. The lawmaker must thus have found that the misuse provision is not inconsistent with international law. It is further set out that the rule was considered and wanted by the legislator. Also, the provision does not raise doubt as to the interpretation. This is significant when applying the primacy rule, see the Supreme Court judgment in HR-2017-241-A para 17.

(56) The proposal for section 28 subsection 4 was inspired by the EU Directive 2004/83/EC of 29 April 2004 – the so-called *status directive* – governing among other things establishment of common criteria for being granted refugee status, see the Proposition chapter 5.5.3 and 5.5.4. The Directive sets a minimum standard for the member states, but does not prevent the individual country from granting further protection. The goal was to establish a common European asylum system "based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees", see the Preamble items 2, 24 and 25.

(57) Article 5 no. 3 concerned sur place refugees having applied for asylum anew after having received a rejection on their first application. The member states were given the freedom to choose that refugee status should normally not be granted in connection with subjective sur place, that is when the risk of persecution was created by the applicant's own acts after he left the country of origin:

> **"Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin."**

(58) The provision only concerned the question of recognition as a refugee, and did not affect the right to protection against refoulement if the applicant's life, physical integrity or freedom would be at risk, see the EU Joint Position "on the harmonized application of the definition of the term 'refugee'" of 4 March 1996 (96/196/JHA) item 9.2.

(59) A new status directive was adopted on 13 December 2011, Directive 2011/95/EU, without amendments to Article 5 no. 3. Another version of the Directive is now present. Article 5 no. 3 is proposed amended so that it imposes the member states to grant asylum in connection with subjective sur place, except in the event of misuse. The draft in its present form is thus almost identical to what is regulated under Norwegian law, and reads as follows:

> **"When assessing a subsequent application in accordance with**

> **Article 42 of Regulation (EU) XXX/XXX [Procedure Regulation] the determining authority shall not normally grant international protection to the applicant if it is established that the risk of persecution or serious harm is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin for the sole or main purpose of being granted international protection."**

(60) From this, I conclude that the EU has also not intended the inclusion of the sur place refugees in the Refugee Convention Article 1 A, and in any case not in the so-called misuse cases.

(61) In connection with the case at hand, both NOAS and the state have made inquiries regarding *state case law* in other countries. The review shows considerable variation from country to country, and some countries apply rules similar to the Norwegian rules. The guidance this gives is therefore limited, see the Vienna Convention Article 31 no. 3 (b).

(62) *State case law in other countries* do also not give a clear answer. In a judgment from the Court of Appeal of England and Wales of 28 October 1999, *Danian v. Secretary of State for the Home Department,* the court concluded that there was no basis for refusing international protection of a person in a misuse case. The alternative was that the person was sent home to potential persecution – and protection against refoulement was not granted like in the case at hand. In a judgment of 18 December 2008, *BVerwG 10 C 27.07*, however, the German Administrative Supreme Court – Bundesverwaltungsgericht – concluded that the German sur place provision, which was in line with the status directive applicable at the time Article 5 no. 3, was not contrary to the Refugee Convention.

(63) Nor are there rules provided in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* that are directly applicable to the misuse cases. The handbook establishes that subjective sur place may form a basis for refugee status, but that this must depend on "a careful examination of the circumstances". I refer to the Abdi judgment where the handbook's provisions in this respect, in items 95 and 96, are quoted and commented on.

(64) It follows from my review thus far that the wording in the Refugee Convention does not solve the interpretation problem in the case at hand, but that the provision's history and original time limit suggest that the misuse cases were not comprised by Article 1 A (2). The Supreme Court has previously established that subjective sur place does not give a right to refugee status under Norwegian law. It is also unlikely that the lawmaker in Norway or in the EU has considered such an exemption for misuse as contrary to international law. On these grounds, I find it rather clear that the misuse exemption in section 28 subsection 4 is not inconsistent with the Refugee Convention.

(65) However, on 14 February 2017, UNHCR submitted a written statement in the matter pursuant to the Dispute Act section 15-8, concluding the opposite:

> **"53. UNHCR submits that Contracting States are obliged under the 1951 Convention to recognize asylum-seekers who can establish that they have a well-founded fear of persecution for reason of a Convention ground, irrespective of whether the act or actions giving rise to such fear have been carried out and/or have been expressed for the main purpose of obtaining a residence permit.**
>
> **…**

> **55. Lastly, UNHCR submits that Section 28, paragraph 4 of the Immigration Act, setting out the basis of the exception from the obligation to grant refugee status to third country nationals in need of protection is at variance with the 1951 Convention. The provision exceeds a reasonable interpretation of the refugee definition and should thus not be a basis for denying refugee status. The exception is an additional requirement to the criteria and grounds in Article 1 of the 1951 Convention and thus contrary to its object and purpose."**

(66) As I understand the statement, UNHCR finds that a person is entitled to protection in the form of refugee status if he risks persecution in his country of origin, irrespective of cause, and that the misuse exemption has a wider reach than the Refugee Convention. UNHCR refers primarily to the protection under Article 1 A (2) of everyone risking persecution, and who are present outside the country of origin, and that Article 1 C (4) and 1 D-F exhaustively regulates the possibility to deny refugee status. The question of an opportunistic basis for asylum must be solved based on the general requirement that a person must have a genuine need for protection, and not based on an assessment of whether someone has acted with "malicious intent". Reference is made to UNHCR's consistent view on this issue and to the weight placed on the Refugee Convention by other international bodies like the European Court of Human Rights and the EU.

(67) UNHCR's views are mainly consistent with the submissions on which I have already commented. Although, generally, there is reason to place great emphasis on UNHCR's view in refugee issues, see Proposition to the Odelsting no. 75 (2006-2007) page 73, I cannot see that the statement here is sufficiently significant to weigh up for other sources of law. I also mention that UNHCR's view was known to Norwegian authorities when the provision in section 28 subsection 4 was implemented, without this succeeding, see the Proposition chapter 5.5.5.

(68) It is also evident from the statement that it is the protection against refoulement in particular that forms the basis for UNHCR's view. I repeat that A is granted protection against refoulement under the Immigration Act section 73 and has a temporary residence permit under section 74. The issue to consider in our case is exclusively to which extent he is entitled to refugee status under the Immigration Act section 28 with the extended rights this gives. The scope of the most central provision in the Refugee Convention Article 33 regarding protection against refoulement is thus unnecessary to address.

(69) I add that in my view, policy considerations also support an interpretation of the provision in line with the state's view. Of course, it may be difficult in terms of evidence to substantiate a person's motive for carrying out acts that may cause persecution. And as submitted also by UNHCR, asylum seekers have a right to engage in political activities and similar even if they are present outside their country of origin. Nevertheless, I agree with the state that granting asylum in misuse cases may undermine the legitimacy and efficiency of the asylum institute, and may be deemed unfair to refugees with a genuine need for protection.

(70) The appellant has in the alternative submitted that the Norwegian provision reaches too far. I cannot see how this issue differs from the one I have already considered. In the second alternative, it is submitted that the court of appeal's judgment is inadequate. This is outside the scope of what has been referred to hearing in the Supreme Court.

(71) Consequently, I cannot see that UNE's decision is invalid as a result of an incorrect application of the law. The appeal must therefore be dismissed.

(72) The state has not claimed costs in the Supreme Court.

(73) I vote for this

J U D G M E N T :

The appeal is dismissed.

(74) Kst. Justice **Kaasen:** I agree with the justice delivering the leading opinion in all material aspects and with her conclusion.

(75) Justice **Arntzen:** Likewise.

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

(77) Justice **Tønder:** Likewise.

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

J U D G M E N T :

The appeal is dismissed.